

THE RIGHT TO FREEDOM

*From Arbitrary or Unlawful
Deprivation of Liberty*

A guide on international human
rights law protections



Lawyers' Rights Watch Canada, 2023



Lawyers Rights Watch Canada (LRWC) [2023]

ISBN: 978-0-9939149-3-5

Copyright

The Right to Freedom from Arbitrary or Unlawful Deprivation of Liberty: A Guidebook on International Human Rights Law Protections has been produced for public use. Other than for commercial purposes, LRWC encourages reproduction and distribution, with acknowledgment to LRWC.

Lawyers' Rights Watch Canada

Vancouver BC

www.lrwc.org; info@lrwc.org

Acknowledgments

The Right to Freedom from Arbitrary or Unlawful Deprivation of Liberty was researched and written by Lois Leslie BSocSc(Hons) LLB LLM, with assistance from Gail Davidson LLB. Layout and design by Christopher Gully. This guidebook updates and replaces *Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law*. LRWC (2013).

Photos from Unsplash, credits by page number: Larry Farr (10), Milad Fakurian (15), Marco Chilese (68)

TABLE OF CONTENTS

ACRONYMS & ABBREVIATIONS.....	viii
INTRODUCTION	1
<i>The duty of States to respect, protect and fulfill rights to freedom from arbitrary or unlawful deprivation of liberty.....</i>	<i>6</i>
<i>UN Working Group on Arbitrary Detention</i>	<i>9</i>
FOUNDATIONS OF THE RIGHT TO FREEDOM FROM ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY	12
<i>Prohibition of unlawful or arbitrary deprivation of liberty</i>	<i>12</i>
<i>Right to challenge lawfulness of deprivation of liberty</i>	<i>15</i>
<i>Right to equality and freedom from discrimination</i>	<i>19</i>
<i>Specific protections against arbitrary or unlawful deprivation of liberty</i>	<i>23</i>
<i>Right of everyone to be treated humanely and with respect for human dignity</i>	<i>24</i>
<i>Right to be immediately informed of the reasons for the deprivation of liberty and of any charges.....</i>	<i>32</i>
<i>Right of anyone deprived of their liberty to request and receive legal assistance.....</i>	<i>34</i>
<i>Right to equality before the law and to a fair and public hearing</i>	<i>36</i>
<i>Minimum guarantees in criminal proceedings</i>	<i>39</i>
<i>Right to presumption of innocence.....</i>	<i>39</i>
<i>Right not to incriminate oneself</i>	<i>41</i>
<i>Right to legal counsel.....</i>	<i>41</i>
<i>Right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial officer.....</i>	<i>44</i>
<i>Right to pre-trial release.....</i>	<i>46</i>
<i>Right of accused persons to adequate time and facilities for the preparation of their defence.....</i>	<i>48</i>
<i>Right of anyone arrested or detained on a criminal charge to a trial within a reasonable time or to release</i>	<i>51</i>
<i>Right to be tried in their presence and to defend themselves in person or through legal counsel of their choice.....</i>	<i>52</i>
<i>Right to examine witnesses</i>	<i>55</i>
<i>Right to an interpreter</i>	<i>56</i>

<i>Right to appeal conviction</i>	56
<i>Prohibition against retrospective criminal laws or penalties</i>	58
<i>Right of everyone not to be imprisoned merely for nonfulfillment of obligations of a purely civil character.</i>	60
<i>Right of everyone to not be tried or punished again for same offence</i>	61
<i>Right of anyone who has been arbitrarily or unlawfully deprived of their liberty to an effective remedy</i>	63
SCOPE OF PROTECTIONS AGAINST ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY	70
PROHIBITION CONSTITUTES A JUS COGENS NORM	70
<i>Prohibition protected under customary international law</i>	70
<i>Non-derogable</i>	71
LIMITATIONS ON STATES ABILITY TO RESTRICT RIGHT TO LIBERTY AND SECURITY OF PERSON	75
<i>Content of the right to liberty and security of person</i>	75
<i>Definition of deprivation of liberty</i>	77
<i>Without free consent</i>	79
<i>All forms of deprivation of liberty are protected</i>	79
<i>Crime against humanity</i>	82
<i>Strict limitations on States' ability to legitimately restrict personal liberty</i>	82
<i>Siracusa Principles</i>	82
<i>Must be authorized by law</i>	84
<i>Principle of legality</i>	89
<i>Law must be accessible and formulated with sufficient precision to ensure foreseeability</i>	92
<i>Contemporaneous legal basis for conviction</i>	94
<i>Law must not be construed to accused's detriment</i>	96
<i>An accused shall benefit from any subsequent change to the law providing for a lighter penalty</i>	97
<i>Must not be arbitrary</i>	98
<i>Reasonable, necessary and proportionate to a legitimate objective</i>	101
<i>Non-discriminatory</i>	103
Scope of Specific Protections	105
<i>Right of everyone to be treated humanely and with respect for human dignity</i>	105
<i>Right to protection against intentional infliction of bodily or mental injury</i>	105

<i>Prohibition of torture or other cruel, inhuman or degrading treatment or punishment</i>	106
<i>Physical conditions of detention</i>	108
<i>Segregation</i>	109
<i>Contact with family and the outside world</i>	110
<i>Religions, culture, education</i>	111
<i>Special measures to protect children</i>	111
<i>Specific measures to protect women and girls</i>	115
<i>Specific measures to protect persons with disabilities</i>	116
<i>Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons</i>	117
<i>Right to be immediately informed of the reasons for the deprivation of liberty and of any charges</i>	121
<i>Right to challenge the lawfulness of a deprivation of liberty</i>	122
<i>Applies to all situations of a deprivation of liberty</i>	123
<i>Proceedings may be commenced by detainee or their representative</i>	124
<i>Detainees must be promptly informed of right</i>	124
<i>The right must be effectively guaranteed</i>	125
<i>“Without delay”</i>	126
<i>In person</i>	127
<i>The review must be conducted by an independent, impartial and objective court with authority to order the detainee’s release, if unlawful</i>	128
<i>The lawfulness of detention is determined under domestic law and international law</i>	131
<i>Burden of proof</i>	132
<i>Standard of review</i>	132
<i>Periodic review</i>	134
<i>Right to legal counsel</i>	135
<i>Right to freedom from discrimination and equal access to and equality before the courts</i>	136
<i>Freedom from discrimination</i>	136
<i>Equal access to the courts</i>	137
<i>Equality of arms</i>	137
<i>Right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial officer</i>	139
<i>A hearing must be held promptly following arrest</i>	140

<i>The “officer” must be independent, objective and impartial, with the authority to order the detainee’s release</i>	143
<i>Scope of review of pre-trial detention</i>	144
<i>Right to pre-trial release</i>	145
<i>Pre-trial detention only as a last resort</i>	146
<i>The burden is on the state to justify pre-trial detention</i>	147
<i>Suspected involvement in serious offences</i>	148
<i>Danger of absconding</i>	148
<i>Pressure on witnesses and risk of collusion</i>	150
<i>Duty to consider alternatives</i>	151
<i>Right of anyone arrested or detained on a criminal charge to a trial within a reasonable time or to release</i>	152
<i>Right of everyone to presumption of innocence</i>	154
<i>Public authorities must refrain from prejudging the outcome of a trial</i>	155
<i>Right to a fair and public trial</i>	156
<i>Fair and public hearing</i>	156
<i>Tribunal</i>	156
<i>Independence</i>	157
<i>Impartiality</i>	157
<i>Applies to all courts and tribunals</i>	157
<i>Public hearing</i>	159
<i>Right of accused persons to adequate time and facilities for the preparation of their defence</i>	160
<i>Right to be tried in their presence and to defend themselves in person or through legal counsel of their choice</i>	160
<i>Right to be tried in person</i>	160
<i>Right to defend oneself with or without legal counsel</i>	161
<i>Right to have competent legal assistance assigned</i>	161
<i>Right of accused persons to examine and compel witnesses</i>	162
<i>Right of an accused to have the free assistance of an interpreter</i>	162
<i>Right not to be compelled to testify against oneself or to confess guilt</i>	162
<i>Right to appeal conviction</i>	163
<i>Right of anyone who has been arbitrarily or unlawfully deprived of their liberty to an effective remedy</i>	165
SELECTED CASES FROM WGAD JURISPRUDENCE	168
WGAD CRITERIA	168

<i>Category I - No legal basis to justify detention</i>	170
<i>Arrest without a warrant</i>	171
<i>Failure to give reasons for arrest or charges at the time of arrest</i>	172
<i>Failure to be brought promptly before a judge</i>	172
<i>Detention in violation of domestic law</i>	172
<i>Detention under law not authorizing detention</i>	173
<i>Domestic legal basis for detention does not comply with IHRL</i>	173
<i>Retroactive application of law (ex post facto laws)</i>	173
<i>Ne Bis In Idem (Double Jeopardy)</i>	174
<i>Detention not ordered by, or under control of, competent, independent, and impartial judicial authority</i>	174
<i>Detained under a vague law</i>	175
<i>Excessive pretrial detention</i>	176
<i>Incommunicado detention</i>	176
<i>Continued detention after completion of sentence, early discharge, or acquittal of charges</i>	177
<i>Protracted preventative detention</i>	177
<i>Non-punitive detention following punitive detention</i>	179
<i>Detention in Psychiatric Hospital without due process</i>	181
<i>Arrest and detention of a person protected by immunity</i>	181
<i>Detention after Amnesty</i>	181
<i>Extraordinary Rendition</i>	182
<i>Detained by non-State actor attributed to State</i>	182
<i>Category II – Violation of fundamental rights and freedoms</i>	183
<i>Freedom of opinion and expression</i>	185
<i>Detention for holding an opinion</i>	187
<i>Refusal to speak or express oneself</i>	187
<i>Speech relating to human rights</i>	187
<i>Expression that may offend or disturb the State</i>	188
<i>National security</i>	189
<i>Vague criminal laws restricting expression</i>	189
<i>Fabricated charges</i>	190
<i>Freedom of Religion</i>	190
<i>Conscientious Objection</i>	192
<i>Coercion to renounce one’s beliefs</i>	192
<i>Banning of certain religions or religious beliefs</i>	192

<i>Freedom of Peaceful Assembly and Association</i>	193
<i>Being a member of a human rights organization</i>	193
<i>Associating with a banned television network</i>	193
<i>Freedom of movement</i>	194
<i>The right to take part in public affairs</i>	194
<i>Category III – Violation of rights of a fair trial</i>	195
<i>Violation of the right to be informed of reasons for arrest and charges and to be brought promptly before a judge</i>	195
<i>Torture, cruel or inhumane treatment</i>	196
<i>Incommunicado detention</i>	197
<i>Violation of right to legal assistance and adequate time and facilities to prepare a defence</i>	197
<i>Automatic or excessive pre-trial detention</i>	199
<i>Category IV – Violation of rights of asylum seekers</i>	199
<i>Blanket policy of mandatory detention of immigrants</i>	201
<i>Failure to provide opportunity for judicial or administrative review</i>	202
<i>Prolonged or indefinite detention</i>	203
<i>Detention used as a deterrent</i>	203
<i>Failure to provide realistic alternatives to detention</i>	204
<i>Detention of migrants in prisons or by police</i>	204
<i>Inhumane conditions</i>	205
<i>Detention of unaccompanied children and families</i>	205
<i>Discriminatory policies and/or procedures</i>	206
<i>State diversion of asylum seekers to Third Countries</i>	206
<i>Category V – Discrimination on Protected Grounds</i>	207
<i>Discrimination on the basis of national origin or ethnic identity</i>	208
<i>Discrimination on the basis of religion</i>	208
<i>Discrimination on the basis of citizenship status</i>	209
<i>Discrimination on the basis of health or physical impairment</i>	209
<i>Discrimination on the basis of economic condition</i>	210
<i>Discrimination on the basis of language</i>	210
<i>Discrimination on the basis of sexual orientation</i>	211
<i>Discrimination on the basis of occupation</i>	211
<i>Human Rights Defenders</i>	211
<i>Journalists</i>	211
<i>Discrimination on the basis of perceived political opinion</i>	212

<i>Discrimination on the basis of “other status”</i>	212
<i>Discrimination against a person charged with a certain offense</i>	212
<i>Discrimination in application of amnesty law</i>	213
APPENDIX A: INTERNATIONAL STANDARDS	214
APPENDIX B: TREATIES, DECLARATIONS AND OTHER INSTRUMENTS	285
<i>United Nations (UN) Treaties, Declarations and Other Instruments</i>	285
<i>The UDHR</i>	285
<i>UN Treaties</i>	285
<i>Other UN Instruments</i>	287
<i>African Union (AU) Treaties and Other Instruments</i>	288
<i>AU Treaties</i>	288
<i>Other African Union Instruments</i>	289
<i>Organization of American States (OAS) Treaties, Declarations and Other Instruments</i>	289
<i>OAS Treaties</i>	289
<i>Council of Europe (COE): Treaties and Other Instruments</i>	290
<i>COE Treaties</i>	290
<i>Other Instruments</i>	290
APPENDIX C: OTHER RESOURCES	291

ACRONYMS & ABBREVIATIONS

ACHR:	American Convention on Human Rights
American Declaration:	American Declaration of the rights and duties of man
ACHPR:	African Commission on Human and Peoples' Rights
Arab Charter	Arab Charter on Human Rights
AU:	African Union
BANJUL CHARTER:	African (Banjul) Charter on Human and Peoples' Rights
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
	UN Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
	UN Committee on the Elimination of All Forms of Discrimination against Women
CERD:	Committee on the Elimination of Racial Discrimination
CHR:	Commission on Human Rights (UN)
CMW:	UN Committee on the Protection of Migrant Workers and Members of their Families
CONVENTION OF BELÉM DO PARÁ:	Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
COE:	Council of Europe
CPT:	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC:	Convention on the Rights of the Child
	UN Committee on the Rights of the Child
CRPD:	Convention on the Rights of Persons with

	Disabilities
CSR:	Convention relating to the Status of Refugees
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
HRC:	UN Human Rights Council
HR Committee:	UN Human Rights Committee
IACHR: Rights	Inter-American Commission on Human Rights
IACTHR:	Inter-American Court of Human Rights
ICCPR: Rights	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICMW:	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
ICPPED:	International Convention for the Protection of all Persons from Enforced Disappearances
OAS:	Organization of American States
OHCHR:	(UN) Office of the High Commissioner for Human Rights
OP-ICCPR:	Optional Protocol to the International Covenant on Civil and Political Rights
SR:	Special Rapporteur
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
WGAD:	UN Working Group on Arbitrary Detention

INTRODUCTION

This is a Guide to international human rights law (IHRL) guarantees of the right to freedom from arbitrary or unlawful deprivation of liberty through arrest or detention. This Guide identifies IHRL provisions and jurisprudence that guarantee individual rights and responsibilities and State duties to ensure the right to freedom from arbitrary arrest and detention. The Guide is intended to provide access to knowledge about the scope, interpretation and application of IHRL guarantees of this fundamental right in order to assist enhanced implementation and enforcement of domestic and IHRL guarantees and remedies for violations. The Guide is intended for use by all—victims, perpetrators, lawyers, human rights defenders, activists, journalists, judges, police, law makers and concerned others.

Arbitrary or unlawful deprivation of liberty refers to arrest or detention that does not comply with domestic law or international standards or is not proportional to a legitimate aim and is not necessary and reasonable to achieve that aim. As stated by the UN Human Rights Committee, “[a]rbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”¹ Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance, for example, may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.² Rights put at risk by arbitrary arrest and detention include rights to liberty, security of the person, expression, association, assembly, movement and participation in governance, among others. Arbitrary detention exposes victims to heightened risk of torture³

1 UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 12, cited in HRC, WGAD, Opinion No. 54/2015 (Sweden and the United Kingdom of Great Britain and Northern Ireland, A/HRC/WGAD/2015, paras. 91, 92.

2 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/30/37, 6 July 2015 para. 9.

3 See HRC, Report of the Working Group on Arbitrary Detention, A/HRC/51/29, 21 July 2022 paras 50-52; Report of WGAD, A/HRC/39/45, 18 July 2018 at paras 59-66; and IACHR, Annual Report 2021 at para. 346, <https://www.oas.org/en/iachr/docs/annual/2021/>

enforced disappearance, denial of due process and access to remedies. Arbitrary arrest can also result in prolonged restriction of rights when victims are released under conditions that prevent the lawful exercise of rights to dissent and advocacy.⁴

Liberty and security of the person are essential to the enjoyment of most other rights protected by IHRL. The profound importance of the right to freedom from arbitrary arrest and detention is reflected in the fact that this right is a norm of customary international law, a peremptory norm of international law and is recognized and guaranteed by many international instruments.

To effectively advocate for the enforcement of IHRL it is necessary to know the IHRL provisions, the jurisprudence interpreting the scope and application and the means of enforcement. LRWC human rights advocacy, research and education over the past twenty years demonstrates that lack of knowledge of IHRL and its application contributes to poor implementation and enforcement and likely to increased violations.⁵

In recognition of the need for IHRL education, the preamble to the 1948 Universal Declaration of Human Rights (UDHR) states, “a common understanding of [the UDHR] rights and freedoms is of the greatest importance for the full realization of [the UDHR]” Article 26 of the UDHR establishes the right of all to education directed to the, “strengthening of respect for human rights and fundamental freedoms.” The UN Human Rights Council affirmed the duty of states to provide human rights education “essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all.”⁶

[Chapters/IA2021cap5.CO-en.pdf](https://www.oas.org/en/iachr/docs/annual/2021/Chapters/IA2021cap5.CO-en.pdf).

4 See: IACHR, Criminalization of the Work of Human Rights Defenders, OEA/Ser.L/V/IL, Doc. 49/15, 31 December 2015 at paras.7, 77, 194, 196; and IACHR, Annual Report 2021 at para. 346, <https://www.oas.org/en/iachr/docs/annual/2021/Chapters/IA2021cap5.CO-en.pdf>.

5 See: *The right to know our rights International law obligations to ensure international human rights education and training*, Catherine Morris and Gail Davidson for LRWC, 2008; and, LRWC communications to UN and OAS monitoring bodies and to states at www.lrwc.org.

6 HRC, *United Nations Declaration on Human Rights Education and Training : resolution / adopted by the Human Rights Council*, 8 April 2011, A/HRC/RES/16/1.

In spite of these provisions, few states have taken seriously the duty to provide IHRL education and therefore often little is known—even amongst human rights defenders, lawyers, judges, police and lawmakers—about the scope of freedom from arbitrary arrest and detention (and other rights) or the IHRL obligation of states to provide effective measures to ensure the right and provide access to effective remedies for violations. The lack of adequate education and training about the right to freedom from arbitrary arrest and detention has grave consequences. It hampers effective advocacy to prevent and remedy violations, allows increased use of arbitrary arrest and detention for a variety of unlawful purposes including the criminalization of the lawful exercise of rights, contributes to lack of accountability for perpetrators and denial of remedies for victims, and, encourages members of the public to support the unlawful use of arbitrary arrest and detention. In December 2021, Reporter Without Borders’ (RSF), logged a record number of journalists and media workers – 488, including 60 women – in prison worldwide, while another 65 were being held hostage, 20% more than at the same time last year.⁷

Although IHRL provides robust protection for individuals and imposes strict duties on States to ensure freedom from arbitrary arrest and detention, state legal systems too often either lack effective protections or are subject to corruption. Arbitrary detention is routinely used in many states to suppress criticism or opposition and punish the lawful exercise of rights protected by IHRL. Some activities that trigger arbitrary arrest and detention in a growing number of states include engagement in or association with: human rights advocacy or legal representation for clients or issues unpopular with the state; criticism of, or opposition to, state sanctioned actions; peaceful assemblies engaged in dissent; public debate or dissemination of information regarding controversial issues; activism in relation to land and environmental rights; and, political or religious beliefs not sanctioned by the state. The UN Working Group on Arbitrary Detention (WGAD) has identified state use of arbitrary detention “against political opponents, religious dissenters, and other persons exercising their freedoms of opinion, expression, conscience and religion.”⁸ State excuses for

⁷ Reporters without borders, *Round-up of journalists detained, killed, held hostage and missing in 2021*, available at https://rsf.org/sites/default/files/rsfroundup_2021.pdf.

⁸ HRC, Report on Arbitrary Detention, A/HRC/19/57, 26 December 2011 at para. 62.

arbitrary detention include ‘re-education’ and addressing purported threats regarding: terrorism, extremism, national security, public safety, public health, protests and national emergencies. In response to a global rise in unlawful restrictions of freedoms of peaceful assembly⁹ and expression, IHRL monitoring bodies issued a joint declaration calling on states not to use emergencies including the Covid-19 pandemic to restrict or criminalize assemblies and affirming rights to freedoms of assembly and expression as absolutely essential to democracy.¹⁰

Against this background state use of arbitrary arrest and detention has increased dramatically. Globally, millions of people remain victims of arbitrary detention. Allegations that China has engaged in “large-scale”¹¹ arbitrary detention of members of the Uyghur and other predominantly Muslim communities in Xinjiang Uighur Autonomous Region remain uninvestigated. Calls on China by states,¹² monitoring bodies¹³ and civil society¹⁴ are ignored. “Estimates of the number of people detained [in the Xinjiang Uighur Autonomous Region] range from tens of thousands to over a million.”¹⁵

9 “Preventive detention of targeted individuals to keep them from participating in assemblies may constitute arbitrary deprivation of liberty”, CCPR General comment No. 37 (2020) on the right of peaceful assembly (article 21), CCPR/C/GC/37 at para. 82.

10 Joint Declaration on Protecting the Right to Freedom of Peaceful Assembly in Time of Emergencies, UN Special Procedures, of the UN, Organization of American States, African Union and the Organization for Security and Cooperation in Europe, at <https://www.ohchr.org/sites/default/files/documents/issues/fassociation/2022-09-15/JointDeclarationProtectingRightFreedomInTimesEmergencies15Sept2022.pdf>

11 *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China*, 31 August 2022 at para. 144.

12 *Government of Canada, Declaration Against Arbitrary Detention in State-to-State Relations*.

13 *UN experts call for decisive measures to protect fundamental freedoms in China*, 26 June 2020.

14 *OHCHR report on grave human right violations in Xinjiang can wait no longer, Joint Statement: Item 2 General Debate on High Commissioner’s update, March 2022*.

15 *Concluding Observations of the UN Committee on the Elimination of Racial Discrimination on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, CERD/C/CHN/CO/14-17, para. 40(a), 42 (h), 19 Sept. 2018. Cited in *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China*, 21 August 2022 at para. 52. <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assessment.pdf>.

Other States identified as using widespread or systematic arbitrary detention of targeted groups that could constitute crimes against humanity include Iran,¹⁶ Türkiye,¹⁷ UAE¹⁸, Sudan, Saudi Arabia¹⁹, Bahrain²⁰, and Russia²¹.

This guide has been produced in response to both the inadequacy of IHRL education about the freedom from arbitrary or unlawful deprivation of liberty and the growing use of arbitrary arrest and detention by authoritarian, autocratic and democratic states to quell human rights advocacy, criticism and protest of state sanctioned actions, access to information and public debate about issues of public concern, reporting of state wrongdoing and reputed association with religious or political beliefs not sanctioned by the state. This guide updates and replaces LRWC, *Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law* (2013).

The Right to Freedom from Arbitrary or Unlawful Deprivation of Liberty is produced for public use with freedom to copy, distribute and display any part of the publication and make derivative works with appropriate credit to LRWC. The law belongs to everyone. We invite everyone to use this guide.

16 HRC, WGAD, Opinion No. 20/2022 (Islamic Republic of Iran), A/HRC/WGAD/2022/20, para. 118.

17 HRC, WGAD, Opinion No. Opinion No. 66/2020, A/HRC/WGAD/2020/66, para. 67; Opinion No. 47/2020 (Turkey and Kosovo), WGAD A/HRC/WGAD/2020/47, para. 101; Opinion No. 51/2020 (Malaysia and Turkey), A/HRC/WGAD/2020/51, para. 102. See also ECtHR, *Case of Turan and Others v. Turkey*, App. nos. 75805/16 and 426 others, 23 November 2021.

18 HRC, WGAD, Opinion No. 31/2020 (United Arab Emirates), A/HRC/WGAD/2020/31, para. 65.

19 HRC, WGAD, Opinion No. 62/2022 (Saudi Arabia), A/HRC/WGAD/2022/62, para. 103; Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10, para. 85.

20 HRC, WGAD, Opinion No. 84/2021 (Bahrain), A/HRC/WGAD/2021/84, para. 113.

21 OHCHR, *Report on the Human Rights Situation in Ukraine 1 February to 31 July 2022*, 27 September 2022.

THE DUTY OF STATES TO RESPECT, PROTECT AND FULFILL RIGHTS TO FREEDOM FROM ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY

States have the obligation to respect, protect and fulfil all human rights and fundamental freedoms, including the liberty of the person. The obligation of states to respect, ensure respect for and implement international human rights law (IHRL) and international humanitarian law arises from treaties to which a State is a party, customary international law, the charters and declarations accepted as a condition of membership in the UN, OAS, AU and the European Union and the domestic law of each State.²²

The right to liberty is a right subject to restrictions that are lawful, necessary, proportionate, legitimate and compliant with IHRL. However, the right to freedom from arbitrary deprivation of liberty and the right to have the legality of a deprivation of liberty determined by an independent, impartial and competent judiciary are recognized under IHRL as peremptory norms of general international law (*jus cogens*), from which no derogation by States is ever permitted.²³ As such, all States must always respect and ensure, without limitation, the rights of all persons to be free from arbitrary or unlawful deprivations of liberty and to bring proceedings before a properly constituted court to determine any challenge of the legality of a deprivation of liberty.

22 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted 16 December 2005, para. 1.

23 Article 53 of the Vienna Convention defines a peremptory norm of international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required: UN, International Law Commission, Report on the work of the seventy-first session (2019), Chapter V, Peremptory norms of general international law (*jus cogens*), Conclusion 7.

The obligation to respect, ensure respect for and implement IHRL and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, states duties to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate allegations of violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be responsible for the violation; and
- (d) Provide effective remedies to victims, including reparation²⁴.

With respect to the right to freedom from arbitrary or unlawful deprivations of liberty, States must ensure that any national law allowing deprivation of liberty is made and implemented in conformity with the relevant international standards set out in the UDHR, ICCPR, CRPD, ICERD and other applicable international and regional instruments. In order to fully protect rights, States must take positive measures to prevent actions by non-State actors that could interfere with the exercise of the rights. To fulfill rights, States must create, facilitate or provide the necessary conditions for the full enjoyment of the rights.²⁵

The *Vienna Convention on the Law of Treaties* specifies that States Parties are bound by their treaty obligations and all treaty obligations must be performed in good faith (*pacta sunt servanda*).²⁶ Article 27 of the *Vienna*

24 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted 16 December 2005, para.3.

25 HRC, *Joint report of the Special Rapporteur on the rights to freedom of rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, A/HRC/31/66, para. 14. See IACtHR, *Velasquez Rodriguez Case*, Judgment of July 29, 1988, (Ser. C) No. 4 (1988), paras. 165-167, for a comment by IACtHR on the general obligation to respect, protect and fulfil rights under ACHR, Article 1(1).

26 UN *Vienna Convention on the Law of Treaties*, 23 May 1969, UN, Treaty Series, vol.

Convention reads: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Therefore, States cannot use domestic law as a legal justification for arbitrary detention. In addition, under IHRL, States have both a negative obligation not to obstruct access to judicial and other remedies as well as a positive duty to organize their domestic law to ensure that all persons can access those remedies.

IHRL treaties contain provisions requiring State Parties: to ensure to all individuals within its territories and subject to its jurisdiction the rights and freedoms set out in the treaty, without distinction of any kind; to take the necessary steps to give full effect to those rights and freedoms; and to ensure the enforcement of appropriate remedies in the event of a treaty violation.²⁷

States also have a legal interest in the performance by other States Parties of their obligations under human rights treaties, flowing from the fact that the “rules concerning the basic rights of the human person” are *erga omnes* (owed to all) obligations, and from States’ obligations, under the *United Nations Charter*, to promote universal respect for, and observance of, human rights and fundamental freedoms for all persons, without distinction.²⁸

Where international human rights norms, including the prohibition of illegal and arbitrary detention, have acquired the force of customary international law through general practice and the acceptance as law (*opinio juris*), such norms constitute binding legal obligations on States, in addition to their respective treaty obligations.

1155, p. 331 [*Vienna Convention*], Article 26.

27 See, for example, ICCPR Article 2.

28 UN, HR Committee, *CCPR General Comment No. 31, Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 2. See also *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 1.2 & 1.3. available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 2 June 2022].

UN WORKING GROUP ON ARBITRARY DETENTION

The jurisprudence of HRC treaty bodies and Special Procedures²⁹ of the HRC provides a rich body of interpretive law and/or persuasive authority concerning States' IHRL obligations.³⁰ The WGAD, as the only body in the international human rights system entrusted with a specific mandate to receive, investigate and determine cases of deprivation of liberty, allegedly imposed arbitrarily or inconsistently with IHRL, is an important source of jurisprudence and elucidation of evolving standards in this area. The WGAD investigates and reports on situations of alleged arbitrary detention by means of: reviews of individual complaints under its regular communications procedure; urgent appeals and communications to Governments with jurisdiction over the alleged victim(s) to clarify and/or bring their attention to these cases, and country visits.

Following review of individual complaints, the WGAD renders opinions that include thoroughly reasoned determinations and recommendations for the state action(s) needed to remedy the established IHRL violations, compensate the victim(s), comply with the applicable IHRL and ensure future state compliance. WGAD opinions are sent to the Government with jurisdiction and to complainant(s) and are published. Notification is given to the HRC through annual reporting. In cases where the person is released after the complaint is made, the WGAD files the case and retains the right to render an opinion.

29 Special Procedures of the HRC are independent human rights experts, such as Special Rapporteurs, Independent Experts and Working Groups, with mandates to report and advise on human rights from a thematic or country-specific perspective.

30 In considering the impact of the findings of UN Treaty Bodies, the International Law Association concluded "treaty body output has become a relevant interpretive source for many national courts in the interpretation of constitutional and statutory guarantees of human rights, as well as in interpreting provisions which form part of domestic law, as well as for international tribunals. While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognised that, as expert bodies entrusted by the States parties with functions under the treaties, the treaty bodies' interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation": International Law Association, Berlin Conference (2004), *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, para. 175 [footnotes omitted].

The urgent action procedure can be used when there are reliable allegations of arbitrary deprivation of liberty that constitutes a serious danger to the victim(s)' health or life or under other circumstances that warrant urgent action.³¹ After sending the urgent appeal to the Government with jurisdiction, the WGAD may refer the case to investigation and opinion under the regular complaint procedure referred to above.

The WGAD makes country visits, with the permission of the state, for the purpose of reviewing deprivation of liberty and the underlying reasons for arbitrary detentions and engaging in dialogue about changes needed to ensure compliance with IHRL obligations. Following a country visit, the WGAD must provide the state and the public first with its preliminary findings and then with its report and recommendations. Two years after the visit, the WGAD request the state to provide a report detailing actions taken to comply with the WGAD recommendations.

The WGAD is not a treaty-based mechanism, and its ability to consider individual complaints involving arbitrary detention is not dependent upon States recognizing its competence to do so.³² The WGAD's mandate is also not limited to States party to the ICCPR.³³ While the WGAD must only apply the ICCPR (or any other treaty) to the determination of cases involving States parties³⁴, it regularly refers to the UDHR in cases involving all States. This is in contrast to the HR Committee, which can only accept individual complaints against States party to the ICCPR and its First Optional Protocol.

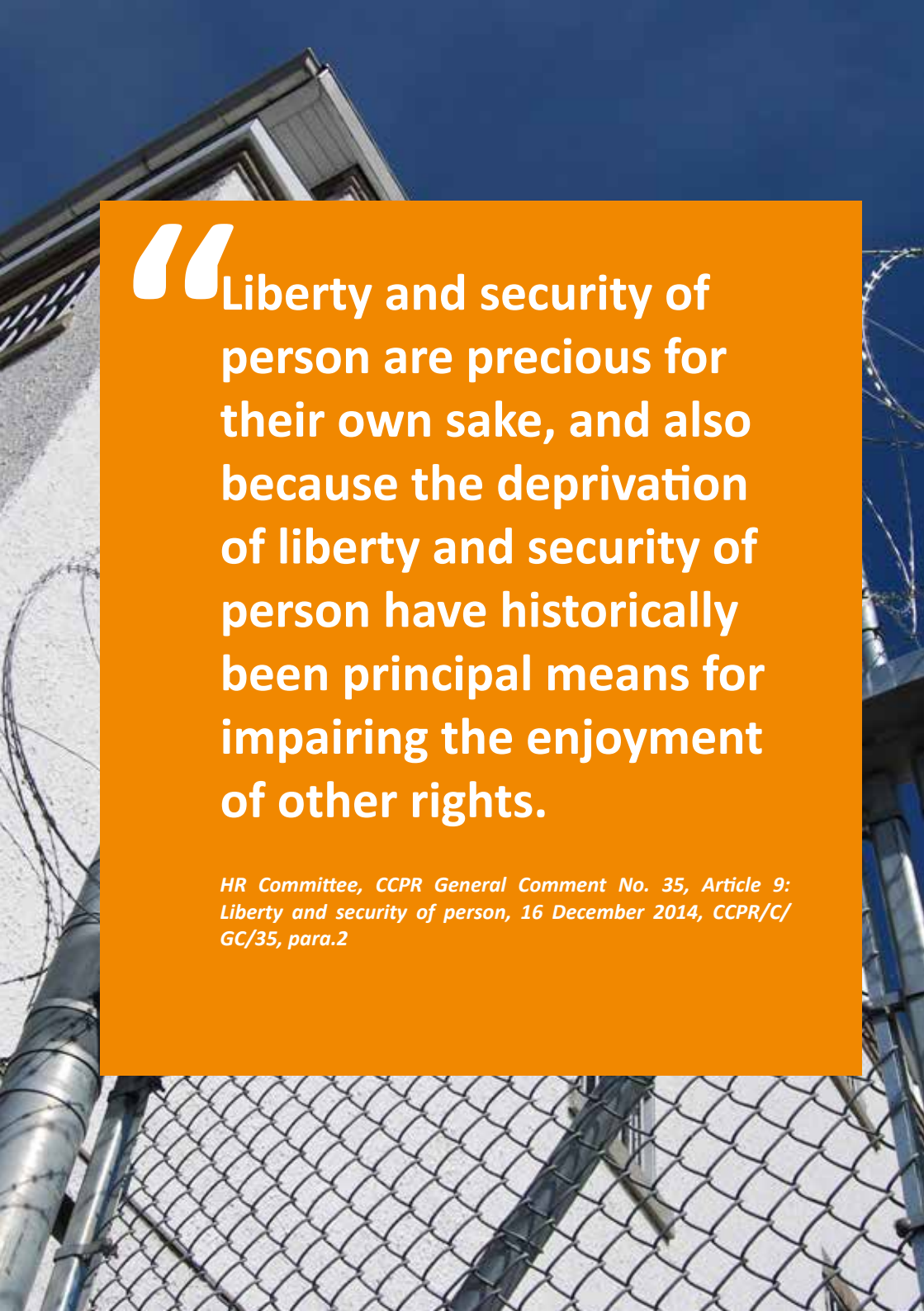
There are additional UN and regional human rights instruments relevant to the right to freedom from illegal and arbitrary deprivation of liberty, including Declarations, Guidelines, Statements of Principle, Resolutions and Recommendations. While not binding *per se* on States, these secondary instruments provide important sources for interpreting and understanding States' international legal obligations arising from treaty obligations and customary international law, as well as normative guidance for States in developing domestic public policy that complies with generally accepted international human rights standards and principles.

31 HRC, *Methods of work of the Working Group on Arbitrary Detention*, A/HRC/36/38, 13 July 2017.

32 WGAD, *Revised Fact Sheet No. 26*, 8 February 2019, p. 2.

33 CHR, *Question of arbitrary detention.*, 15 April 1997, E/CN.4/RES/1997/50, para. 5.

34 CHR, *Question of arbitrary detention.*, 19 April 1996, E/CN.4/RES/1996/28, para. 5.



“Liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.

HR Committee, CCPR General Comment No. 35, Article 9: Liberty and security of person, 16 December 2014, CCPR/C/GC/35, para.2

FOUNDATIONS OF THE RIGHT TO FREEDOM FROM ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY

PROHIBITION OF UNLAWFUL OR ARBITRARY DEPRIVATION OF LIBERTY

The fundamental right to liberty and security of the person is enshrined in the UDHR and in all the major international and regional human rights treaties. While the right to liberty and security of person is not absolute, IHRL absolutely prohibits any unlawful or arbitrary deprivation of the right. The two requirements ensure that individuals are protected not only from unlawful acts, but also from arbitrary or unjust laws and actions, measured against binding international human rights standards.

Under UDHR article 29, limitations on all rights, including the right to personal liberty, must be for the sole purposes enumerated in that article. The ECHR is the only treaty that specifically enumerates the grounds which can lawfully justify a deprivation of liberty in the Contracting States.

UDHR, articles 3, 9, 29:

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

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

29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

ICCPR, article 9(1):³⁵

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.

ICERD. Article 5:

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:...(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

American Declaration, articles 1, 25:

1. Every human being has the right to life, liberty and the security of his person.

25. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law...

ACHR, article 7:³⁶

7. (1) Every person has the right to personal liberty and security.

(2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

35 See also, CRC, article 37(b); ICERD, article 5(b); CRPD, article 14(1); *UN Declaration on the Rights of Indigenous Peoples*, article 7; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ("Body of Principles"), principles 9, 12, 13, 36(2); *UN Standard Minimum Rules for Non-custodial Measures* ("the Tokyo Rules"), para. 3; *UN Rules for the Protection of Juveniles Deprived of their Liberty* ("Havana Rules"), paras. 68,70.

36 See also Convention of Belém Do Pará, article 4; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 3(1).

(3) No one shall be subject to arbitrary arrest or imprisonment...

Arab Charter, article 14(1), (2), 16(8):

14. (1) ...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. ..

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:... (8) The right to respect for his security of person and his privacy in all circumstances.

ASEAN Declaration of Human Rights, article 12:

12. Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.

Banjul Charter, article 6:³⁷

6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, article 4(1):

4. (1) Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ECHR, article 5(1):

5. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

³⁷ See also *The Robben Island Guidelines*, articles 20, 21.

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Charter of Fundamental Rights of the European Union, article 6:

6. Everyone has the right to liberty and security of person.

RIGHT TO CHALLENGE LAWFULNESS OF DEPRIVATION OF LIBERTY

Everyone who has been deprived of their liberty by arrest or detention has the right to take proceedings before a court so that the court may decide without delay on the lawfulness of their detention, and order their release, if the detention is not lawful. A self-standing right of its own and a peremptory norm of international law (see discussion in Section II), the right to challenge the lawfulness of a deprivation of liberty enshrines the principle of *habeas corpus*, a procedural guarantee protecting the right to



“

The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in appropriate remedies and reparations, including an entitlement to release upon a successful challenge, must be guaranteed by the State

HRC, Report of the Working Group on Arbitrary Detention : United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, 6 July 2015, para. 3.

liberty and security of the person in all situations of deprivation of liberty.³⁸ The right to take proceedings for release from unlawful or arbitrary detention is contained in all of the major international³⁹ and regional⁴⁰ human rights instruments.

UDHR, article 8:

8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ICCPR, article 9(4):

9. (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.

Where persons deprived of liberty are not able to exercise this right, such as in cases of suspected enforced disappearance, the ICPPED, article 17(2) (f) obligates State parties to

guarantee that...any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings

38 HRC, *Report of the Working Group on Arbitrary Detention, A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court*, A/HRC/27/47, 30 June 2014, para. 64.

39 ICCPR, article 9(4); CRC, article 37(d); CRPD, article 14; ICMW, article 16; ICPPED, article 17(2)(f); CSR, article 16, 32. In addition, the right is found in the following instruments: *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, principles 1,3; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 4, 9, 11, 32; *UN Rules for the Protection of Juveniles Deprived of Their Liberty*, para. 2; *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, paras. 7.1, 13.3; and the *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*, para. 47.

40 ACHPR, article 7(1)(a); American Declaration, article XXV; ACHR, article 7(6); Arab Charter, article 14(6); ECHR, article 5(4). The right is also contained in the following regional instruments: *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. M.; *The Robben Island Guidelines*, Guideline 32; the *Guidelines on Conditions of Police Custody and Pretrial Detention in Africa*, article 5 (h); the *ASEAN Human Rights Declaration*, article 5; COE, Recommendation (2006) 13, article 19; *Principles and Best Practices on the Protection of Persons deprived of Liberty in the Americas*, articles 5,7.

before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

American Declaration, article XXV:

XXV. ...Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released...

ACHR, article 7(6):⁴¹

7. (6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Arab Charter, article 14(6):

14. (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.

Banjul Charter, article 7(1)(a):

7. (1)(a) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

41 See also Convention of Belém Do Pará, article 4.

ECHR, article 5(4):

5. (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION

In the exercise and enjoyment of all human rights, including the right to freedom from arbitrary deprivation of liberty, everyone has the right to absolute equality and freedom from discrimination in any form.

The UDHR and each of the core international human rights treaties⁴² explicitly prohibits both formal (*de jure*) and substantive (*de facto*) discrimination. For example, the UDHR, articles 1, 2 and 7, state:

1. All human beings are born free and equal in dignity and rights...
2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

42 The core international treaties include: ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, and CRPD.

ICCPR, articles 2, 3, 14, 20, 26:⁴³

2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

14. (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...

20. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination...shall be prohibited by law.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICERD, article 5:

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic

⁴³ See also CAT, article 1; ICMW, article 7; *UN Declaration on The Rights of Indigenous Peoples*, articles 1, 2; 44; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 5; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 5(1); *UN Standard Minimum Rules for the Treatment of Prisoners*, (*Nelson Mandela Rules*), Rule 2; *Guidelines on the Role of Prosecutors*, 13(a); *UN Basic Principles on the Role of Lawyers*, 2.

origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice;

CEDAW, article 15(1):

15. (1) States Parties shall accord to women equality with men before the law.

CRC, article 2:

2. (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

American Declaration, article 2:

II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

ACHR, articles 1(1), 8(2), 24.⁴⁴

1. (1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according

44 See also Convention of Belém Do Pará, articles 4,6.

to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees...

24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Arab Charter, article 3(3), 11, 12:

3. (3) Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

11. All persons are equal before the law and have the right to enjoy its protection without discrimination.

12. All persons are equal before the courts and tribunals...

ASEAN Declaration of Human Rights, article 2:

2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.

Banjul Charter, articles 2, 3, 19:⁴⁵

2. Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

3. (1) Every individual shall be equal before the law.

(2) Every individual shall be entitled to equal protection of the law.

⁴⁵ See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, paras. A(2)(b)(c), G(a), K(a), Q(b).

19. All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

African Charter on the Rights and Welfare of the Child, article 3:

3. Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African (Maputo Protocol), article 8:

8. Women and men are equal before the law and shall have the right to equal protection and benefit of the law...

ECHR, article 14:

14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

SPECIFIC PROTECTIONS AGAINST ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY

IHRL provides for specific safeguards for the protection of liberty and security of person. Some provisions apply only in connection with criminal charges, for example, the rights to be notified without delay of any charges, to be brought promptly before a judge or other officer authorized by law to exercise judicial oversight, to pre-trial release, and to trial within a reasonable time. The rights to human dignity, to be immediately informed of reasons for deprivation of liberty, to be represented by legal counsel and to prompt review by a court of the legality of detention apply in all situations of a deprivation of liberty.

Right of everyone to be treated humanely and with respect for human dignity

All persons have the right to be treated humanely and with respect for human dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment. The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment is explicitly affirmed in ICCPR article 7 of ICCPR. The CAT defines torture, and details measures to be taken by States parties to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment. The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute.

In addition to enjoying at least the same guarantees and protection as are accorded to adults under IHRL, juvenile accused persons are entitled to special protection.

UDHR, articles 1, 5:

- 1.** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- 5.** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ICCPR, articles 7, 10, 24:⁴⁶

- 7.** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...
- 10.** (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

⁴⁶ See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 1, 6, 8, 15, 16, 19; *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*; *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

(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.

24. (1) Every child shall have ...the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

CAT, articles 1, 2:

1. For the purposes of this Convention, the term "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.

2. (1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

(3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

Declaration on the Elimination of Violence against Women, article 4:

4. States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:... (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

ICERD, article 5:

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights; ...

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;...

CRC, articles 3, 9, 37(c), 39, 40(1):

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

9. (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

37. (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

39. States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

40. (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

ICMW, article 17:

17. (1) Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

(2) Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

(3) Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial...

CRPD, articles 1, 3, 8:

1. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

3. The principles of the present Convention shall be: (a) Respect for inherent dignity...

8. States Parties undertake to adopt immediate, effective and appropriate measures: (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

14. (2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

ACHR, article 5:⁴⁷

5. (1) Every person has the right to have his physical, mental, and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

(3) Punishment shall not be extended to any person other than the criminal.

(4) 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.

(5) Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

(6) Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Arab Charter, articles 8(1), 14(4), 17, 20:

8. (1) No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.

14. (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.

17. Each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and enforcement of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society.

⁴⁷ See also Convention of Belém Do Pará, articles 3,4; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

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

(2) Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons.

ASEAN Declaration of Human Rights, articles 1, 14:

1. All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.

14. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Banjul Charter, articles 4, 5: ⁴⁸

4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

African Charter on the Rights and Welfare of the Child, articles 4(1), 16(1), 17:

4. (1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

13. (1) Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

⁴⁸ See also *The Robben Island Guidelines; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, paras. M(2)(c)(e)(g), M(6)(c), M(7), O.

16. (1) States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

17. (1) Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

(2) States Parties to the present Charter shall in particular: (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment; (b) ensure that children are separated from adults in their place of detention or imprisonment; ...

Protocol to the African Charter on Human and People's Rights on the Rights of Women In Africa, articles 3, 22, 23, 24;

3. (1) Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.

(2) Every woman shall have the right to respect as a person and to the free development of her personality.

(3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.

(4) States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

22. The States Parties undertake to: a) Provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training; b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

23. The States Parties undertake to: (a) Ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; (b) Ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

24. The States Parties undertake to: (a) Ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs; (b) Ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

ECHR, article 3:

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

Charter of Fundamental Rights of the European Union, article 3(1), 4:

3. (1) Everyone has the right to respect for his or her physical and mental integrity.

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

Right to be immediately informed of the reasons for the deprivation of liberty and of any charges

Anyone who is being deprived of their personal liberty has the right to be informed immediately upon arrest of the reasons for the deprivation of liberty. The right to notice of the reasons for an apprehension applies to any deprivation of liberty. Persons arrested for the purpose of investigating crimes they may have committed, or for the purpose of holding them for criminal trial must also be informed promptly of the nature and cause of

any criminal charges brought against them. The guarantee to be informed of charges applies to all cases of criminal charges, including those of persons not in detention.

ICCPR, articles 9(2), 14(3):⁴⁹

9. (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.

14. (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; ...

African Charter on the Rights and Welfare of the Child, article 17(2)(c)(ii):⁵⁰

17. (2) State Parties to the present Charter shall in particular: ... (c) ensure that every child accused of infringing the penal law: ... (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

ACHR, 7(4):⁵¹

7. (4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

49 See also CRC, article 40(2)(b)(ii); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 10, 12; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 7; *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, rule 7.1; *UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention*, para. 47(i).

50 See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. M(2)(a); *The Robben Island Guidelines*, articles 25, 26.

51 See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

Arab Charter, article 14(3), 16(1):

14. (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.

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: (1) The right to be informed promptly, in detail and in a language which he understands, of the charges against him.

ECHR, 5(2), 6(3)(a):

5. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

6. 3) Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

Right of anyone deprived of their liberty to request and receive legal assistance

All persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. While the right to counsel for persons detained in the context of criminal proceedings is expressly guaranteed in international and regional instruments (see standards under rights of persons charged with criminal offences below), IHRL recognizes the right to legal assistance is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention, and therefore applies in

all cases of deprivation of liberty.⁵² Upon apprehension, all persons shall be promptly informed of this right.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 11(1):

Principle 11 (1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

UN Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, principle 9, para. 30; guideline 8:

Principle 9. Any persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension.⁵⁶ Upon apprehension, all persons shall be promptly informed of this right...

Guideline 8. Access shall be provided without delay to legal counsel immediately after the moment of deprivation of liberty and at the latest prior to any questioning by an authority,¹²⁶ and thereafter throughout the period of detention. This includes providing detainees with the means to contact legal counsel of their choice...

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention, para. 47(ii):

47. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees: ...(ii) to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to nationals similarly situated,⁸⁰ and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights. Communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting

52 HRC, WGAD, *Opinion No. 74/2020 (Turkey)*, A/HRC/WGAD/2020/74, para. 59.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle 5:

5 All persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family, or provided by the State; they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority...

Right to equality before the law and to a fair and public hearing

The specific right to equality before the law and equal protection of the law without discrimination is a fundamental principle underlying the right to a fair trial and a fair hearing. The right to equality before the courts and tribunals guarantees the right of everyone to equal access and equality of arms, freedom from discrimination, and a fair and public hearing by a competent, independent and impartial tribunal established by law.⁵³ The right to equality before the courts is not limited to cases involving the determination of criminal charges or of rights and obligations in a suit of law but applies whenever domestic law entrusts a judicial body with a judicial task.⁵⁴ As discussed below, the right to a fair trial is non-derogable.

UDHR, articles 7, 10:

7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

⁵³ HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 8.

⁵⁴ HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 7.

10. 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.

ICCPR, article 14(1):⁵⁵

14. (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. ..

(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.

American Declaration, article 2, 18:

II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

XVIII. Every person may resort to the courts to ensure respect for his legal rights...

ACHR, articles 8(1), 24:⁵⁶

8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

⁵⁵ See also CRC, article 40(2)(b)(iii).

⁵⁶ See also Convention of Belém Do Pará, article 4; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

Arab Charter, articles 11, 12, 13(1), 22:

11. All persons are equal before the law and have the right to enjoy its protection without discrimination.

12. All persons are equal before the courts and tribunals...

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.

22. Everyone shall have the right to recognition as a person before the law.

ASEAN Declaration of Human Rights, article 3:

3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.

Banjul Charter, articles 3, 7(1), 19:⁵⁷

3. (1) Every individual shall be equal before the law.

(2) Every individual shall be entitled to equal protection of the law.

7. (1) Every individual shall have the right to have his cause heard...

19. All peoples shall be equal; they shall enjoy the same respect and shall have the same rights...

ECHR, article 6(1):

6. (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

⁵⁷ See also *African Charter on the Rights and Welfare of the Child*, article 17(2)(c)(iv); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

Charter of Fundamental Rights of the European Union, articles 20, 47, 48(2):

20. Everyone is equal before the law.

47. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

48. (2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Minimum guarantees in criminal proceedings

For persons facing criminal charges, IHRL provides a set of procedural guarantees to safeguard the rule of law and ensure universal application of the principles of impartiality, fairness and equality of arms, implicit in the right to a fair trial. A violation of these rights may result in a violation of the right to freedom from arbitrary or unlawful detention.

Right to presumption of innocence

Every individual charged with a crime has the right to be presumed innocent until proven guilty according to law. The presumption of innocence is a principle that is fundamental to the protection of human rights and imposes on the prosecution the burden of proving the charge. It guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt and ensures that the accused has the benefit of the doubt. Persons accused of a criminal act must be treated in accordance with this principle.⁵⁸ Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.⁵⁹

58 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 30.

59 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 6.

HR Committee, *CCPR General Comment No. 29, Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

UDHR, article 11(1):

11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

ICCPR, article 14(2):⁶⁰

14. (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

American Declaration, article 26:

XXVI. Every accused person is presumed to be innocent until proved guilty.

ACHR, article 8(2):

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law...

ASEAN Declaration of Human Rights, article 20(1):

20. (1) Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

Banjul Charter, article 7(1)(b):⁶¹

7. (1) Every individual shall have the right to have his cause heard. This comprises: ... (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

ECHR, article 6(2):

6. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

⁶⁰ See also CRC, article 40(2)(b)(i); *UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, rule 111(2).

⁶¹ See also *African Charter on the Rights and Welfare of the Child*, article 17 (2)(c)(i); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, article N.(6)(e).

Charter of Fundamental Rights of the European Union, article 48(1):

48. 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

Right not to incriminate oneself

ICCPR, article 14(3)(g):⁶²

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) Not to be compelled to testify against himself or to confess guilt.

ACHR, article 8(2)(g):⁶³

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... g. the right not to be compelled to be a witness against himself or to plead guilty;

Arab Charter, article 16(6):

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ... (6) The right not to be compelled to testify against himself or to confess guilt.

Right to legal counsel⁶⁴

Persons charged with a criminal offence have the express right to communicate with and be represented by counsel of their choosing.

⁶² See also CRC, article 40(2)(iv).

⁶³ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

⁶⁴ See Lois Leslie, *The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*, LRWC (2014).

ICCPR, article 14(3)(b)(d):⁶⁵

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:... (b) ...to communicate with counsel of his own choosing; ...d) ...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;

CRC, articles 12, 40(1),(2):

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

40. (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

(2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: ...(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ...(ii)...to have legal or

⁶⁵ See also *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 9(12); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 17; *UN Basic Principles on the Role of Lawyers*, principle 7.

other appropriate assistance in the preparation and presentation of his or her defence;... (iii) To have the matter determined... in the presence of legal or other appropriate assistance...

ACHR, article 8(2):⁶⁶

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:... (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;...

Arab Charter, article 16:

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ...

(3) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.

(4) The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.

(5) The right to examine or have his lawyer examine the prosecution witnesses and to summon defence according to the conditions applied to the prosecution witnesses.

⁶⁶ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

Banjul Charter, article 7(1)(c):⁶⁷

7. (1) Every individual shall have the right to have his cause heard. This comprises: ... c) the right to defense, including the right to be defended by counsel of his choice;

ECHR, article 6(3)(c):

6. (3) Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial officer

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. Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release.⁶⁸ Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence.⁶⁹ (The presumption in favour of pre-trial release is discussed below.)

67 See also *African Charter on the Rights and Welfare of the Child*, article 17(2)(c)(iii); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, paras. N(2), Q(b)(8).

68 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 36. See, for example HR Committee, *Concluding Observations on the Initial Report of Tajikistan*, CCPR/CO/84/TJK, 18 July 2005, para. 12.

69 HR Committee, *Sextus v. Trinidad and Tobago*, Comm. No. 818/1998, Views adopted on 16 July 2001, para. 7.2.

ICCPR, article 9(3):⁷⁰

9. (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...

ACHR, article 7(5):⁷¹

7. (5) Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

Arab Charter, article 14(5):

14. (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.

Banjul Charter, article 7(1)(d):⁷²

7. (1) Every individual shall have the right to have his cause heard. This comprises: ...**(d)** the right to be tried within a reasonable time by an impartial court or tribunal.

ECHR, article 5(3):

5. (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a

⁷⁰ See also CRC, article 40(2)(b)(iii); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 11, 37, 38; *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, rule 6.3; *UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, rule 7.1; *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, rule 70.

⁷¹ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

⁷² See also *African Charter on the Rights and Welfare of the Child*, article 17(2)(c)(iv); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, M(3)(a); *The Robben Island Guidelines*, para. 27.

judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Right to pre-trial release

As pre-trial detention involves the deprivation of liberty of individuals who have not been convicted of a crime, it can negatively impact on the presumption of innocence and the right to liberty and security of person. All the international standards governing pre-trial detention reflect the principle that pre-trial detention should be used only in certain limited circumstances, when strictly necessary as a last resort and for as short a period as possible. The burden is on the State to show why an accused person cannot be released.

ICCPR, article 9(3):

9. (3) ...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.⁷³

CRC, article 37(b):

37. States Parties shall ensure that: ...(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

American Declaration, article 25:

XXV...Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by

⁷³ See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 39; *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, rule 6; *Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, rules 13, 19; *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, rules 1,2; *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*.

a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

ACHR, article 7(5):⁷⁴

7. (5) Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

ECHR, articles 5(1)(c), 5(3):

5. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(1)(e):

M. (1)(e) Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.

⁷⁴ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 3.

Right of accused persons to adequate time and facilities for the preparation of their defence

Everyone accused of a criminal offence is entitled to adequate time and facilities for the preparation of their defence.

UDHR, article 11:

11. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

ICCPR, article 14(3):⁷⁵

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(b) To have adequate time and facilities for the preparation of his defence...

ACHR, article 8(2)(c):

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... c. adequate time and means for the preparation of his defense;

African Charter on the Rights of the Child, article 17(2)(c):

17. (2) States Parties to the present Charter shall in particular: ... (c) ensure that every child accused in infringing the penal law: ... (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

⁷⁵ See also CRC, article 40(2)(ii); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 36(1); *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, rule 70; *UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, rule 13.3.

Arab Charter, article 16(2):

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ... (2) The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family.

ECHR, article 6(3)(b):

6. (3) Everyone charged with a criminal offence has the following minimum rights: ... (b) to have adequate time and facilities for the preparation of his defence;

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paras. A(2)(e), N(3), Q(b)(6):

A. (2) The essential elements of a fair hearing include: ... e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

N. (3)(a) The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(e) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

1. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.
2. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.
3. The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.
4. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
5. The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.
6. Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know and challenge all the evidence which may be used to support the decision. All evidence submitted must be considered by the judicial body.
7. Following a trial and before any appellate proceeding, the accused or the defence counsel has a right of access to (or to consult) the evidence which the judicial body considered in making a decision and the judicial body's reasoning in arriving at the judgement.

Q. (b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts: ... (6) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;...

Right of anyone arrested or detained on a criminal charge to a trial within a reasonable time or to release

The right of an accused person to be tried without undue delay is intended to serve the interests of justice, in addition to ensuring that the accused person is not deprived of their liberty any longer than necessary or kept in a state of uncertainty as to their fate.⁷⁶ All stages, whether in first instance or on appeal, must take place “without undue delay”. As noted above, persons who are not released pending trial must be tried as expeditiously as possible to the extent consistent with their rights of defence.⁷⁷ Detainees must be granted provisional release once continuing detention ceases to be reasonable.

ICCPR, articles 9(3), 14(3)(c):⁷⁸

9. (3) Anyone arrested or detained on a criminal charge ...shall be entitled to trial within a reasonable time or to release...

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay;

American Declaration, article 25:

XXV. ... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be release...

⁷⁶ HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 35.

⁷⁷ HR Committee, *Sextus v. Trinidad and Tobago*, Comm. No. 818/1998, Views adopted on 16 July 2001, para. 7.2.

⁷⁸ See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 38; *UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, rule 13.3;

ACHR, article 8(1):⁷⁹

8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time ,...

Arab Charter, article 14(5):

14. (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.

Banjul Charter, article 7(1)(d):⁸⁰

7. (1) Every individual shall have the right to have his cause heard. This comprises: ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.

ECHR, article 5(3):

5. (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.

Right to be tried in their presence and to defend themselves in person or through legal counsel of their choice

Accused persons are entitled to be present during their trial and to defend themselves in person, or through legal counsel of their choice.

⁷⁹ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

⁸⁰ See also *African Charter on the Rights and Welfare of the Child*, article 17(2)(c)(iv); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, paras. M(3)(a), Q(b)(10); *The Robben Island Guidelines*, article 8.

ICCPR, article 14(3)(d):⁸¹

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(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;

CRC, article 12:

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

ACHR, article 8(2)(d):

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

⁸¹ See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 11, 36; *Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, rule 41(3).

Arab Charter, article 16(3):

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ... (3) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.

ECHR, article 6(3)(c):

6. (3) Everyone charged with a criminal offence has the following minimum rights: ...(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N(2).⁸²

N. (2)(a) The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.

(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.

(c) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.

(d) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

82 See also *The Robben Island Guidelines*, article 27.

Right to examine witnesses

ICCPR, article 14(3)(e):

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...**(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;

ACHR, article 8(2)(f):

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...**(f)** the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

Arab Charter, article 16(5):

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ...

(5) The right to examine or have his lawyer examine the prosecution witnesses and to summon defence according to the conditions applied to the prosecution witnesses.

ECHR, article 6(3)(d):

6. (3) Everyone charged with a criminal offence has the following minimum rights: ...**(d)** 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;

Right to an interpreter

ICCPR, article 14(3)(f):

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

ACHR, article 8(2)(a):⁸³

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court...

ECHR, article 6(3)(e):

6. (3) Everyone charged with a criminal offence has the following minimum rights: ... (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Right to appeal conviction

Anyone convicted of a crime has the right to have their conviction and sentence lawfully reviewed by a higher tribunal.

ICCPR, article 14(5):⁸⁴

14. (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

⁸³ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

⁸⁴ See also CRC, article 40(2)(b)(v); *UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, rule 70.

ACHR, article 8(2)(h):⁸⁵

8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... (h) the right to appeal the judgment to a higher court.

Arab Charter, article 16(7):

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: ... (7) The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.

Banjul Charter, article 7(1)(a):⁸⁶

7. (1) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ...

African Charter on the Rights and Welfare of the Child, article 17(2)(c)(iv):

17. (2) States Parties to the present Charter shall in particular: ... (c) ensure that every child accused of infringing the penal law: ... (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

Protocol No. 7 to the ECHR, article 2(1):

2. (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

⁸⁵ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

⁸⁶ See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, paras. A(2)(j), N(2)(10), Q(b)(11).

Prohibition against retrospective criminal laws or penalties

One of the fundamental guarantees of due process is the principle of legality - the requirement that public power be authorized by law - including the principle of *nullum crimen, nulla poena sine lege certa* – “no crime, nor punishment without clear law”. This principle ensures that no defendant may be punished arbitrarily or retroactively by the State. In criminal law, the principle of legality is violated if an individual is arrested or detained on grounds that are not clearly established in domestic legislation in place at the time of the arrest or detention.⁸⁷ On the other hand, an accused shall benefit from any subsequent change to the law providing for a lighter penalty than the one that was in effect at the time of the offence. IHRL does not permit any derogation from the principle of legality.⁸⁸

UDHR, article 11(2):

11. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

ICCPR, article 15:⁸⁹

15. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent

⁸⁷ HR Committee, *McLawrence v. Jamaica*, Communication No. 702/1996, Views adopted on 18 July 1997, para. 5.5.

⁸⁸ ICCPR article 4(2); ACHR article 27(2); ECHR article 15(2). The Banjul Charter does not contain a derogation clause.

⁸⁹ See also CRC, article 40(2)(a); *Additional Protocol I to the 1949 Geneva Conventions*, article 75(4)(c)(1977); *Additional Protocol II to the 1949 Geneva Conventions* article 6(2)(c) (1977); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 2.

to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

American Declaration, article 26:

XXVI. ...Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws...

ACHR, article 9:⁹⁰

9. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Arab Charter, article 15:

15. No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.

ASEAN Declaration of Human Rights, article 20(2):

20. (2) No person shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

⁹⁰ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 5.

Banjul Charter, article 7(2):⁹¹

7. (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ECHR, article 7:

7. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Charter of Fundamental Rights of the European Union, article 49(1):

49. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

Right of everyone not to be imprisoned merely for nonfulfillment of obligations of a purely civil character.

No one may be deprived of their liberty merely on the ground of inability to pay a debt arising from a contractual obligation or other obligation of a purely civil character.

91 See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. N(7).

ICCPR, article 11:

11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

American Declaration, article 25:

XXV. ...No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Arab Charter, article 18:

18. No one who is shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned.

Protocol No. 4 to the ECHR, article 1:

1. No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Right of everyone to not be tried or punished again for same offence

IHRL prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence. This prohibition against “double jeopardy” reflects the general principle of law, *ne bis in idem* - “not twice in the same [thing]”.

ICCPR, article 14(7):⁹²

14. (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.

ACHR, article 8(4):⁹³

8. (4) An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

⁹² See also the *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, rule 39.

⁹³ See also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle V.

Arab Charter, article 19(1):

19. (1) No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.

ASEAN Declaration of Human Rights, article 20(3):

20. (3) No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.

Protocol No. 7 to the ECHR, article 4:

4. (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

(3) No derogation from this Article shall be made under Article 15 of the Convention.

Charter of Fundamental Rights of the European Union, article 50:

50. No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N(8):

N. (8) No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Right of anyone who has been arbitrarily or unlawfully deprived of their liberty to an effective remedy

Everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of their rights and freedoms, including the right to freedom from arbitrary or unlawful deprivation of liberty.

IHRL also expressly provides for an enforceable right to compensation for unlawful deprivation of liberty and miscarriage of justice.

UDHR, article 8:

8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ICCPR, articles 2(3), 9, 14:⁹⁴

2. (3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

⁹⁴ See also *UN Declaration on the Rights of Indigenous Peoples*, articles 8, 40; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 7, 33, 35; *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, 11, 12, 14, 15, 18; *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, rule 7.

9. (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.

14. (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.

Optional Protocol to the International Covenant on Civil and Political Rights, article 2:

2. Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

ICERD, article 6:

6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

ICMWW, article 83:

83. Each State Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICPPED, article 24:

24. (1) For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

(2) Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

(3) Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

(4) Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

(5) The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.

(6) Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

(7) Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to

establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

American Declaration, article 18:

XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

ACHR, articles 10, 25, 63(1):⁹⁵

10. Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

25. (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

63. (1) If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

95 See also Convention of Belém Do Pará, article 4.

Arab Charter, articles 8(2), 12, 14(7), 19(2), 23:

8. (2). ... Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.

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.

14. (7) Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

19. (2) Anyone whose innocence is established by a final judgement shall be entitled to compensation for the damage suffered.

23. Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

ASEAN Declaration of Human Rights, article 5:

5. Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

ECHR, articles 5(5), 13, 41:

5. (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

41. If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Protocol No. 7 to the ECHR, article 3:

3. 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 the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

Charter of Fundamental Rights of the European Union, article 47:

47. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article...

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, article 25:⁹⁶

XXV. The States Parties undertake to: a) Provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; b) Ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

⁹⁶ See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. C, M(1)(h), M(5)(b), M(7)(j), N(10)(c); *The Robben Island Guidelines*, article 50.

“

...the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a jus cogens norm. Its specific content, as laid out in [Deliberation No. 9], remains fully applicable in all situations

WGAD, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 51

SCOPE OF PROTECTIONS AGAINST ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY

PROHIBITION CONSITUTES A JUS COGENS NORM

Prohibition protected under customary international law

In addition to their codification in international and regional treaties, the prohibition on arbitrary or unlawful deprivation of liberty and the right to challenge the lawfulness of a deprivation of liberty are accepted as general principles of customary international law binding on all states. As the WGAD observes

the provisions of article 9 of the [ICCPR] reflect the principles elaborated by general (customary) international law, and are therefore binding also on States, which have not ratified the [ICCPR]. The drafting history of ICCPR testifies that there have been attempts to give an exhaustive list of all possible forms of the deprivation of liberty, and the Commission on Human Rights unanimously adopted in 1949 a general formula prohibiting anyone from being arbitrarily arrested or detained.⁹⁷

In addition to the widespread ratification⁹⁸ of treaty law on deprivation of liberty and widespread translation of the prohibition of arbitrary detention

⁹⁷ WGAD, *Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet*, para. 53.

⁹⁸ See Appendix B for current numbers of States parties to the major international and regional instruments.

into national laws⁹⁹, the prohibition is widely enshrined in national constitutions and legislation and follows closely the international norms and standards on the subject.¹⁰⁰ Detailed prohibitions of arbitrary arrest and detention are contained in domestic legislation of States not party to the ICCPR, including China, Qatar, Saudi Arabia, the UAE and others.¹⁰¹ The customary binding nature of rules prohibiting arbitrary deprivation of liberty is further reflected in a number of UN resolutions.¹⁰²

Non-derogable

The rights to freedom from arbitrary or unlawful deprivation of liberty and the right to challenge the lawfulness of a deprivation of liberty are further viewed as peremptory norms (*jus cogens*)¹⁰³ of customary international law and, as such, are absolute and may never be suspended or rendered impracticable. All absolute rights are non-derogable. For example, under the ICCPR, no derogation is possible from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18:

- Right to life (art. 6)
- Prohibition on torture, cruel, inhuman or degrading treatment or punishment (art. 7)
- Prohibition on slavery and servitude (art. 8)
- Prohibition on imprisonment for contractual obligation (art. 11)
- Prohibition on retrospective criminal punishments (art. 15)

99 HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/22/44, 24 December 2012, para. 43.

100 HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/22/44, 24 December 2012, para. 43.

101 HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/22/44, 24 December 2012, para. 46.

102 For example: Security Council resolutions 392 (1976), 417 (1977) and 473 (1980) on South Africa; General Assembly resolution 62/159.

103 Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable: UN, International Law Commission, Report on the work of the seventy-first session (2019), Chapter V, Peremptory norms of general international law (*jus cogens*), Conclusion 3.

- Right to recognition as a person before the law (art. 16)
- Right to freedom of thought, conscience and religion (art. 18)

While ICCPR article 9 is not included in the list of non-derogable rights under ICCPR article 4(2), the HR Committee states that the category of peremptory norms extends beyond the list of non-derogable provisions as given in [ICCPR] article 4(2):

[t]he enumeration of non-derogable provisions in [ICCPR] article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in [ICCPR] article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the [ICCPR] (e.g., articles 6 and 7). However, it is apparent that some other provisions of the [ICCPR] were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in [ICCPR] article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the [ICCPR] as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence. [emphasis added]¹⁰⁴

In the view of the treaty bodies, the non-derogability of the right to freedom from arbitrary or unlawful deprivation of liberty is built into the arbitrariness standard itself as procedural safeguards such as habeas corpus, the presumption of innocence and minimum fair trial rights may never be made subject to measures that would circumvent the protection of non-derogable rights.¹⁰⁵ Thus, “a State can never claim that illegal, unjust,

¹⁰⁴ HR Committee, *CCPR General Comment No. 29, Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11. See *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 3.

¹⁰⁵ HR Committee, *CCPR General Comment No. 29, Article 4: Derogations during a State of*

or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end".¹⁰⁶ Similarly, derogation from customary international law's prohibition of arbitrary deprivation is not possible. States are precluded from invoking a plea of necessity, as an essential condition to doing so is that non-compliance with the prohibition of arbitrary deprivation of liberty must be necessary and proportionate to the end sought.¹⁰⁷

Where, during such a national emergency, IHRL permits measures to accommodate practical constraints on the application of some procedural elements of the right to bring proceedings to challenge the lawfulness of detention, such measures must not diminish the right itself.¹⁰⁸ This principle is reflected in Principle 4 of the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*:

Principle 4

4. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law.

5. The right is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed.

6. The international law review of measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings will depend upon the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the derogation.

Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 15.

106 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty*, para. 48.

107 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty*, para. 50.

108 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 50.

Such measures must not, in their adoption, represent any abuse of power nor have the effect of negating the existence of the right to bring such proceedings before a court.

7. Any such practical measures in the application of the right to bring proceedings before a court to challenge the detention are permitted only to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are consistent with the State's other obligations under international law, including provisions of international humanitarian law relating to the deprivation of liberty, and are non-discriminatory.

States are also barred from reserving the right to arbitrarily arrest or detain persons upon ratification or accession to the ICCPR or Optional Protocols.¹⁰⁹ Provisions of the ICCPR which represent customary international law may not be the subject of reservations.¹¹⁰ In particular, reservations that offend peremptory norms are considered to be incompatible with the object and purpose of the ICCPR.¹¹¹

The prohibition applies in any territory under a State's jurisdiction or wherever the State exercises effective control, or otherwise as the result of its actions or omissions of its agents or servants.¹¹²

The non-derogability of the right to challenge the lawfulness of detention is explicitly recognized in ACHR, article 27(2), and the *Arab Charter*, article 4(2). Under ACHR, article 27(2), no derogation is permitted from the following:

Art. 27. (2) Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child),

109 *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, para. 8.

110 *Ibid.*

111 *Ibid.*

112 HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/45/16, 24 July 2020, Annex II, *Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies*, para. 5.

Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. (emphasis added).

Under article 4(2) of the *Arab Charter*, no derogation is permitted from article 14(6) (right to challenge lawfulness of arrest or detention).

The ACHPR has confirmed that the *Banjul Charter* does not contain a derogation clause and, therefore, limitations on the rights and freedoms enshrined in the *Banjul Charter* cannot be justified by emergencies or special circumstances.¹¹³ The only legitimate reasons for limitations of the rights and freedoms of the *Banjul Charter* are those found in article 27(2), that is, that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest”.¹¹⁴

LIMITATIONS ON STATES ABILITY TO RESTRICT RIGHT TO LIBERTY AND SECURITY OF PERSON

Content of the right to liberty and security of person

The HR Committee has elaborated on the content of the right to liberty and security of the person contained in ICCPR article 9:

Liberty of person concerns freedom from confinement of the body, not a general freedom of action. Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in [ICCPR] paragraph 9 below. [ICCPR] Article 9 guarantees those rights to everyone. “Everyone” includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers,

¹¹³ ACHR, *Constitutional Rights Project and Others v. Nigeria*, Communication Nos. 140/94, 141/94 and 145/95 (2000), para. 41.

¹¹⁴ *Ibid.*

stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity....

The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.¹¹⁵

The ECtHR has ruled that the right to liberty under article 5 of the ECHR “contemplates the physical liberty of the person...it is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 [to the ECHR]”.¹¹⁶

States have an obligation to respect and ensure without distinction of any kind the right to liberty and security of all persons within a State’s territory and subject to its jurisdiction. With respect to the ICCPR, the HR Committee has clarified that the enjoyment of the rights laid down in the ICCPR is not limited to citizens of States parties, but extends to anyone “within the power or effective control” of that State party, even if not situated within the territory of the State party:

States Parties are required by [ICCPR] article 2, paragraph 1, to respect and to ensure the [ICCPR] rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in [CCPR General Comment 15] the enjoyment of [ICCPR] rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national

115 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, paras.3 and 9 [footnotes omitted].

116 ECtHR, *Case of de Tommaso v. Italy*, App. No. 43395/09, Judgment of 23 February 2017, para. 80.

contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.¹¹⁷

ICCPR article 9 reinforces the obligations of States Parties to protect individuals against reprisals for having cooperated or communicated with the HR Committee, such as physical intimidate or threats to personal liberty.¹¹⁸

Definition of deprivation of liberty

The ICCPR and regional treaties do not explicitly define what constitutes a deprivation of liberty or personal freedom within the meaning of the prohibitions. Nor do international instruments always use the same terminology to refer to deprivations of liberty – referring variously to “arrest”, “apprehension”, “holding”, “detention”, “incarceration”, “prison”, “reclusion”, “custody”, “remand”, etc. To eliminate any differences in interpretation in different terminologies, the WGAD was mandated to investigate “cases of deprivation of liberty imposed arbitrarily”.¹¹⁹

A deprivation of liberty under ICCPR article 9 involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under ICCPR, article 12 (Freedom of Movement).¹²⁰

To determine whether someone has been deprived of their liberty within the meaning of ECHR Article 5,

the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question.

117 HR Committee, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10.

118 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 54.

119 CHR, *Question of arbitrary detention.*, 15 April 1997, E/CN.4/RES/1997/50.

120 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para.5.

The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance...¹²¹

A deprivation of liberty covers the period from the initial moment of apprehension until release. Whether the person is deprived of liberty is a question of fact. According to the WGAD, “[i]f the person concerned is not at liberty to leave, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected and the right to challenge the lawfulness of detention before a court afforded to the individual”.¹²²

Where the facts indicate a deprivation of liberty within the meaning of ECHR article 5(1), the relatively short duration of the detention does not affect this conclusion.¹²³ An element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.¹²⁴

ECHR article 5(1) lays down a positive obligation on the State not only to refrain from active infringement of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction.¹²⁵ The State is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.¹²⁶

The ECtHR has ruled that the responsibility of a State is engaged if it acquiesces in a person’s loss of liberty by private individuals or fails to put an end to the situation.¹²⁷

121 ECtHR, *Case of de Tommaso v. Italy*, App. No. 43395/09, Judgment of 23 February 2017, para. 80.

122 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/36/37, 19 July 2017, para. 56.

123 ECtHR, *Case of Rantsev v. Cyprus and Russia*, App. No. 25965/04, Judgment of 10 May 2010 (Final), para. 317.

124 ECtHR, *Case of Krupko and Others v. Russia*, App. No. 26587/07, Judgment of 17 November 2014 (Final), para. 36.

125 ECtHR, *Case of El-Masri v. the Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Judgment of 13 December 2012, para. 239.

126 ECtHR, *Case of Storck v. Germany*, App. No. 61603/00, Judgment of 16 September 2005, para. 102.

127 ECtHR, *Case of Riera Blume and Others v. Spain*, App. No. 37680/97, Judgment of 14

Without free consent

Deprivation of liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.¹²⁸ The WGAD warns, however, that it is “paramount that the element of voluntariness is not abused and that any claim that an individual is at a certain place at his or her own free will is indeed the case”.¹²⁹ The ECtHR has ruled that

the right to liberty is too important in a democratic society for a person to lose the benefit of [ECHR] protection for the single reason that he may have given himself up to be taken into detention ...especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.¹³⁰

Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.¹³¹ The purpose of measures taken by the authorities depriving individuals of their liberty is not decisive¹³²

All forms of deprivation of liberty are protected

The protections under IHRL are not limited to detention under criminal law powers, but apply to all deprivations of liberty. As the WGAD explains, the term “deprivation of liberty” is consistent with the objective entrusted to

January 2000, para. 35.

128 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 6.

129 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/36/37, 19 July 2017, para. 51.

130 ECtHR, *Case of H.L. v. the United Kingdom*, App. No. 45508/99, Judgment of 05/01/2005 (final), para. 90.

131 ECtHR, *Case of Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment of 15 December 2016, para. 71.

132 ECtHR, *Case of Rozhkov v. Russia (No. 2)*, App. No. 38898/04, Judgment of 31 January 2017, para. 74.

the WGAD which “relates to the protection of individuals against arbitrary deprivation of liberty in all its forms”¹³³, including

placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, and internally displaced persons, gathering centres, hospitals, psychiatric or other medical facilities or any other facilities where they remain under constant surveillance, given that may not only amount to restrictions to personal freedom of movement but also constitute the de facto deprivation of liberty. It also includes detention during armed conflicts and emergency situations, administrative detention for security reasons, and the detention of individuals considered civilian internees under international humanitarian law.¹³⁴

According to the HR Committee, “arrest” under the ICCPR need not involve a formal arrest as defined under domestic law, but refers to any apprehension of a person that commences a deprivation of liberty, and the term “detention” refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.¹³⁵ When an additional deprivation of liberty is imposed on a person already in custody, such as detention on unrelated criminal charges, the commencement of that deprivation of liberty also amounts to an arrest.¹³⁶

Examples of deprivation of liberty under the ICCPR include:

police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already

133 WGAD, *Revised Fact Sheet No. 26*, 8 February 2019, p.5.

134 HRC, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para.9.

135 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 13.

136 HR Committee, *Morrison v. Jamaica*, Comm. No. 635/1995, Views adopted on 27 July 1998, paras.22.2-22.3.

detained, for example, solitary confinement or the use of physical restraining devices.¹³⁷

A deprivation of liberty under the ACHR encompasses

[a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses.¹³⁸

Under ECHR article 5, a deprivation of liberty may take numerous forms, the “variety [of which] is being increased by developments in legal standards and in attitudes”.¹³⁹

The rights to freedom from arbitrary or unlawful deprivation of liberty and to challenge the lawfulness of detention are recognized both in times of peace and in armed conflict¹⁴⁰, administrative detention for security reasons, and the detention of individuals considered civilian internees under international humanitarian law¹⁴¹. Under the ECHR, the safeguards of ECHR article 5 must be interpreted and applied taking into account the context and the provisions of international humanitarian law.¹⁴²

137 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para.5.

138 *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, General Provision.

139 ECtHR, *Case of Guzzardi v. Italy*, App. No. 7367/76, Judgment of 6 November 1980, para. 95.

140 See, for example, HR Committee, Concluding observations on the combined fourth and fifth periodic reports of Sri Lanka, CCPR/CO/79/LKA, para. 13; Concluding observations on the initial report of Uganda, CCPR/CO/80/UGA, para. 17; Concluding observations on the third periodic report of the Sudan, CCPR/C/SDN/CO/3, para. 21. See also International Committee of the Red Cross, Customary International Humanitarian Law Database, rule 99 (deprivation of liberty).

141 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 9 and Principle 16.

142 ECtHR, *Case of Hassan v. the United Kingdom*, App. No. 29750/09, Judgment of 16 September 2014, paras. 103-106.

Crime against humanity

Where detention or other severe deprivation of liberty is committed as part of widespread or systematic attack against any civilian population, it is recognized under IHRL as a crime against humanity.¹⁴³

Strict limitations on States' ability to legitimately restrict personal liberty

Where IHRL permits limitations on protected rights, including the right to personal liberty, such limitations must be provided for by law, for the sole purposes enumerated, and are subject to strict interpretation. With respect to the UDHR, article 29 (2) provides:

29. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
[emphasis added]

With respect to States' ability to restrict personal liberty, specifically, IHRL introduces the additional safeguard that limitations must not be "arbitrary".

Siracusa Principles

Important guidelines for interpretation of the limitation provisions of the ICCPR are the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*¹⁴⁴, adopted in 1985 by the UN Economic and Social Council. While the

143 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, para. 45; HRC, WGAD, Opinion No. 54/2018 (China and the Democratic People's Republic of Korea), A/HRC/WGAD/2018/54, para. 57.

144 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

limitation provisions of the ICCPR vary, key principles apply generally to their interpretation, including the following:

1. No limitations or grounds for applying them to rights guaranteed by the [ICCPR] are permitted other than those contained in the terms of the [ICCPR] itself.
2. The scope of a limitation referred to in the [ICCPR] shall not be interpreted so as to jeopardize the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognized by the [ICCPR] shall be provided for by law and be compatible with the objects and purposes of the [ICCPR].
6. No limitation referred to in the [ICCPR] shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognized by the [ICCPR] shall discriminate contrary to [ICCPR] Article 2, paragraph 1.
10. Whenever a limitation is required in the terms of the [ICCPR] to be “necessary,” this term implies that the limitation:
 - (a) is based on one of the grounds justifying limitations recognized by the relevant article of the [ICCPR];
 - (b) responds to a pressing public or social need;
 - (c) pursues a legitimate aim; and
 - (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

II. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

13. The requirement expressed in Article 12 of the [ICCPR] that any restrictions be consistent with other rights recognized in the [ICCPR] is implicit in limitations to the other rights recognized in the [ICCPR].

14. The limitation clauses of the [ICCPR] shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

Must be authorized by law

IHRL provides for certain permissible limitations on the right to liberty and security of the person, by way of detention, where the grounds and the procedures for doing so are established by law and the restrictions are carried out in accordance with those laws. Any deprivation of liberty that is not in conformity with national law would be unlawful, as a matter of national as well as international law. Both the law and the procedures must also be in conformity with international human rights standards, including the UDHR, general principles of international law, customary international law, international humanitarian law, as well as with the relevant international human rights instruments accepted by the States concerned.¹⁴⁵ Under the ECHR, a deprivation of liberty must be for a prescribed purpose contained in ECHR article 5. Domestic law must be in conformity with the ECHR and the general principles expressed or implied in it, including the principle of the rule of law and that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness.¹⁴⁶

Compliance with general principles of international law requires that national laws authorizing a deprivation of liberty be “accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally”.¹⁴⁷ They must be formulated and applied in a way

145 HRC, *Report of the Working Group on Arbitrary Detention : United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, A/HRC/30/37, 6 July 2015, para. 12.

146 ECtHR, *Case of Simons v. Belgium*, App. No. 71407/10, Judgment of 28 August 2012, para. 32.

147 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation*

that is not arbitrary, unreasonable or unnecessarily destructive of the right of liberty itself.¹⁴⁸ With respect to the legal framework that establishes the process to challenge the arbitrariness and lawfulness of detention, for example, it shall have

a sufficient degree of precision, be drafted in clear and unambiguous language, be realistically accessible and ensure that the exact meaning of the relevant provisions and the consequences of its application are foreseeable to a degree reasonable for the circumstances¹⁴⁹

Under the ICCPR, all regimes involving deprivation of liberty must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.¹⁵⁰ Deprivation of liberty without such legal authorization is unlawful.¹⁵¹ Procedures for carrying out legally authorized deprivation of liberty must also be established by law and States must ensure compliance with their legally prescribed procedures.¹⁵² For example, ICCPR article 9 requires compliance with domestic rules that: define the procedure for arrest by identifying the officials authorized to arrest¹⁵³ or specifying when a warrant is required¹⁵⁴; define when authorization to continue detention must be obtained from a judge or other officer¹⁵⁵, where individuals may be detained¹⁵⁶, when the

of liberty, para. 62. *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 2.

148 HR Committee, *Fardon v. Australia*, Comm. No. 1629/2007, Views adopted on 18 March 2010, para. 7.3.

149 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 2.

150 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 22.

151 HR Committee, *Clifford McLawrence v. Jamaica*, Comm. No. 702/1996, Views adopted 18 July 1997, para. 5.5.

152 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 23.

153 HR Committee, *Maksudov et al. v. Kyrgyzstan*, Comm. No. 1461,1462,1476&1477/2006, Views adopted 16 July 2008, para. 12.2.

154 HR Committee, *Pagdayawon Rolando v. The Philippines*, Comm. No. 1110/2002, Views adopted 3 November 2004, para. 5.5.

155 HR Committee, *Dimitry Gridin v. Russian Federation*, Comm. No. 770, Views adopted 18 July 2000, para. 8.1.

156 HR Committee, *Indira Umarova v. Uzbekistan*, Comm. No. 1449/2006, Views adopted 3 November 2010, para. 8.4.

detained person must be brought to court¹⁵⁷ and legal limits on the duration of detention.¹⁵⁸ It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest¹⁵⁹ and permitting access to counsel.¹⁶⁰

For the purposes of the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, the WGAD regards a deprivation of liberty unlawful when

it is not on such grounds and in accordance with procedures established by law. It refers to both detention that violates domestic law and detention that is incompatible with the Universal Declaration of Human Rights, general principles of international law, customary international law, international humanitarian law, as well as with the relevant international human rights instruments accepted by the States concerned. It also includes detention that may have been lawful at its inception but has become unlawful because the individual has served the entire sentence of imprisonment, following the expiry of the period for which the person was remanded into custody or because the circumstances that initially justified the detention have changed.¹⁶¹

Article 7(2) of the *ACHR* was considered by the IACtHR in *Gangaran Panday Case v. Suriname*:

This provision contains specific guarantees against illegal or arbitrary detentions or arrests, as described in [ACHR, article 7] clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect)

157 HR Committee, *Teófila Casafranca de Gómez v. Peru*, Comm. No. 981/2001, Views adopted 22 July 2003, para. 7.2.

158 HR Committee, *Arshidin Israil v. Kazakhstan*, Comm. No. 2024/2011, Views adopted 31 October 2011, para. 9.2.

159 HR Committee, *Abduali Ismatovich Kurbanov v. Tajikistan*, Comm. No. 1096/2002, Views adopted 6 November 2003, para. 7.2.

160 HR Committee, *Aleksandr Butovenko v. Ukraine*, Comm. No. 1412/2005, Views adopted 19 July 2011, para. 7.6.

161 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 12.

and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect).¹⁶²

A violation of Articles 7(1), (2) and (3) of the ACHR were found by the IACtHR in the *Cesti Hurtado* case, as a result of the detention, prosecution and sentencing of the petitioner by the Peruvian military in defiance of a legitimate order of the Public Law Chamber.¹⁶³

The ECtHR has held that “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) of the ECHR

stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of [ECHR] Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the [ECHR], which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...¹⁶⁴

The list of exceptions to the right to liberty secured in ECHR article 5(1) is an exhaustive one and “only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty”.¹⁶⁵ Both the order to detain and the execution of the detention must “genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of [ECHR Article 5(1)]”.¹⁶⁶ There must also be a connection between the ground of permitted deprivation of liberty under ECHR article 5(1) and the place and conditions

162 IACtHR, *Gangaram Pandey Case v. Suriname*, Judgment of January 21, 1994, in OAS doc. OAS/Ser.L/V/III.31, doc, *Annual Report of the Inter-American Court of Human Rights 1994*, p.32, at para. 47.

163 IACtHR, *Case of Cesti-Hurtado v. Peru*, Judgment of September 29, 1999, at para. 143.

164 ECtHR, *Case of Steel and Others v. the United Kingdom*, App. No. 67/1997/851/1058, Judgment of 23 September 1998, para. 54; ECtHR, *Case of Dougoz v. Greece*, App. No. 40907/98, Judgment of 6 March 2001, para. 55.

165 ECtHR, *Case of Vasileva v. Denmark*, App. No. 52792/99, Judgment (Final) of 25 December 2003, para. 33.

166 ECtHR, *Case of James, Wells and Lee v. The United Kingdom*, App.

nos. 25119/09, 57715/09 and 57877/09, Judgment (Final) of 11 February 2013, para 193.

of detention.¹⁶⁷ A deprivation of liberty will be unlawful if there has been an element of bad faith or deception.¹⁶⁸ The objective of ECHR article 5 (of preventing arbitrary deprivation of liberty) and the “broader condition that detention be ‘in accordance with a procedure prescribed by law’, require the existence in domestic law of adequate legal protections and ‘fair and proper procedures’”.¹⁶⁹ For the detention of an individual to be compliant with the “lawful arrest” requirement in Article 5(1) of the ECHR, data concerning the date, time and location of detainees, as well as the ground for the detention and the name of the persons effecting it must be recorded accurately.¹⁷⁰

In *Waleed Abulkhair v. Saudi Arabia*, the WGAD cited to the Max Planck Encyclopedia of International Law to explain the fundamental guarantees of *nulla poena sine lege*, which include

- α) the principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*);
- β) the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta*);
- χ) the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and
- δ) the prohibition against uncoded, unwritten, or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta*).¹⁷¹

This means that an act is only punishable by law if, when committed, it was the object of a “valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached”.¹⁷²

167 ECtHR, *Case of Bouamar v. Belgium*, App. no. 9106/80, Judgment of 29 February 1988, para. 52.

168 ECtHR, *Case of Bozano v. France*, App. no. 9990/82, Judgment of 18 December 1986, para. 60.

169 ECtHR, *Case of H.L. v. the United Kingdom*, App. No. 45508/99, Judgment of 05 January 2005, para. 115.

170 ECtHR, *Case of Cakici v. Turkey*, App. No. 23657/94, Judgment of 8 July 1999, para. 105.

171 HRC, WGAD, *Opinion No. 10/2018 (Saudi Arabia)*, A/HRC/WGAD/2018/10, para. 50.

172 HRC, WGAD, *Opinion No. 10/2018 (Saudi Arabia)*, A/HRC/WGAD/2018/10, para. 50.

Further, the WGAD explained, the principle of legality requires that the substance of penal law be “due and appropriate in a democratic society that respects human dignity and rights (*nullum crimen, nulla poena sine lege apta*)”.¹⁷³ Punishment must satisfy, at a minimum,

- α) the principle of necessity (*nullum crimen, nulla poena sine necessitate*;
- β) the prerequisite of injustice (*nullum crimen, nulla poena sine injuria*); and
- χ) the principle of guilt (*nullum crimen, nulla poena sine culpa*).

The HR Committee considers that detention pursuant to proceedings incompatible with ICCPR article 15 is necessarily arbitrary within the meaning of ICCPR article 9(1).¹⁷⁴ By the same logic, the WGAD has found that proceedings in violation of UDHR article 11 (2) are arbitrary for the purpose of UDHR article 9.¹⁷⁵

Principle of legality

To comply with the legality principle under ICCPR article 15(1), all laws must meet basic criteria – they must be clearly defined, objectively determinable and non-retrospective. They must provide notice to the public of the nature of the conduct declared to constitute a criminal offence and the corresponding penalties, and stipulate achievable limits on conduct so that individuals may regulate their behaviour accordingly.¹⁷⁶ Legislation defining criminal offences must be promulgated democratically, meaning that, prior to its adoption, it should be subject to broad consultations with individuals and associations concerned, including civil society. Such laws may not confer unfettered discretion and must also be compatible with the provisions, aims

173 HRC, WGAD, *Opinion No. 10/2018 (Saudi Arabia)*, A/HRC/WGAD/2018/10, para. 53.

174 HR Committee, *Fardon v. Australia*, Comm. No. 1629/2007, Views adopted on 18 March 2010, para. 7.4(2).

175 HRC, WGAD *Opinion No. 10/2018 (Saudi Arabia)*, A/HRC/WGAD/2018/10, para. 52.

176 UN, General Assembly, *Situation of human rights defenders*, 10 August 2012, A/67/292, para. 64.

and objectives of the ICCPR.¹⁷⁷ Once adopted, the law must be publicized using the appropriate channels to ensure that the public is aware of what constitutes punishable behaviour.¹⁷⁸

The reference in ICCPR 15(1) to international law is intended to ensure that no one shall escape punishment for a criminal offence under international law by pleading that the impugned act was legal under national law.¹⁷⁹ The concept of “international law” set out in ECHR article 7(1) refers to the international treaties ratified by the State in question, as well as customary international law, even where the corresponding law has never been formally published.¹⁸⁰

Under the ACHR, the principle of legality, protected by ACHR article 9 and article XXVI of the *American Declaration*, requires that “any measure restricting or limiting a right through the use of a definition of a crime must meet the requirements provided for by law, both in the formal and material sense, and must have been formulated previously, in an express, accurate, and restrictive manner”¹⁸¹. The IACHR stresses that, in codifying crimes,

States must use precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of legality in criminal law. As the Inter-American Court has indicated, this means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power.¹⁸²

177 HR Committee, *CCPR General comment no. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, paras. 25-26.

178 UN, General Assembly, *Situation of human rights defenders*, 10 August 2012, A/67/292, para. 65.

179 UN, General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights, Chapter VI — Civil and Political Rights*, UN Doc. A/2929, 1 July 1955, para. 94.

180 ECtHR, *Guide on Article 7 of the European Convention on Human Rights, No punishment without law: the principle that only the law can define a crime and prescribe a penalty*, updated on 31 December 2018, para. 10.

181 Doc. 66 31, December 2011, para. 89. IACtHR, *Case of Kimel v. Argentina*, Judgment of May 2, 2008 (Merits, Reparations and Costs), para. 63.

182 IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. Doc. 66 31, December 2011, para. 90.

As the IACtHR has affirmed, when a crime is described in vague and ambiguous language and does not specify clearly the elements of the offence, it can lead to broad interpretations, allowing and requiring the prosecution, courts or an injured party to subjectively determine the existence of the crime even in where there is “no intent to injure, offend or disparage”.¹⁸³

The ECtHR has stated that the principle of legality enshrined in ECHR article 7

which is an essential element of the rule of law, occupies a prominent place in the [ECHR] system of protection, as is underlined by the fact that no derogation from it is permissible under [ECHR] Article 15...in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.¹⁸⁴

ECHR article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage but also embodies the principles that “only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*)” and that “the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy”.¹⁸⁵ The requirement flowing from these principles, that the offence must be clearly defined by a law properly passed for a proper purpose, is satisfied “where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.¹⁸⁶ The term “law’ in ECHR article 7, consistent with its use elsewhere in the ECHR, refers to the provision in force as competent courts have interpreted statutes,

183 IACtHR, *Case of Usón Ramírez v. Venezuela*, Judgment of November 20, 2009 (Preliminary Objection, Merits, Reparations and Costs), para 56.

184 ECtHR, *Case of S.W. v. the United Kingdom*, App. no. 20166/92, Judgment of 22 November 1995, para. 34.

185 *Ibid.*, para. 35. See also *Case of C.R. v. the United Kingdom*, App. no. 20190/92, Judgment of 22 November 1995, para. 49; *Case of Del Río Prada v. Spain*, App. no. 42750/09, Judgment of 21 October 2013, para. 78; *Case of Vasiliauskas v. Lithuania*, App. no. 35343/05, Judgment of 20 October 2015, para. 154.

186 *Case of S.W. v. the United Kingdom*, App. no. 20166/92, Judgment of 22 November 1995, para. 35.

including subordinate legislation, case law and unwritten law.¹⁸⁷ The law must comply with qualitative requirements, including those of accessibility and foreseeability.¹⁸⁸ These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries.¹⁸⁹ The Court must have regard to the domestic law “as a whole” and to the way it was applied at the material time. State practice incompatible with the written law in force cannot be considered as “law” within the meaning of ECHR article 7.¹⁹⁰

Law must be accessible and formulated with sufficient precision to ensure foreseeability

The law must be published¹⁹¹ and framed in such a way that it is adequately accessible, that is, an individual must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.¹⁹² Secondly, the law must be formulated with sufficient precision to enable the individual to regulate their conduct. The individual must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁹³ Overly broad or arbitrary interpretation or application of penal laws must be avoided to ensure compliance with the principle of legality.

Under the ACHR, when codifying crimes States must use precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of legality in criminal law.¹⁹⁴ This means

187 ECtHR, *Case of Kafkaris v. Cyprus*, App. no. 21906/04, Judgment of 12 February 2008, para. 139.

188 *Ibid.*, para. 140.

189 *Ibid.*

190 ECtHR, *Case of Streletz, Kessler and Krenz v. Germany*, App.

nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, paras. 67-87; ECtHR, *Case of Polednová v. the Czech Republic*, App. no. 2615/10, Judgment of 21 June 2011.

191 ECtHR, *Case of Kokkinakis v. Greece*, App. no. 14307/88, Judgment of 25 May 1993, para. 40. For accessibility of an “executive order”, see ECtHR, *Case of Custers, Deveaux and Turk v. Denmark*, App. nos. 11843/03, 11847/03 and 11849/03, Judgment (Final) of 03 August 2007.

192 ECtHR, *Case of the Sunday Times v. the United Kingdom*, App. no. 6538/74, Judgment of 26 April 1979, para. 49.

193 *Ibid.*

194 IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*,

a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power.¹⁹⁵

In *Kimel v. Argentina*, the IACtHR found a violation of ACHR articles 9 (freedom from ex post facto laws) and 13(1) (freedom of thought and expression) where the definition of “crimes against the honor”, which “dishonour” and “discredit” another person, did not describe a particular conduct and were extremely vague and ambiguous, in contradiction of the principle of strict legality.¹⁹⁶ The IACtHR reiterated that:

in the formulation of criminal definitions it is necessary to use restrictive and univocal terms, which clearly limit the punishable conducts, thus making the *nullum crimen nulla poena sine lege praevia* criminal principle effective. This implies an accurate definition of the criminalized conduct, which sets its elements and allows it to be delimited and distinguishable from non-punishable acts or illegal acts punishable with sanctions other than criminal. Ambiguity in the formulation of criminal definitions generates doubts and opens the door to the discretion of the authorities, particularly undesirable where the criminal liability of a person is to be determined and punished with sanctions which severely affect fundamental rights, such as life or freedom. Rules such as the ones applied in the instant case, which do not strictly delimit the criminal conducts, are in violation of the *nullum crimen nulla poena sine lege praevia* principle.¹⁹⁷

In *Castillo Petruzzi et al.*, the IACtHR found a violation of ACHR article 9 where the claimants were convicted of treason and sentenced to life imprisonment under a Peruvian law, which contained open-ended criminal classifications “couched in vague language”, referred to actions not strictly defined, was open to broad interpretation and which removed prosecution

OEA/Ser.L/V/II. Doc. 66 31, December 2011, para. 90.

195 IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, (Merits, Reparations and Costs), paras para. 121.

196 IACtHR, *Case of Kimel v. Argentina*, Judgment of May 2, 2008 (Merits, Reparations and Costs), para. 67.

197 *Ibid.*, para. 63.

from the jurisdiction of the competent, independent and impartial tribunal previously established by law, to the military court, with fewer guarantees.¹⁹⁸

The IACHR has highlighted that where legal provisions are unclear, they should be clarified or, where appropriate, interpreted in favour of those exercising the right to freedom of peaceful assembly.¹⁹⁹

Article 5(1) of the ECHR does not merely refer back to domestic law, it also relates to the “quality of law”. In *Altuğ Taner Akçam v. Turkey*, the ECtHR found that the crime of “denigrating Turkishness” under Article 301 of the Turkish Criminal Code did not meet the quality of “law” within the meaning of ECHR article 10 as it was too wide and vague to enable individuals to regulate their conduct or to foresee the consequences of their acts and thus constituted a continuing threat to the exercise of the right to freedom of expression under ECHR article 10.²⁰⁰ In *Oleksiy Vyerentsov v. Ukraine*, the ECtHR held that the offence of a breach of the procedure for holding demonstrations was not established in the domestic law with sufficient precision required to meet the requirements of accessibility and foreseeability under ECHR article 7.²⁰¹

Contemporaneous legal basis for conviction

IHRL prohibits convictions based on law(s) enacted after the act or omission was committed (ex post facto). The prohibition of convictions based on ex post facto laws under IHRL requires that at the time an accused person performed the alleged act or omission which led to being prosecuted and convicted, the act or omission must have been a criminal offence. This prohibition also requires that the punishment imposed cannot exceed that which was set out by law at the time of commission. If, subsequent to the

198 IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, (Merits, Reparations and Costs), paras. 119, 122.

199 IACHR 'IACHR and Special Rapporteurship on Freedom of Expression express deep concern over decision to declare protests illegal in Nicaragua' (2018), available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/222.asp.

200 ECtHR, *Case of Altuğ Taner Akçam v. Turkey*, App. no. 27520/07, Judgment of 25 January 2012 (Final), para. 96.

201 ECtHR, *Case of Vyerentsov V. Ukraine*, App. no. 20372/11, Judgment of 11 July 2013 (Final), para. 67.

commission of the offence, provision is made by law for a lighter penalty, the offender is entitled to benefit from the lighter penalty.

There are two exceptions to the principle of non-retroactivity: the principle is not violated when an act, even though it was not punishable under national criminal law at the time when it was performed, was nevertheless criminalized either (i) under international law, or (ii) according to the general principles of law recognized by the community of the nations.²⁰²

In *Hicks v. Australia*, an Australian citizen had been captured by U.S. armed forces in Afghanistan and transferred to the Guantanamo Bay prison where he was detained from January 2002 to March 2007. He was convicted by the Guantanamo Bay military tribunal on 31 March 2007 of “providing material support for terrorism” and sentenced to seven years of imprisonment under U.S. statute, para. 950v (25) of the Military Commissions Act. The applicable law had come into effect on 17 October 2006, five years after the accused allegedly committed the relevant conduct, i.e. from December 2000 to December 2001. In a bilateral prisoner transfer arrangement between the U.S. and Australia, Mr. Hicks was returned to Australia on 20 May 2007, where he served seven months of his sentence. The HR Committee held that, by virtue of the prisoner transfer, Australia had participated directly in the retrospective punishment and imprisonment of Mr. Hicks, in violation of the ICCPR Art. 15 (1) which prohibits conviction and sentence based on ex post facto law. The HR Committee’s views were that:

The ordinary meaning of “held guilty” [in ICCPR article 15(1)] encompasses not only the moment of judgement and conviction before a criminal court, but also the enforcement of any sentence of punishment that follows from the conviction. Such interpretation is supported by the safeguards elsewhere in [ICCPR article 15(1)] concerning the application of penalties and in ICCPR article 15(2)] concerning trial and punishment, which indicate that the scope of the protection extends to whatever punishment follows from a conviction. Furthermore, the protection of [ICCPR] article 15 must extend to wherever enforcement of a sentence takes place, including where a sentence is enforced by another State in its own territory. Otherwise, one State would be free to enforce retroactive penalties imposed

202 ICCPR (art. 15); ECHR (art. 7).

by another State's courts without itself violating [ICCPR] article 15. This would create an incentive to "contract out" the enforcement of sentences to other States whose imprisonment of an offender could not be challenged in the second State for retroactivity.²⁰³

In *Casafranca de Gomez v. Peru*, the HR Committee found a violation of ICCPR article 15(1) where the accused was convicted under an existing anti-terrorist law and sentenced to a minimum of 25 years imprisonment, pursuant to penalties amended imposing a higher minimum sentence, after the alleged conduct was said to have occurred.²⁰⁴

Law must not be construed to accused's detriment

While the principle of legality prohibits extending the scope of existing offences to acts which previously were not criminal offences, the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.²⁰⁵

The IACtHR has ruled that,

when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law²⁰⁶

"Penalty"

The concept of "penalty" in ECHR article 7 is, "like the notions of "civil right and obligations" and "criminal charge" in [ECHR article 6(1)], autonomous

203 HR Committee, *Hicks v. Australia*, Comm. No. 2005/2010, Views adopted on 5 November 2015, CCPR/C/115/D/2005/2010, Annex II, para. 10.

204 HR Committee, *Teófila Casafranca de Gómez v. Peru*, Comm. No. 981/2001, Views adopted on 22 July 2003, para. 7.4.

205 ECtHR, *Case of Coëme and Others v. Belgium*, App. nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 18 October 2000 (Final), para. 146.

206 IACtHR, *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), para. 82; IACtHR, *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005 (Preliminary Objection, Merits, Reparations and Costs), para. 190.

in scope”.²⁰⁷ In order for the protection afforded by ECHR article 7 to be rendered effective, “the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision.”²⁰⁸ In assessing the existence of a penalty under ECHR article 7(1), the court will consider whether the measure in question is imposed following conviction for a “criminal offence”; the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.²⁰⁹

An accused shall benefit from any subsequent change to the law providing for a lighter penalty

In *Case of Ricardo Canese v. Paraguay*, the IACtHR found that the State’s failure to reduce sanctions imposed over four years in light of more favourable norms that came into force during that period was a violation of ACHR article 9.²¹⁰ The IACtHR stated that

the principle of retroactivity of the most favourable penal norm should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose of the [ACHR], which is the effective protection of the individual...and also by an evolving interpretation of the international instruments for the protection of human rights.

In this respect, both the law establishing a lighter punishment for offenses, and the one encompassing norms such as those that decriminalize a behavior which was previously considered an offense, or create a new motive for justification or innocence, or an impediment to the effectiveness of a penalty, should be interpreted as the most favorable penal norm. The foregoing is not a closed list of cases that merit the application of the principle of the retroactivity of the most favorable penal norm. It is worth emphasizing that the principle of

207 ECtHR, *Case of Kafkaris v. Cyprus*, App. no. 21906/04, Judgment of 12 February 2008, para. 142.

208 Ibid.

209 Ibid.

210 IACtHR, *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004 (Merits, Reparations and Costs), para. 187.

retroactivity is applicable to laws enacted before the judgment was delivered and during its execution, because the [ACHR] does not establish a limit in this respect.²¹¹

Must not be arbitrary

In addition to being authorized by and carried out in accordance with domestic law in conformity with IHRL, a deprivation of liberty must not be otherwise arbitrary. As noted below, the prohibitions of unlawful and arbitrary deprivation of liberty overlap, in that a deprivation of liberty may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful, such as an arrest or detention that lacks any legal basis.²¹²

Under the ICCPR, the formal prescription of laws permitting limitations on personal liberty is “not sufficient if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself”.²¹³ For example, a detention, even if authorized by law, may still be considered arbitrary if it is “premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds”.²¹⁴

The question of when a deprivation of liberty is, or becomes, arbitrary is not definitely answered by the international and regional instruments. In *Mukong v. Cameroon*, the HR Committee held that the drafting history of ICCPR article 9(1) confirms that “arbitrariness” “is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of

211 Ibid., paras. 178-179.

212 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para.11.

213 HR Committee, *Fardon v. Australia*, Comm. No. 1629/2007, Views adopted on 18 March 2010, para. 7.3.

214 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty*, para. 63.

law”.²¹⁵ In that case, this required that remand in custody on criminal charges must be both reasonable and necessary in all of the circumstances.²¹⁶

When determining the mandate of the WGAD, the CHR considered as arbitrary those deprivations of liberty which are imposed “inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States”.²¹⁷

In its *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, the WGAD states

The notion of “arbitrary” *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary.²¹⁸

The IACtHR has held that ACHR, article 7(3) addresses the issue that “no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality”.²¹⁹ In order to assess the compatibility with the ACHR of reasons for and methods by which a person is being deprived of their liberty, it is necessary in each case to ensure

i) that the purpose of measures that deprive or restrict a person’s liberty is compatible with the [ACHR]; ii) that the measures adopted are appropriate for complying with the intended purpose; iii) that the measures are necessary, in the sense that they are absolutely

215 HR Committee, *Mukong v. Cameroon*, Comm. No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

216 HR Committee, *Mukong v. Cameroon*, Comm. No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

217 See CHR, *Question of arbitrary detention.*, 5 March 1991, E/CN.4/RES/1991/42, as clarified by CHR, *Question of arbitrary detention.*, 17 April 1998, E/CN.4/RES/1998/41.

218 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty*, para. 61.

219 IACtHR, *Gangaram Pandey Case v. Suriname*, Judgment of January 21, 1994, in OAS doc. OAS/Ser.L/V/III.31, doc, *Annual Report of the Inter-American Court of Human Rights 1994*, p.32, at para. 47.

indispensable for achieving the intended purpose and that no other measure less onerous exists, in relation to the right involved, to achieve the intended purpose. Hence, the Court has indicated that the right to personal liberty assumes that any limitation of this right must be exceptional; and iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose. Any restriction of liberty not based on a justification that allows an evaluation of whether it is in-keeping with the conditions set out above will be arbitrary and, therefore, will violate [ACHR] Article 7(3).²²⁰

The ACHPR has interpreted indefinite detention as arbitrary and a violation of Article 6 of the *ACHPR*,²²¹ as it has the detention of persons without charge and without the possibility of bail.²²²

While Article 5 of the ECHR does not set out explicitly the condition of non-arbitrariness, the aim of the provision has been interpreted “to ensure that no one should be dispossessed of this liberty in an arbitrary fashion”.²²³ Under the ECHR, to avoid being branded as arbitrary, a deprivation of liberty under ECHR Article 5(1)(f) “must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued”.²²⁴

220 IACtHR, *Case of Vélez Loor v. Panama*, Judgment of November 23, 2010 (Preliminary Objections, Merits, Reparations and Costs), para. 166.

221 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC* (25/89-47/90-56/91-100/93), at para. 42.

222 African Commission on Human and Peoples' Rights, Communication No. 102/93, *Constitutional Rights Project v. Nigeria*, at para. 55.

223 ECtHR, *Case of Medvedyev and Others v. France*, App. No. 3394/03, Judgment of 29 March 2010 para. 73.

224 ECtHR, *Case of Louled Massoud v. Malta*, App. No.24340/08, Judgment of 27 July 2010, para. 62.

Reasonable, necessary and proportionate to a legitimate objective

A deprivation of liberty is an exceptional measure and can only be justified if it is necessary and reasonable, in light of all of the circumstances. In assessing whether detention is necessary and reasonable in all of the circumstances, the standard of proportionality is applied.²²⁵ This requires that any action must not exceed that which is necessary to achieve a legitimate objective. Proportionality applies in relation to both the initial order of detention as well as its extension. Detention should not continue beyond the period for which the State can provide appropriate justification.²²⁶ The “reasonableness” of a detention will be assessed in the light of all of the circumstances of the particular case, such as the gravity of the offences, the risk of absconding and the risk of influencing witnesses, as well as the conduct of the domestic authorities. Detention should not be of a punitive character.²²⁷

Detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are being detained²²⁸ or detention is actuated by bad faith or an improper purpose.²²⁹

The HR Committee has variously determined that

[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the [ICCPR] is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), freedom of association (art. 22), freedom of religion (art. 18) and the right to privacy (art. 17). Arrest or detention on discriminatory grounds in violation of [ICCPR] article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary. Retroactive criminal punishment by detention in violation of article 15 amounts to arbitrary detention.

225 HR Committee, *A. v. Australia*, Comm. No. 560/1993, Views adopted on 3 April 1997, para. 9.2.

226 HR Committee, *A. v. Australia*, Comm. No. 560/1993, Views adopted on 3 April 1997, para. 9.4.

227 HR Committee, *Marques de Morais v. Angola*, Comm. No. 1128/2002, Views adopted on 29 March 2005, para. 6.1.

228 HR Committee, *Fardon v. Australia*, Comm. No. 1629/2007, Views adopted on 18 March 2010, para. 7.4.

229 ECtHR, *Case of Bozano v. France*, App. no. 9990/82, Judgment of 2 December 1987, para. 8.

Enforced disappearances violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention. Imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in [ICCPR] article 14 results in arbitrary detention.²³⁰

In the view of the HR Committee, “[e]gregious examples of arbitrary detention include detaining family members of an alleged criminal who are not themselves accused of any wrongdoing, the holding of hostages and arrests for the purpose of extorting bribes or other similar criminal purposes”.²³¹

In assessing the lawfulness of a deprivation of liberty under article 5(1) of the ECHR, the principle of proportionality requires that a balance be drawn “between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty”, taking into account the duration of the deprivation.²³² The ECtHR has ruled that a requirement that the State actor carrying out an arrest has a “reasonable suspicion” that an offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as “reasonable” will however depend upon all the circumstances.²³³

The principles of reasonableness, necessity and proportionality require further that states demonstrate that there were not less invasive means of achieving the same ends, without interfering with the right to liberty and security of person.²³⁴

230 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para.17.

231 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para.16.

232 ECtHR, *Case of Vasileva v. Denmark*, App. no. 52792/99, Judgment of 25 September 2003, para. 37.

233 ECtHR, *Case of Fox, Campbell and Hartley v. the United Kingdom*, App no. 12244/86, 12245/86, 12383/86, Judgment of 30 August 1990, para. 32.

234 HR Committee, *Baban v. Australia*, Comm. No. 1014/2001, Views adopted on 6 August 2003, para.7.2.

The WGAD describes the application of these principles in its *Revised Deliberation No. 5 on deprivation of liberty of migrants*:

- The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention;
- The element of necessity requires that the detention be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person;
- The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned. To ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered.

With regard to the application of the principle of proportionality, the WGAD has applied the following test in its jurisprudence:

(a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.²³⁵

Non-discriminatory

A deprivation of liberty that aims at or may undermine the equality of human beings, in violation of IHRL rights to equality and freedom from discrimination is in principle, arbitrary. The WGAD has consistently found

235 HRC, WGAD, *Opinion No. 56/2017 (Thailand)*, A/HRC/WGAD/2017/56, para.51.

such discrimination when it is apparent that persons have been deprived of their liberty specifically on the basis of their own or perceived distinguishing characteristics or because of their real or suspected membership of a distinct (and often minority) group.²³⁶

The deprivation of liberty on discriminatory grounds may occur on a variety of grounds that aim at or may result in undermining the equality of human beings, and may also occur in relation to a broad range of people, including, but not limited to:

women and children; persons with disabilities, including psychosocial and intellectual disabilities; human rights defenders and activists; persons engaged in social protest; older persons; indigenous peoples; minorities based on national or ethnic, cultural, religious and linguistic identity; lesbian, gay, bisexual, transgender and intersex persons; non-nationals, including migrants, refugees and asylum seekers, internally displaced persons, stateless persons, trafficked persons and those at risk of being trafficked; persons living with HIV/AIDS and other serious communicable or chronic diseases; sex workers; and drug users.²³⁷

²³⁶ HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/36/37, 19 July 2017, para. 48.

²³⁷ HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/36/37, 19 July 2017, para. 46.

SCOPE OF SPECIFIC PROTECTIONS

Right of everyone to be treated humanely and with respect for human dignity

Right to protection against intentional infliction of bodily or mental injury

The HR Committee states that the right to security of person in ICCPR article 9

protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury. The right to personal security also obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors... [footnotes omitted]²³⁸

With respect to ICCPR article 10, the HR Committee states:

[ICCPR article 10(1)] applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere.

[ICCPR article 10(1)] imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in [ICCPR article 7]. Thus, not only may persons deprived of

²³⁸ HR Committee, *CCPR General Comment No. 35: Article 9: Liberty and security of person*, 16 December 2014, para. 9.

their liberty not be subjected to treatment that is contrary to [ICCPR] article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²³⁹

Prohibition of torture or other cruel, inhuman or degrading treatment or punishment

IHRL prohibits in absolute terms torture and inhuman or degrading treatment or punishment. No exceptional circumstances whatsoever – including a state of war or threat thereof, internal political instability, a threat of terrorist acts, violent crime or armed conflict, international or non-international or any other public emergency - may be invoked by a State Party to justify acts of torture, cruel, inhuman or degrading treatment or punishment, or the admission into evidence of confessions extorted by torture in any territory or facilities under its jurisdiction.²⁴⁰ States obligation to prevent torture must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party and also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.²⁴¹

239 HR Committee, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, paras. 2-4.

240 CAT, *CAT General Comment No. 2, CAT/C/GC/2*, 24 January 2008, paras. 5-7.

241 CAT, *CAT General Comment No. 2, CAT/C/GC/2*, 24 January 2008, para. 7.

In its General Comment No. 20, the HR Committee states that the aim of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment in ICCPR article 7

is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in [ICCPR] article 7 is complemented by the positive requirements of [ICCPR] article 10, paragraph 1, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The text of [ICCPR] article 7 allows of no limitation...The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.... States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement...²⁴²

To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both ICCPR article 7 (prohibiting torture and inhuman, cruel or degrading treatment) and ICCPR article 14(3) (g) (prohibiting compulsion to testify against oneself or confess guilt).²⁴³ In a joint report submitted by five holders of mandates of special procedures of the CHR concerning the situation of detainees held at the United States Naval Base at Guantánamo Bay since June 2004, the SR on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, found that treatment aimed at

242 HR Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, paras. 2-9. See also *Body of principles for the protection of all persons under any form of detention or imprisonment*, principle 6.

243 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 60. See, for example, HR Committee, *Shukurova v. Tajikistan*, Communication No. 1044/2002, Views adopted on 17 March 2006, para. 8.2.

humiliating victims may amount to degrading treatment or punishment, even without intensive pain or suffering²⁴⁴ and that beating, kicking, punching, but also stripping and force shaving amounts to torture, as it inflicts severe pain or suffering on the victims for the purpose of intimidation and/or punishment.²⁴⁵ With respect to the practice of rendition and forcible return of Guantánamo detainees to countries where they are at serious risk of torture, SR Novak found that such practice constitutes a violation of CAT article 3 and ICCPR article 7 of ICCPR.²⁴⁶ The SR further found that the lack of any independent investigation into the various allegations of torture and ill-treatment at Guantánamo Bay amount to a violation of U.S. obligations under CAT articles 12 and 13.²⁴⁷

States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.²⁴⁸ The prohibition of torture encompasses the obligation to exercise due diligence to prevent, investigate, prosecute and punish alleged violations promptly.²⁴⁹

Physical conditions of detention

Persons deprived of their liberty are guaranteed a minimum level of physical conditions of detention. Under the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, for example, this means that persons deprived of liberty shall have

244 CHR, Economic, Social and Cultural Rights Civil and Political Rights: Situation of detainees at Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, 27 February 2006, E/CN.4/2006/120, para. 51.

245 Ibid, para. 54.

246 Ibid, para. 55.

247 Ibid, para. 56.

248 CAT, *CAT General Comment No. 2*, CAT/C/GC/2, 24 January 2008, para. 15.

249 CAT, *CAT General Comment No. 2*, CAT/C/GC/2, 24 January 2008, para. 18.

the **right to health**, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being... the **right to food** in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns, as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law...access at all times to **sufficient drinking water** suitable for consumption...**adequate floor space**, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty... access to **clean and sufficient sanitary installations that ensure their privacy and dignity**... The **clothing** to be used by persons deprived of liberty shall be sufficient and adequate to the climatic conditions, with due consideration to their cultural and religious identity. Such clothing shall never be degrading or humiliating.²⁵⁰ [emphasis added]

Prolonged solitary confinement and similar measures aimed at causing stress violate the right of detainees under ICCPR article 10 (1) ICCPR to be treated with humanity and with respect for the inherent dignity of the human person, and might also amount to inhuman treatment in violation of ICCPR article 7.²⁵¹

Segregation

The different categories of detainees are to be segregated in accordance with ICCPR article 10(2) and *Body of principles for the protection of all persons under any form of detention or imprisonment*, principle 8.

250 *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principles X-XII.

251 HR Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 6.

Contact with family and the outside world

The *Body of principles for the protection of all persons under any form of detention or imprisonment* provide:

15. Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

16. (1) Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

19. A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Under the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 18,

18. Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners.

They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law.

Religions, culture, education

Persons deprived of their liberty have the right to satisfy the needs of their religious life²⁵², to obtain reasonable quantities of educational, cultural and informational material²⁵³ and opportunities for meaningful employment²⁵⁴. The HR Committee interprets ICCPR article 18 to the effect that “[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint”.²⁵⁵

Special measures to protect children

ICCPR article 24(1) entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by ICCPR article 9 for everyone.²⁵⁶ The HR Committee states that a child may be deprived of liberty “only as a last resort and for the shortest appropriate period of time” and “the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation”.²⁵⁷

The rights of children not to be arbitrarily detained are addressed by the UN Committee on the Rights of the Child, in *CRC General Comment No. 10 (2007): Children’s rights in juvenile justice*, at paragraph 79:

The leading principles for the use of deprivation of liberty are:
(a) the arrest, detention or imprisonment of a child shall be in

252 ICCPR, article 18(1); *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, rules 65, 66.

253 *UN Body of principles for the protection of all persons under any form of detention or imprisonment*, Principle 28; *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, rule 104.

254 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, rule 64.

255 HR Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, para. 8.

256 HR Committee, *CCPR General Comment No. 35: Article 9: Liberty and security of person*, 16 December 2014, para. 62.

257 HR Committee, *CCPR General Comment No. 35: Article 9: Liberty and security of person*, 16 December 2014, para. 62.

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.²⁵⁸

The HR Committee notes, that while the ICCPR contemplates that limits of juvenile age are to be determined by each State party “in the light of relevant social, cultural and other conditions”, ICCPR article 6(5) suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice.²⁵⁹

In CCPR General Comment No. 32, the HR Committee stresses that juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under ICCPR article 14, under ICCPR article 14(4), criminal justice procedures are to take into account their age and the desirability of promoting their rehabilitation, and that, in addition, juveniles need special protection:

In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.²⁶⁰

The Committee on the Rights of the Child outlines general and fundamental principles States must apply in the administration of juvenile justice:

- **Non-discrimination** (CRC, art. 2)

States parties must take all necessary measures to ensure that all children in conflict with the law are treated equally.

258 CRC General Comment No. 10 (2007): *Children's rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, para. 79.

259 HR Committee, *CCPR General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, para. 13.

260 HR Committee, *CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 42.

- **Best interests of the child** (CRC, art. 3)

In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.

- **The right to life, survival and development** (CRC, art. 6)

The inherent right of every child to life, survival and development should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency and should inform a policy of responding to juvenile delinquency in ways that support the child's development.

- **The right to be heard** (CRC, art. 12)

The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice.

- **Dignity** (CRC, art. 40 (1))

The treatment accorded to children in conflict with the law should be guided by the following fundamental principles:

- Treatment that is consistent with the child's sense of dignity and worth.
- Treatment that reinforces the child's respect for the human rights and freedoms of others.
- Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society.
- Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.²⁶¹

261 CRC, *General Comment No. 10 (2007): Children's rights in juvenile justice*, CRC/C/GC/10, paras. 6-13.

Under the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 18,

Children may only be deprived of their liberty as a measure of last resort and for the shortest possible period of time. The right of the child to have his or her best interests taken as a primary consideration shall be paramount in any decision-making and action taken in relation to children deprived of their liberty.

The exercise of the right to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized and accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

The authorities overseeing the detention of children shall ex officio request courts to review the arbitrariness and lawfulness of their detention. This does not exclude the right of any child deprived of his or her liberty to bring such proceedings before a court in his or her own name or, if it is in his or her best interests, through a representative or an appropriate body.²⁶²

The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeking, refugee or stateless child is prohibited.²⁶³ Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.²⁶⁴

The ECtHR held, in *Case of Muskhadzhiyeva and Others v. Belgium*, that detaining children in a transit centre created for adults not only amounted to inhuman and degrading treatment in violation of ECHR article 3, it also rendered the children's detention unlawful.²⁶⁵

262 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, paras. 34-36.

263 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 11.

264 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 46.

265 ECtHR, *Case of Muskhadzhiyeva and Others v. Belgium*, App. No. 41442/07, Judgment of 19 April 2010 (Final), para. 75.

Specific measures to protect women and girls

In its introduction to *Deliberation No. 12 on women deprived of their liberty*, the WGAD expressed concern that “women continue to be arbitrarily deprived of their liberty in violation of their human rights, particularly in circumstances where they are detained directly or indirectly because of their sex or gender, or where their gender-specific needs are not taken into account”.²⁶⁶

As discussed below, a deprivation of liberty is arbitrary when it constitutes a violation of IHRL on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status. Accordingly, the arrest or detention of women on the basis of their sex or gender is *prima facie* discriminatory, in violation of UDHR, articles 2 and 7 and ICCPR, articles 2 (1), 3 and 26, and therefore constitutes arbitrary detention.²⁶⁷ Measures that are designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, are not considered to be discriminatory.²⁶⁸

Under the *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*,

In order for the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.²⁶⁹

266 HRC, *Report of the Working Group on Arbitrary Detention, Annex - Deliberation No. 12 on women deprived of their liberty*, A/HRC/48/55, 6 August 2021, para. 3.

267 HRC, *Report of the Working Group on Arbitrary Detention, Annex - Deliberation No. 12 on women deprived of their liberty*, A/HRC/48/55, 6 August 2021, para. 13.

268 *UN Body of principles for the protection of all persons under any form of detention or imprisonment*, Principle 5(2).

269 *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, para. 1.

The *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 19 provides:

Appropriate and tailored measures shall be taken into account in the provision of accessibility and reasonable accommodation to ensure the ability of women and girls to exercise their right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies. This includes introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure equal and fair access to justice.²⁷⁰

Specific measures to protect persons with disabilities

Principle 20 of the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* states:

Courts, while reviewing the arbitrariness and lawfulness of the deprivation of liberty of persons with disabilities, shall comply with the State's obligation to prohibit involuntary committal or internment on the grounds of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as with their obligation to design and implement de-institutionalization strategies based on the human rights model of disability. The review must include the possibility of appeal.

The deprivation of liberty of a person with a disability, including physical, mental, intellectual or sensory impairments, is required to be in conformity with the law, including international law, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.

²⁷⁰ See *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 37.

Persons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of disability. Protection from violence, abuse and ill-treatment of any kind must be ensured.

Persons with disabilities are entitled to request individualized and appropriate accommodations and support, if needed, to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.²⁷¹

Under *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, principle 3(3):

The health systems of the Member States of the Organization of American States shall apply in conformity with the law a series of measures in favor of persons with mental disabilities, with a view to gradually de-institutionalizing these people, and organizing alternative service models that facilitate the achievement of objectives that are compatible with an integrated, continuing, preventative, participatory, and community-based psychiatric care and health system, and in this way avoid unnecessary deprivation of liberty in hospitals or other institutions. The deprivation of liberty of a person in a psychiatric hospital or other similar institution shall be applied as a measure of last resort, and solely when there is serious likelihood of immediate or imminent harm to that person or to others. The mere existence of a disability shall in no case justify a deprivation of liberty.

Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons

The fundamental right to personal liberty extends to all persons at all times and circumstances, including migrants and asylum seekers, irrespective of their citizenship, nationality or migratory status.²⁷² The right to seek asylum

271 See *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, paras. 38-41.

272 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 7; HR

is a universal human right, protected under UDHR, article 14, the CSR and the *Protocol relating to the Status of Refugees*, the exercise of which must not be criminalized.²⁷³ As noted above, the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant person who is a child, including unaccompanied or separated children, is prohibited.

In its *Revised Deliberation No. 5 on deprivation of liberty of migrants*, the WGAD defines a “migrant” to mean

any person who is moving or has moved across an international border away from his or her habitual place of residence, regardless of: (a) the person’s legal status; (b) whether the movement is voluntary or involuntary; (c) the cause of the movement; or (d) the duration of stay. The term shall also be taken to include asylum seekers, refugees and stateless persons.²⁷⁴

The *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* applies to all non- nationals, including immigrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty²⁷⁵ and persons detained in the course of migration proceedings enjoy the same rights as those detained in the criminal justice or other administrative context, including the rights enshrined in the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.²⁷⁶ Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.²⁷⁷ The need to detain should be assessed on an individual basis and not based on a formal assessment of the migrant’s current migration status. The detention must comply with the principle of proportionality and as such, automatic and/or mandatory detention in the

Committee, *CCPR General Comment No. 35 Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 3.

273 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 9.

274 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 6.

275 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 28.

276 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 31.

277 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 12.

context of migration is arbitrary.²⁷⁸ Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.²⁷⁹

Detention of asylum seekers or other irregular migrants must not take place in facilities designed for those in the realm of the criminal justice system and the mixing of migrants and other detainees who are held under the remit of the criminal justice system must not take place.²⁸⁰ The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings. Detention conditions and treatment must not be such as to impede the ability to challenge the lawfulness of detention, and detention should not be used as a tool to discourage asylum applications.²⁸¹

Representatives from UNHCR, ICRC and other relevant organizations must be allowed free access to the places of detention where those detained in the course of migration proceedings are held.²⁸² Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled “shelters”, “guest houses”, “transit centres” “migrant stations” or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.²⁸³

Under Principle 21 of the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*,

Non-nationals, including migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty shall be informed of the reasons for their detention and their rights in connection with the detention order. This includes the right to bring proceedings before a court to challenge the arbitrariness and

278 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 19.

279 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 26.

280 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 44; HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 18.

281 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 38.

282 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 47.

283 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 45.

lawfulness and the necessity and proportionality of their detention, and to receive without delay appropriate and accessible remedies. It also includes the right of the above-mentioned persons to legal assistance in accordance with the basic requirement of prompt and effective provision of legal assistance, in a language that they use and in a means, mode or format they understand, and the right to the free assistance of an interpreter if they cannot understand or speak the language used in court.

Irrespective of the body responsible for their detention order, administrative or other, such non-nationals shall be guaranteed access to a court of law empowered to order immediate release or able to vary the conditions of release. They shall promptly be brought before a judicial authority before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.

Proceedings of challenges to decisions regarding immigration detention must be suspensive to avoid expulsion prior to the case-by-case examination of migrants in administrative detention, regardless of their status.

The deprivation of liberty as a penalty or punitive sanction in the area of immigration control is prohibited.

The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeking, refugee or stateless child is prohibited. Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.²⁸⁴

The IACHR has found that immigrants must not be detained in prisons and that States are required to institute special protection for vulnerable persons.²⁸⁵

284 See *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, paras. 42-46.

285 IACHR, *Resolution 03108: Human Rights of Migrants, International Standards and the Return Directive of the EU*, p.2.

Right to be immediately informed of the reasons for the deprivation of liberty and of any charges

The requirement to be given reasons is to enable a person being detained to seek release if they believe that the reasons given are invalid or unfounded.²⁸⁶ The reasons must include the official legal basis of the arrest and sufficient factual specifics to indicate the substance of the complaint.²⁸⁷ The reasons may be given orally, but in a language that the arrested person understands. Where, in exceptional circumstances, a delay may be required, for example to obtain an interpreter, any such delay must be kept to the absolute minimum possible.²⁸⁸ In the case of children, information must be provided in a manner appropriate to their age and maturity.²⁸⁹ In the case of minors or other vulnerable persons, notice must also be given directly to parents, guardians or relevant third persons.²⁹⁰

The right to be informed of charges applies in connection with ordinary criminal prosecutions and military prosecutions or other special regimes directed at criminal prosecution.²⁹¹ The same considerations as mentioned above under the right to be given reasons apply when minors and other vulnerable persons are arrested.

The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law²⁹² or the individual is publicly named

286 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 25.

287 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 25. See *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 5.

288 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 27.

289 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 5.

290 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 28.

291 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 29.

292 HR Committee, *Marques de Morais v. Angola*, Comm. No. 1128/2002, Views adopted on 29 March 2005, para. 5.4.

as such. The charge may be made orally, if later confirmed in writing.²⁹³ The information must indicate both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, ICCPR article 14(3)(a) requires that all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.²⁹⁴

When an accused is arrested *in flagrante delicto* - an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed²⁹⁵ - the circumstances of the arrest should make clear to anyone the cause of the arrest. Nevertheless, if the person arrested is not released, the authorities still need to make a formal notification of the charges once they have decided on a criminal course of action.²⁹⁶

The IACHR has held that failing to set a time-limit for the release of a detainee without charges or for announcing the nature of the accusations violates the detainee's rights.²⁹⁷

Right to challenge the lawfulness of a deprivation of liberty

The right to challenge the lawfulness of detention is “a self-standing human right, the absence of which constitutes a human rights violation”.²⁹⁸ As the WGAD explains,

[the right to challenge the lawfulness of detention] is a judicial remedy designed to protect personal freedom and physical integrity against

293 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 31.

294 HR Committee, *Mbenge v. Zaire*, Comm. No. 16/1977, Views adopted on 25 March 1983, para. 14.1.

295 HRC, WGAD, Opinion No. 9/2018 (Cambodia), A/HRC/WGAD/2018/9, para. 38.

296 HRC, WGAD, Opinion No. 41/2016 (Egypt), A/HRC/WGAD/2016/41, para. 26.

297 IACHR, *Report on the Situation of Human Rights in Paraguay* (OEA/Ser.LV/II.44, doc. 38 rev.1), p. 53, as cited in UN Centre for Human Rights (1994) Professional Training Series No.3: *Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (United Nations), at p. 17.

298 UN *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 2.

arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. It is also a means of determining the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty.²⁹⁹

A peremptory norm of international law, the right to challenge the legality of detention applies to all forms of arbitrary deprivation of liberty and to all situations of deprivation of liberty.³⁰⁰ It also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.³⁰¹

Applies to all situations of a deprivation of liberty

The right to challenge the lawfulness of detention before court extends to all situations of a deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including

military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes, and other forms of administrative detention. No category of detainees may be denied taking such proceedings. [footnotes omitted]

Administrative detention is imposed only in the most exceptional circumstances, “when there is a present, direct and imperative threat justifying such detention”.³⁰² Even where justified, administrative detention must not last longer than absolutely necessary, the overall length of possible

299 Ibid.

300 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, paras. 47, 57.

301 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 1.

302 HRC, WGAD, Opinion No. 86/2017 (Israel), A/HRC/WGAD/2017/86, para. 34.

detention must be limited and the guarantees provided for in ICCPR, article 9, must be fully respected in all cases.³⁰³ Administrative detention may also be subject to the customary norm codified in ICCPR, article 14, e.g. in cases where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative.³⁰⁴

Proceedings may be commenced by detainee or their representative

The right to take proceedings to challenge the lawfulness of detention under ICCPR article 9(4) does not require automatic initiation of review by the authorities detaining an individual, but leaves the option of taking proceedings to the person being detained, or those acting on their behalf.³⁰⁵ Procedures shall allow anyone to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee.³⁰⁶ Where proceedings are initiated by a person other than the detainee, the court shall make every effort to discover, accommodate and support the detained person's will and preferences.³⁰⁷

Detainees must be promptly informed of right

Detainees must be promptly informed of this right, in a language they understand.³⁰⁸

303 HRC, WGAD, Opinion No. 86/2017 (Israel), A/HRC/WGAD/2017/86, para. 35.

304 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, para. 68..

305 HR Committee, *Stephens v. Jamaica*, Comm. No. 373/1989, Views adopted on 18 October 1995, para. 9.7.

306 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 10.

307 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 9.

308 *UN Body of principles for the protection of all persons under any form of detention*

The right must be effectively guaranteed

This judicial remedy must be “effectively available” to the detainee. Laws that exclude a particular category of detainees from the review required by ICCPR article 9(4) violate the ICCPR.³⁰⁹ Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation.³¹⁰ Similarly, where a lack of access to legal representation throughout his detention prevented an individual from, in principle, applying for a writ of habeas corpus, the Committee held that his detention was a violation of Article 9(4) of the ICCPR.³¹¹

In *Case of Castillo Petruzzi et al. v. Peru*, the IACtHR found a violation of both Article 7(5) and Article 25 of the ACHR when the State’s enforcement of its domestic laws under a state of emergency denied the victims the possibility of recourse to judicial guarantees.³¹² The IACtHR held:

Of the essential judicial guarantees not subject to derogation or suspension, habeas corpus is the proper remedy in “ensuring that a person’s life and physical

integrity are respected, in preventing his disappearance or the keeping of his

whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.”³¹³

or imprisonment, Principles 13-14. *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 7.

309 HR Committee, *Torres Ramirez v. Uruguay*, Comm. No. R. 1/4, Views adopted on 23 July 1980, para. 18; *Umarova v. Uzbekistan*, Comm. No. 1449/2006, Views adopted on 19 October 2010, para. 8.6.

310 HR Committee, *Hernández Valentini de Bazzano et al. v. Uruguay*, Comm. No. 5/1977, Views adopted on 15 August 1979, para. 10; *Aboussedra v. Libyan Arab Jamahiriya*, Comm. No. 1751/2008, Views adopted on 25 October 2010, para. 7.6; *Fijalkowska v. Poland*, Comm. No. 1061/2002, para. 8.4 (State’s failures frustrated the ability of a patient to challenge involuntary committal).

311 HR Committee, *Berry v. Jamaica*, Comm. No. 330/1988, Views adopted on 7 April 1994, para. 11.1. See also Comm. No. 9/1977, *Valcada v. Uruguay*, para. 12.

312 IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, (Merits, Reparations and Costs), para. 188.

313 *Ibid.*, para. 187.

The right to bring proceedings applies where a new case is opened against someone already in detention.³¹⁴

States are obliged under IHRL to adopt specific measures that ensure meaningful access to that right by certain groups of detainees, including persons belonging to ethnic, cultural or linguistic minorities.³¹⁵

“Without delay”

The right to bring proceedings applies from the moment of apprehension and ends with the release of the detainee or the final judgement, depending on the circumstances.³¹⁶ Any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.³¹⁷ Persons deprived of their liberty are entitled not merely to take proceedings, but to receive a decision, and without delay.³¹⁸ The HR Committee emphasized, in *Torres v. Finland*, that, to ensure compliance with the ICCPR,

as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached "without delay". Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis.³¹⁹

314 HR Committee, *Felix Kulov v. Kyrgyzstan*, Comm. No. 1369/2005, Views adopted on 26 July 2010, para. 8.5.

315 HRC, *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, A/HRC/30/37, 6 July 2015, Principle 17.

316 UN *Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 8.

317 HR Committee, *Torres v. Finland*, Comm. No. 291/1988, Views adopted on 2 April 1990, para. 7.2 (seven days); UN *Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 7.

318 See UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 11(2).

319 HR Committee, *Torres v. Finland*, Comm. No. 291/1988, Views adopted on 2 April 1990, para. 7.3.

After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds.³²⁰

Under Article 5(4) of the *ECHR*, the question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case.³²¹ In the *Case of Bezicheri v. Italy*, the ECtHR held that an interval of five and a half months from the time the applicant lodged his application until the investigating judge dismissed it did not comply with term “speedily” under Article 5(4).³²² The government’s arguments that “the investigating judge suffered from an excessive workload at the material time” was not relevant since “the [ECHR] requires the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements.”³²³

In person

In general, a person deprived of liberty has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise.³²⁴ The Court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear.³²⁵ The Court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness

320 HR Committee, *Rameka et al. v. New Zealand*, Comm. No. 1090/2002, Views adopted on 6 November 2003, paras. 7.3-7.4 (annual review of post-conviction preventive detention); *A v. New Zealand*, Comm. No. 754/1997, Views adopted on 3 August 1999, para. 7.3 (regular review of hospitalization); *Torres v. Finland*, Comm. No. 291/1988, Views adopted on 2 April 1990, para. 7.4 (review every two weeks of detention for extradition).

321 ECtHR, *Case of Alikhonov v. Russia*, App. no. 35692/11, Judgment (Final) of 31 October 2012, para. 60.

322 ECtHR, *Case of Bezicheri v. Italy*, App. no. 11400/85, Judgment of 26 September 1989, paras. 22-26.

323 Ibid.

324 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 42.

325 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 42.

and lawfulness of the deprivation of liberty and every time that the person requests to appear physically before the court.³²⁶

The review must be conducted by an independent, impartial and objective court with authority to order the detainee's release, if unlawful

Even if the initial decision to detain is taken by an administrative body, IHRL guarantees the right of judicial review.³²⁷ A "court" must be established by law and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.³²⁸ The court must have the power to order the detainee to be brought before it. The court reviewing the arbitrariness and lawfulness of detention must be a different body from the one that ordered the detention.³²⁹

Under the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*:

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

326 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 11, Guideline 10.

327 HR Committee, *Antti Vuolanne v. Finland*, Comm. No. 265/1987, Views adopted on 7 April 1989, para. 9.6.

328 HRC, *Report of the Working Group on Arbitrary Detention- A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court*, A/HRC/27/47, 30 June 2014, para. 17.

329 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 4.

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

Principle 6

9. A court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful.

UN Basic Principles on the Independence of the Judiciary:

Principle 2

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.

Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.³³⁰ While domestic legal systems may establish differing methods for ensuring court review of detention, ICCPR article 9(4) requires that there be a judicial remedy for any detention that violates domestic law or is otherwise incompatible with the requirements of ICCPR article 9(1) or with any other relevant provision of the ICCPR.³³¹

The HR Committee found that a right to appeal against a detention order to the Minister of the Interior, “while providing for some measure of protection

330 HR Committee, *Rameka v. New Zealand*, Comm. No. 1090/2002, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); *Torres v. Finland*, Comm. No. 291/1988, Views adopted on 2 April 1990, para. 7.2 (finding review by the Minister of the Interior insufficient); *Vuolanne v. Finland*, Comm. No. 265/1987, Views adopted on 7 April 1989, para. 9.6 (finding review by a superior military officer insufficient); HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, paras. 18–22.

331 HR Committee, *Shams v. Australia*, Comm. Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, Views adopted on 20 July 2007, para. 7.3.

and review of the legality of detention, does not satisfy the requirements of [ICCPR] article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control.”³³²

The object of the right is release (either unconditional or conditional) from ongoing unlawful detention.³³³ A reviewing court, therefore, must have the power to order release.³³⁴ Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.³³⁵ When a judicial order of release under ICCPR article 9(4) becomes operative (*exécutoire*), it must be complied with immediately, and continued detention would be arbitrary.³³⁶

To constitute a “court” within the meaning of Article 5(4) of *ECHR*, an authority must exercise proceedings of a “judicial character” and “provide the fundamental guarantees of procedure applied in matters of deprivation of liberty.”³³⁷ It must be “independent both of the executive and of the parties to the case.”³³⁸ The court must have the power to examine the lawfulness of any detention in light of the requirement of IHRL.³³⁹ It must have the ability to order the defendant’s release if detention is deemed unlawful.³⁴⁰

332 HR Committee, *Torres v. Finland*, Comm. No. 291/1988, Views adopted on 2 April 1990, para. 7.2.

333 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 41.

334 HR Committee, *Danyal Shafiq v. Australia*, Comm. No. 1324/2004, Views adopted on 31 October 2006, para. 7.4.

335 HR Committee, *Mansour Ahani v. Canada*, Comm. No. 1051/2002, Views adopted on 29 March 2004, para. 10.2; *A v. New Zealand*, Comm. No. 754/1997, Views adopted on 3 August 1999, para. 7.3.

336 HR Committee, *Alex Soteli Chambala v. Zambia*, Comm. No. 856/1999, Views adopted on 15 July 2003, para. 7.3.

337 ECtHR, *Cases of De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, App. nos. 2832/66; 2835/66; 2899/66, Judgment of 18 June 1971, para. 76.

338 ECtHR, *Case of Neumeister v. Austria*, App. no. 1936/63, Judgment of 27 June 1968, para. 24.

339 ECtHR, *Case of Louled Massoud v. Malta*, App. no. 24340/08, Judgment of 27 October 2010 (Final), para. 43.

340 ECtHR, *Case of Singh v. the United Kingdom*, App. no. 23389/94, Judgment of 21 February 1996, para. 70.

A review under Article 5(4) of the ECHR must be wide enough to bear on those conditions which are essential to the “lawful” detention of a person according to 5(1).³⁴¹ Where an individual may face a substantial term of imprisonment and “where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness,” ECHR Article 5(4) “requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.”³⁴² Arrested or detained persons are entitled to a remedy that ensures the competent court may examine “not only compliance with the procedural requirements set out in domestic law, but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.”³⁴³

The lawfulness of detention is determined under domestic law and international law

Article 9(4) of the ICCPR governs the granting of compensation for arrest or detention that is “unlawful” either under domestic law or within the meaning of the ICCPR.³⁴⁴

The “lawfulness” of a detention under Article 5(4) of the ECHR must be determined in the light not only of domestic law, but also the text of the ECHR, the general principles embodied therein and the aim of the restrictions permitted by ECHR Article 5(1).³⁴⁵ The notion of “lawfulness” in ECHR Article 5(4) has the same meaning as in ECHR Article 5(1).³⁴⁶

341 ECtHR, *Case of Singh v. the United Kingdom*, App. no. 23389/94, Judgment of 21 February 1996, para. 65.

342 *Ibid.*, para. 68.

343 ECtHR, *Case of Petar Vasilev V. Bulgaria*, App. no. 62544/00, Judgment of 21 March 2007, para. 33.

344 HR Committee, *Marques v. Angola*, Comm. No. 1128/2002, Views adopted on 29 March 2005, para. 6.6. *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 14.

345 ECtHR, *Case of Brogan v. UK*, App. nos. 11209/84; 11234/84; 11266/84; 11386/85, Judgment of 29 November 1988, para. 65.

346 *Ibid.*

Burden of proof

The burden of establishing the legal basis and the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention.³⁴⁷

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

Guideline 14

83. The State authorities shall establish before the court that:

- (a) The legal basis for the detention in question is in conformity with international standards;
- (b) The detention is justified in accordance with the principles of necessity, reasonableness and proportionality;
- (c) Other less intrusive means of achieving the same objectives have been considered in the individual case.

84. The burden of proof must be met in a manner that is known in detail to the detainee, complete with supporting evidence, including those who are defendants in security-related cases.

Standard of review

The court shall consider all available evidence that has a bearing on the arbitrariness and lawfulness of detention, “namely, the grounds justifying the detention, and its necessity and proportionality to the aim sought in view of the individual circumstances of the detainee, and not merely its reasonableness or other lower standards of review”.³⁴⁸ No restriction may be imposed on the court’s authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty.³⁴⁹

³⁴⁷ *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 13.

³⁴⁸ *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 14.

³⁴⁹ *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of*

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

Guideline 15

85. When reviewing the arbitrariness and lawfulness of the detention, the court is empowered:

(a) To examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, and on basic principles of reasonableness, proportionality and necessity. Such an examination will take into account details such as age, gender and marginalized groups;

(b) To consider whether the detention remains justified or whether release is warranted in the light of all the changing circumstances of the detained individual's case, including health, family life, protection claims or other attempts to regularize one's status;

(c) To consider and make a pronouncement on whether alternatives to detention have been considered, including non-custodial alternatives to detention in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);

(d) To take into account any orders of detention made subsequent to the commencement of court proceedings and prior to the rendering of the court's decision.

86. When assessing whether the measures taken are in compliance with international standards, the prohibition of particular grounds of detention or forms of detention are to be complied with, and the needs of specific persons affected and any vulnerability are to be taken into consideration, given that the arbitrariness and unlawfulness of detention may include the unsuitability of detention for the persons in question.

Periodic review

The necessity for ongoing detention and the imposition of non-custodial measures must be kept under judicial review.³⁵⁰ While an initial period of detention may be lawful, extended periods may not be.³⁵¹ Given that circumstances can change and lead to the possibility that a previous legal justification for a detention is no longer applicable, detainees have the right to challenge a deprivation of liberty periodically.³⁵² The decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.³⁵³

In the *Case of Assenov and Others v. Bulgaria*, the European Commission of Human Rights found that ECHR Article 5(4) requires that a person on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.³⁵⁴ In that case, ECHR Article 5(4) was violated when the person was held in pre-trial detention for two years, but was only entitled to apply to have the legality of the continued detention examined once under Bulgarian law, and then without an oral hearing. In *Case of Bezicheri v. Italy* an application brought one month after the dismissal of the first application was not considered “unreasonable”:

the nature of detention on remand calls for short intervals; there is an assumption in the [ECHR] that detention on remand is to be of strictly limited duration [ECHR Article 5(3)] ...because its *raison d'être* is essentially related to the requirements of an investigation which is to be conducted with expedition.³⁵⁵

350 Eur. Comm HR, *Case of Assenov and Others v. Bulgaria*, App. No.24760/94, 10 July 1997, para. 165.

351 HR Committee, *Spakmo v. Norway*, Comm. 631/1995, Views adopted on 5 November 1999, para. 6.3.

352 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 7.

353 HR Committee, *Danyal Shafiq v. Australia*, Comm. No. 1324/2004, Views adopted on 31 October 2006, para. 7.3.

354 Eur. Comm HR, *Case of Assenov and Others v. Bulgaria*, App. No. 24760/94, 10 July 1997, para. 165.

355 ECtHR, *Case of Bezicheri v. Italy*, App. no. 11400/85, Judgment of 26 September 1989, para. 21.

Right to legal counsel

The right to request and receive legal assistance by counsel of their choice must be ensured “from the moment of deprivation of liberty and across all settings of detention, including criminal justice, immigration detention, administrative detention, detention in health-care settings (including in the context of public health emergencies), and detention in the context of migration”.³⁵⁶

In the context of the criminal justice setting, persons must be informed of the right to receive legal assistance prior to questioning by the authorities.³⁵⁷ Assistance by legal counsel in the proceedings shall be at no cost for a detained person without adequate means. In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty.³⁵⁸

The right to communicate with counsel requires that an accused person is granted prompt access to counsel, to meet with counsel in private and to communicate with counsel in conditions that fully respect the confidentiality of their communications.³⁵⁹ Legal counsel shall be allowed to carry out their functions effectively and independently, free from reprisal, interference, intimidation, hindrance or harassment.³⁶⁰

While ICCPR article 14(3)(d) explicitly addresses the guarantee of legal assistance in criminal proceedings, States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it, and in some cases, they may even be obliged to do so.³⁶¹

356 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/45/16, 24 July 2020, para. 51.

357 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/45/16, 24 July 2020, para. 51.

358 HRC, Report of the Working Group on Arbitrary Detention, A/HRC/45/16, 24 July 2020, para. 51; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 9.

359 HR Committee, *Khomidov v. Tajikistan*, Comm. No. 1117/2002, Views adopted on 29 July 2004, para. 6.4; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 8.

360 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 9.

361 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 10. *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of*

Right to freedom from discrimination and equal access to and equality before the courts

Freedom from discrimination

IHRL requires that States ensure that the rights and fundamental freedoms guaranteed for all persons within their territories and subject to their jurisdiction, including the right to equal access and treatment before the courts are enjoyed equally and without distinction of any kind. States must also ensure that the content and application of any legislation adopted by a State party affecting rights not provided for under IHRL be enjoyed equally by all persons within their territories and subject to their jurisdiction, without discrimination of any kind.

In the view of the HR Committee, the term “discrimination” as used in the ICCPR should be understood to imply

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 by all persons, on an equal footing, of all rights and freedoms.³⁶²

The ACHPR has found that arrests and detention “based on grounds of ethnic origin alone, in light of [Banjul Charter] Article 2 in particular, constitute arbitrary deprivation of the liberty of an individual” under the *African Charter on Human and Peoples’ Rights (Banjul Charter)*.³⁶³

Their Liberty to Bring Proceedings Before a Court, Principle 9; Lois Leslie, *The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*, LRWC (2014).

362 HR Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 7.

363 *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l’Homme v. Rwanda* (27/89-46/91-49/91-99/93), at para. 28.

Equal access to the courts

The right of equal access to courts and tribunals, equality before them and treatment without any discrimination is not limited to citizens of States parties, but must also be 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 of the State party.³⁶⁴

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 12:

20. Every individual deprived of liberty shall be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities to preserve the equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.

Equality of arms

The right to equality of arms means that the same procedural rights are to be provided to all the parties to criminal or civil litigation involving the State “unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”³⁶⁵ There is no equality of arms where only the prosecutor,

364 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 9; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Principle 12.

365 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 13. See HR Committee, *Lucy Dudko v. Australia*, Comm. No. 1347/2005, Views adopted on 23 July 2007, para. 7.4.

but not the defendant is allowed to appeal a certain decision.³⁶⁶ A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of ICCPR article 14(1).³⁶⁷ The imposition of fees by administrative, prosecutorial or judicial authorities of a State party may violate ICCPR article 14(1) where the cost burden effectively prevents access to the court.³⁶⁸

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

Guideline 11

76. To ensure that the procedure is guided by the adversarial principle and equality of arms, the following conditions shall be guaranteed in all proceedings, whether of a criminal or non-criminal nature:

(a) Full and complete access by detainees and their legal counsel to the material related to the detention or presented to the court, as well as a complete copy of them;

(b) The ability of detainees to challenge any documents relating to their case file, including all the arguments and material elements adduced by the authorities, including the prosecution, the security apparatus and the immigration authorities, to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention.

The guarantee of the right to equality before the courts and tribunals is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁶⁹ Procedural laws or their application that make distinctions based

366 HR Committee, *Sholam Weiss v. Austria*, Comm. No. 1086/2002, Views adopted on 3 April 2003, para. 9.6.

367 HR Committee, *Olé Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, Views adopted on 20 October 1993, para. 9.4.

368 HR Committee, *Lindon v. Australia*, Comm. No. 646/1995, Views adopted on 25 November 1998, para. 6.4.

369 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 9. See, for

on any of the criteria listed in ICCPR article 2(1) or ICCPR article 26, or disregard the equal right of men and women, in accordance with ICCPR article 3, to the enjoyment of the guarantees set forth in ICCPR article 14, not only violate the right to equality before the courts, but may also violate rights to equality and freedom from discrimination under the ICCPR.³⁷⁰

Right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial officer

This right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control. “A failure to do so at the beginning of someone's detention, would thus lead to a continuing violation of article 9(3), until cured.”³⁷¹ The right to be brought under judicial control applies in connection with ordinary criminal prosecutions, military prosecutions and other special regimes directed at criminal prosecutions.³⁷²

The right to be brought promptly before a judge in this circumstance applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it.³⁷³

With respect to Article 5(3) of the ECHR, the ECtHR ruled that “[s]uch automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment.”³⁷⁴

example, *Graciela Ato del Avellanal v. Peru*, Comm. No. 202/1986, Views adopted on 28 October 1988, para. 10.2.

370 HR Committee, *Ato del Avellanal v. Peru*, Comm. No. 202/1986, Views adopted on 28 October 1988, paras. 10.1 and 10.2.

371 HR Committee, *Vladimir Kulomin v. Hungary*, Comm. No. 521/1992, Views adopted on 22 March 1996, para. 11.2.

372 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 31.

373 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 32; ECtHR, *Case of McKay v. the United Kingdom*, App. No. 543/03, Judgment of 3 October 2006, para. 34.

374 ECtHR, *Medvedyev and Others v. France*, App No. 3394/03, Judgment of 29 March 2010, para. 118.

Detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detained can be more easily mitigated.³⁷⁵

Individuals must be brought to appear physically before the judge. The physical presence of detainees at the hearing serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment by allowing for inquiry into the detainee's treatment in custody and to facilitate immediate transfer to a remand centre if continued detention is required.³⁷⁶

If a person already detained on one criminal charge is also ordered to be detained on an unrelated charge, the person must be brought before a judge for control of the second detention.³⁷⁷

A hearing must be held promptly following arrest

While the meaning of the term "promptly" in ICCPR article 9(3) must be determined on a case by case basis, delays should not exceed a few days.³⁷⁸ The HR Committee considers 48 hours to be sufficient to transport the individual and prepare for the judicial hearing; any longer must be considered absolutely exceptional and be justified under the circumstances.³⁷⁹ The HR Committee has stated that a strict standard of promptness applies to juveniles, who should be brought before a court within 24 hours of arrest.³⁸⁰ The Committee on the Rights of the Child has confirmed that a similar requirement exists under CRC article 37(d), and that every child deprived of liberty should be brought before a competent

375 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 36.

376 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 34.

377 HR Committee, *Marrison v. Jamaica*, Comm. No. 635/1995, Views adopted on 27 July 1998, paras. 22.2-22.3.

378 HR Committee, *Stephens v. Jamaica*, Comm. No. 373/1989, Views adopted on 18 October 1995, para. 9.6.

379 HR Committee, *Kovsh v. Belarus*, Comm. No. 1787/2008, Views adopted on 27 March 2013, paras. 7.3-7.5.

380 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 33.

authority within 24 hours to examine the legality of the deprivation of liberty or its continuation.³⁸¹ With respect to the right to a prompt decision under CRC article 37(d), the Committee on the Rights of the Child states:

The term “prompt” is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term “without delay” (art. 40 (2) (b) (iii) of CRC), which is stronger than the term “without undue delay” of article 14 (3) (c) of ICCPR.³⁸²

Incommunicado detention that prevents prompt presentation before a judge violates ICCPR article 9(3).³⁸³

The African Commission on Human and Peoples’ Rights found that a Nigerian Decree which authorized the detention of people without charge for a 3-month period and allowed the government arbitrarily to hold people critical of its policies for a period of 3 months without having to submit and explanations and without the possibility to challenge the arrest and detention before a court violated Article 6 of the *Banjul Charter*.³⁸⁴

An assessment of whether the requirement for “promptness” in Article 5(3) of the ECHR has been met must be made in the light of the object and purposes of Article 5, that is, “the protection of the individual against arbitrary interferences by the State with his right to liberty”.³⁸⁵ No violation of ECHR Article 5(3) can arise if the arrested person is released “promptly” before any judicial control would have been feasible.³⁸⁶

According to the ECtHR

the word “promptly” and in French...“aussitôt” [in Article 5(3)] is clearly distinguishable from the less strict requirement in the second part of paragraph 3 (art. 5-3)(“reasonable time”/“délai raisonable”)

381 CRC, *CRC General Comment No. 24 (2019 on children’s rights in the child justice system, CRC/C/GC/24*, para. 90.

382 Committee on the Rights of the Child, *General Comment No. 10 (2007), Children’s rights in juvenile justice*, para. 51.

383 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 35.

384 ACHPR, *International Pen and Others v. Nigeria, African Commission on Human and Peoples’ Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998)*, paras. 83-84.

385 ECtHR, *Case of Brogan and Others v. the United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; 11386/85, Judgment of 29 November 1988, para. 58.

386 *Ibid.*

and even from that in paragraph 4 of Article 5... (“speedily”/“á bref délai”)...

Whereas promptness is to be assessed in each case according to its special features...the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3...that is to the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority.³⁸⁷

Consequently, the ECtHR held that a period of four days and six hours spent in police custody fell outside the strict constraints as to time permitted by the first part of ECHR Article 5(3), despite the “undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism.”³⁸⁸

In *Case of Acosta-Calderón v. Ecuador*, the IACtHR explained that “prompt judicial control”

seeks to avoid arbitrary or illegal arrests, taking into account that, in a Constitutional State, a judge must guarantee the rights of the person detained, authorize the adoption of precautionary or coercive measures, when these are strictly necessary and, in general, ensure that the accused receive a treatment consequent with the presumption of innocence...

The simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his statement before the competent judge or authority.³⁸⁹

The IACtHR held, in *Castillo-Páez Case v. Peru*, that Article 7(5) of the ACHR was violated since the victim had not been “brought before a competent court within 24 hours or otherwise if distance was a factor, nor within fifteen days on suspicion of terrorism, pursuant to Article 7, paragraph 5,

387 Ibid, para. 59.

388 Ibid, para. 62.

389 IAtHR, *Case of Acosta-Calderón v. Ecuador*, Judgment of June 24, 2005, (Merits, Reparations and Costs) paras. 76-78.

of the Convention, and Article 2, paragraph 20(c), of the Constitution of Peru.”³⁹⁰

The “officer” must be independent, objective and impartial, with the authority to order the detainee’s release

Inherent to the proper exercise of judicial power is that “it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”.³⁹¹ In *Kulov v. Kyrgyzstan*, a decision by a prosecutor, i.e., a representative of the executive branch, to place someone in pretrial detention violated ICCPR article 9(3) as the State failed to provide any information to show that the officer possessed the “institutional objectivity and impartiality necessary to be considered an “officer authorized to exercise judicial power” within the meaning of ICCPR article 9(3).³⁹²

An “officer” under Article 5(3) of the ECHR must be independent of the executive and the parties, must hear the individual brought before him in person and must have the power to make a binding order for the detainee’s release.³⁹³ In *Case of Shishkov v. Bulgaria*, neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders, could be considered to be an “officer authorised by law to exercise judicial power” within the meaning of ECHR Article 5(3).³⁹⁴

390 IACtHR, *Castillo-Páez Case v. Peru*, Judgment of November 3, 1997, at para. 57.

391 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 32.

392 HR Committee, *Felix Kulov v. Kyrgyzstan*, Comm. No. 1369/2005, Views adopted on 26 July 2010, para. 8.4; HRC, WGAD, Opinion No. 2/2021 (Bahrain), A/HRC/WGAD/2021/2, para. 57.

393 ECtHR, *Case of Assenov and Others v. Bulgaria*, App. No. 90/1997/874/1086, Judgment of 28 October 1998, para. 146.

394 ECtHR, *Case of Shishkov v. Bulgaria*, App. No. 38822/97, Judgment 09 April 2003 (Final), para. 53.

Scope of review of pre-trial detention

In *Case of McKay v. the United Kingdom*, the ECtHR identified three strands running through the Court's case law on ECHR Article 5(3):

the **exhaustive nature of the exceptions**, which must be interpreted strictly.. and which do not allow for the broad range of justifications under other provisions... the repeated emphasis on **the lawfulness of the detention**, procedurally and substantively, requiring scrupulous adherence to the rule of law...and the **importance of the promptness or speediness of the requisite judicial controls...**³⁹⁵ [emphasis added]

Under Article 5(3) of the ECHR, arrested or detained persons are entitled to

a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention...³⁹⁶

The ECtHR held, in *Case of Cahit Demirel v. Turkey*, that the multiple, consecutive detention periods served by the applicant should be regarded as a whole when assessing the reasonableness of the length of detention under Article 5(3) of the Convention.³⁹⁷

³⁹⁵ ECtHR, *Case of McKay v. the United Kingdom*, App. No. 543/03, Judgment 3 October 2006, para. 30.

³⁹⁶ ECtHR, *Case of X.Y. v. Hungary*, App. No. 43888/08, Judgment of 19 June 2013 (Final), para. 50.

³⁹⁷ ECtHR, *Case of Cahit Demirel v. Turkey*, App No. 18623/03, Judgment of 07 October 2009 (Final), para. 23.

Right to pre-trial 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 before the court as directed, not interfere with evidence and be of good behaviour.

Pre-trial detention may become a violation of the right to liberty and the presumption of innocence where, for example, the duration is excessive, or is set according to the length of potential sentence or it is applied automatically.³⁹⁸

Under Article 5(1) of the ECHR, an individual may only be detained following the first appearance before a judicial officer when it is reasonably necessary to prevent further offences or flight. Under para. M(1)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, persons arrested on a criminal charge must not be kept in custody pending trial unless there is sufficient evidence that makes it necessary to prevent such person from fleeing, interfering with witnesses or posing a clear and serious risk to others.

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.³⁹⁹ Where appropriate and compatible with the legal system, and in accordance with established criteria, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.

400

A wide range of alternatives to pre-trial detention, prescribed by law, should be employed as early as possible. The Council of Europe has said that “the widest possible use should be made of alternatives to pretrial detention.”⁴⁰¹

398 HR Committee, Concluding observations on the fifth periodic report of Italy, CCPR/C/ITA/CO/5, para. 14.

399 See *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, rule 5.1; also, *Guidelines on the Role of Prosecutors*, paras 14 and 18.

400 *Guidelines on the Role of Prosecutors*, *ibid.*, at para. 18.

401 *Recommendation No. R (99) 22 of the Committee of Ministers to Member States*

Principle 3(4) of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* requires, whenever detention is a possibility, that States establish by law a series of alternative or substitute measures.

States are urged to provide the necessary and appropriate resources to ensure the availability and effectiveness of alternative or substitute measures for deprivation of liberty.⁴⁰²

The IACtHR held, in the *Suarez Rosero* case, that the principle of the presumption of innocence, set out in Article 8(2) of the *ACHR*

establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; (detention is, therefore, a precautionary rather than a punitive measure...preventive detention should not be the normal practice in relation to persons who are to stand trial...⁴⁰³

Pre-trial detention only as a last resort

The HR Committee, interpreting the ICCPR, states in *CCPR General Comment No. 35*, that “[ICCPR article 9(3)] requires that detention in custody of persons awaiting trial shall be the exception rather than the rule”.⁴⁰⁴

The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, expressing serious concern about delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population, among other things, recommended that Member States use

Concerning Prison Overcrowding and Prison Population Inflation, Adopted by the Committee of Ministers on 30 September 1999, para. III(12).

402 See *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle 3(4); see also, *Recommendation Rec(2000)22 of the Committee of Ministers to member states on Improving the Implementation of the European Rules on Community Sanctions and Measures*, adopted by the Committee of Ministers on 29 November 2000, para. 9.

403 IACtHR, *Case of Suárez-Rosero v. Ecuador*, Judgment of November 12, 1997, ara. 77.

404 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 38.

pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.⁴⁰⁵

The pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and minors should be kept apart from adults.⁴⁰⁶

The burden is on the state to justify pre-trial detention

States must demonstrate that the detention of individuals pending trial is absolutely necessary. The HR Committee has stated, in relation to the ICCPR, that “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party.”⁴⁰⁷ The mere assumption by the State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3 of the ICCPR.⁴⁰⁸

The burden is on the State to show why the defendant cannot be released. The ECtHR ruled, in *Case of Ilijkov v. Bulgaria*:

Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of [ECHR Article 5], a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.⁴⁰⁹

405 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p.158.

406 ECtHR, *Case of Nart v. Turkey*, App. no. 20817/04, Judgment of 06 August 2008 (Final), para. 31. See also ECtHR, *Case of Güveç v. Turkey*, App. no. 70337/01, Judgment of 20 April 2009 (Final).

407 HR Committee, *Hill v. Spain*, Comm. No. 526/1993, Views adopted on 2 April 1997, para. 12.3.

408 HR Committee, *Aleksander Smantser v. Belarus*, Comm. No. 1178/2003, Views adopted on 23 October 2008, para. 10.3.

409 ECtHR, *Case of Ilijkov V. Bulgaria*, App. No.33977/96, Judgment of 26 July 2001, para. 85.

In *Case of Case of Grishin v. Russia*, the ECtHR reiterated that, under the second limb of ECHR Article 5(3),

a person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify his continuing detention. The domestic courts must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty and must set them out in their decisions on the applications for release.”⁴¹⁰

Suspected involvement in serious offences

The existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention.⁴¹¹ When release pending trial is refused on the basis that the defendant may commit further offences prior to trial, the domestic court must be satisfied that the risk is substantiated. A reference to a person's antecedents cannot suffice to justify refusing release.⁴¹²

Danger of absconding

The absence of a fixed residence does not give rise to a danger of flight.⁴¹³ The danger of an accused person's absconding “cannot be gauged solely on the basis of the severity of the sentence risked,” but “must be assessed with reference to a number of other relevant factors which may either confirm

410 ECtHR, *Case of Grishin v. Russia*, App. No. 14807/08, Judgment of 24 October 2012, para. 139.

411 ECtHR, *Case of Van Der Tang v. Spain*, App. No 19382/92, Judgment of 13 July 1995, para. 63. See also *Case of Ilijkov v. Bulgaria* (App. No.33977/96), Judgment of 26 July 2001, para. 81.

412 ECtHR, *Case of Muller v. France*, App. No. 21802/93, Judgment of 18 February 1997, para. 44.

413 ECtHR, *Case of Sulaoja v. Estonia*, App. No. 55939/00, Judgment (Final) of 15 May 2005, para. 64.

the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.”⁴¹⁴ In *Case of Grishin v. Russia*, the ECtHR stated that the risk of flight “should be assessed with reference to various factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted.”⁴¹⁵

The domestic courts must explain why there is a danger of absconding and not simply to confirm the detention using “identical stereotyped terms, such as ‘having regard to the nature of the offence, the state of the evidence and the content of the case file’.”⁴¹⁶

The HR Committee has held that the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.”⁴¹⁷

414 ECtHR, *Case of Tomasi v France*, App. No 12850/87, Judgment of 27 August 1992, para. 98.

415 ECtHR, *Case of Grishin v. Russia*, App. No. 14807/08, Judgment (Final) of 24 October 2012, para 143.

416 ECtHR, *Case of Cahit Demirel v. Turkey*, App. No. 8623/03, Judgment (Final) of 07/10/2009, paras. 24-25.

417 HR Committee, *Hill v. Spain*, Comm. No. 526/1993, Views adopted on 2 April 1997, para. 12.3.

Pressure on witnesses and risk of collusion

Although a risk of collusion between co-accused may be genuine at the outset of the detention, it may gradually diminish, or even disappear altogether.⁴¹⁸

The ECtHR ruled that

for the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to an abstract risk unsupported by any evidence. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at the falsification or destruction of evidence or manipulation of witnesses...⁴¹⁹

The ECtHR has found that certain crimes prejudicing public order may justify pre-trial detention.⁴²⁰ However, the circumstances must be exceptional, and

this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order. In addition, detention will continue to be legitimate only if public order remains actually threatened...⁴²¹

418 ECtHR, *Case of Tomasi v France*, App. No. 12850/87, Judgment of 7 August 1992, paras. 92-95.

419 ECtHR, *Case of Grishin v. Russia*, App. No. 14807/08, Judgment (Final) of 24 October 2012, para. 148.

420 ECtHR, *Case of Tomasi v. France*, App. No. 12850/87, Judgment of 7 August 1992, para. 91.

421 *Ibid.*

However, the Office of the UN High Commissioner for Human Rights has challenged the notion of “public order” as a justification for pre-trial detention in a democratic society governed by the rule of law.⁴²² In *Cámpora Schweizer v. Uruguay*, the author of an individual communication to the HR Committee was held in accordance with the “prompt security measures” under Uruguayan law. While the HR Committee indicated it was not in a position to pronounce itself on the general compatibility of the regime of “prompt security measures” under Uruguayan law with the ICCPR, it emphasized that “although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner...the guarantees enshrined in the following paragraphs of Article 9 fully apply in such instances”.⁴²³

In some States, insults to authorities are offences for which those convicted are subject to imprisonment. States sometimes claim that such charges warrant pre-trial detention to prevent a breach of public order. WGAD has considered charges for insulting authorities to be violations of the right to freedom of expression, and imprisonment on conviction for such charges is considered arbitrary.⁴²⁴ Pre-trial detention on charges that themselves violate international human rights law is not permissible at international law.

Duty to consider alternatives

When deciding whether a person should be released or detained, authorities have an obligation under Article 5(3) of the ECHR to consider alternative measures of ensuring his or her appearance at the trial.⁴²⁵ Where the risk of absconding is legitimately found to exist, authorities are under a duty

422 Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003), *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), p.194.

423 HR Committee, *Schweizer v. Uruguay*, Comm. No. 66/1980, Views adopted on 12 October 1982, para. 18.1.

424 HRC, WGAD, Opinion No. 35/2012 (Thailand), A/HRC/WGAD/ 2012/35 (2012), at para. 24.

425 ECtHR, *Case of Yevgeniy Kuzmin v. Russia*, App. No.6479/05, Judgment (Final) of 03 August 2012, para. 34.

to consider alternatives to detention which will ensure that the defendant appears at trial.⁴²⁶

When fixing a financial surety as a condition of release pending trial, authorities “must take as much care in fixing appropriate bail as in deciding whether or not the accused’s continued detention is indispensable... Furthermore, the amount set for bail must be duly justified in the decision fixing bail ...and must take into account the accused’s means.”⁴²⁷

Right of anyone arrested or detained on a criminal charge to a trial within a reasonable time or to release

What is reasonable has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.⁴²⁸ The guarantee to be tried without undue delay relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal.⁴²⁹ Detention should not continue beyond the period for which the State party can provide appropriate justification.⁴³⁰

If someone suspected of a crime and detained on the basis of ICCPR article 9 is charged with an offence but not brought to trial, the prohibitions of

426 ECtHR, *Case of Khodorkovskiy v. Russia*, App. No. 5829/04, Judgment (Final) of 8 November 2011, para. 186.

427 ECtHR, *Case of Mangouras v. Spain*, App. No. 12050/04, Judgment of 28 September 2010, paras. 79-80.

428 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 35.

429 HR Committee, *Rouse v. Philippines*, Comm. No. 1089/2002, Views adopted on 25 July 2005, para. 7.4.

430 HR Committee, *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 10; HR Committee, *Salim Abbassi v. Algeria*, Comm. No. 1172/2003, Views adopted on 28 March 2007, at para. 8.4.

unduly delaying trials as provided for by ICCPR articles 9(3) and ICCPR article 14(3)(c) may be violated at the same time.⁴³¹

The ECtHR has stated that Article 5(3) of ECHR “cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees.” Instead:

The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.⁴³²

The ECtHR held in *Wemhoff v. Germany* that “it is the provisional detention of accused persons which must not, according to [ECHR] Article 5(3)...be prolonged beyond a reasonable time” and that the end of the period of detention is the day “on which the charge is determined, even if only by a court of first instance.”⁴³³

According to the ECtHR, it falls first to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end:

[national judicial authorities] must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of [ECHR Article 5(3)].

431 HR Committee, *Xavier Evans v. Trinidad and Tobago*, Comm. No. 908/2000, Views adopted on 21 March 2003, para. 6.2.

432 ECtHR, *Case of Neumeister v. Austria*, App. No. 1936/63, Judgment of 27 June 1968, para. 4.

433 ECtHR, *Case of Wemhoff v. Germany*, App. No. 2122/64, Judgment of 27 June 1968, paras. 5, 9.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings...⁴³⁴

The ACHPR found a violation of Articles 7(1)(d) and 26 (independence of the courts) of the ACHPR where victims had been detained for weeks and months respectively without any charges being brought against them.⁴³⁵

Right of everyone to presumption of innocence

The presumption of innocence requires that pre-trial detainees be treated in accordance with their status as unconvicted persons. Defendants must not be presented in court in a manner indicating that they may be dangerous criminals.⁴³⁶

In CCPR General Comment No. 21, the HR Committee states, at paragraph 9:

[ICCPR] Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in [ICCPR] article 14, paragraph 2...⁴³⁷

In the view of the IACHR, not only is the right to be presumed innocent expressly violated when someone is pronounced guilty before the end of a trial, but it may also be tacitly violated when the context of the actions

434 ECtHR, *Case of Assenov and Others v. Bulgaria*, App. No. 90/1997/874/1086, Judgment of 28 October 1998, para. 154.

435 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98 (2000), 6 November 2000, para. 46.

436 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, para. 30.

437 HR Committee, *CCPR General Comment 21: Article 10 (Humane treatment of persons deprived of liberty)*, 10 April 1992, para. 9.

of state agents betray a pattern of unmistakable hounding and harassment that prejudice the individual as guilty.⁴³⁸

Public authorities must refrain from prejudging the outcome of a trial

All public authorities must refrain from prejudging the outcome of a trial, e.g., by abstaining from making public statements affirming the guilt of the accused.⁴³⁹ The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt.

The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.⁴⁴⁰ The length of pre-trial detention should never be taken as an indication of guilt and its degree⁴⁴¹, nor may the denial of bail⁴⁴² or findings of liability in civil proceedings⁴⁴³ affect the presumption of innocence.

438 IACHR, *Gallardo Rodríguez v. Mexico*, Case 11.430, Report No. 43/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 485 (1997), 15 October 1996, para. 110.

439 HR Committee, *Gridin v. Russian Federation*, Comm. No. 770, Views adopted on 18 July 2000, paras. 3.5 and 8.3; *Felix Kulov v. Kyrgyzstan*, Comm. No. 1369/2005, Views adopted on 26 July 2010, para. 8.7; *Annadurdy Khadzhiyev and Ogulsapar Muradova v. Turkmenistan*, Comm. No. 2252/2013, Views adopted on 6 April 2018, para. 7.10.

440 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 30.

441 See, e.g. HR Committee, *Concluding Observations: Italy*, 24 April 2006, CCPR/C/ITA/CO/5, para. 14; HR Committee, *Concluding Observations: Argentina*, 15 November 2000, CCPR/CO/70/ARG, para. 10.

442 HR Committee, *Cagas, Butin and Astillero v. The Philippines*, Comm. No. 788/1997, Views adopted on 23 October 2001, para. 7.3.

443 HR Committee, *Moraël v. France*, Comm. No. 207/1986, Views adopted on 28 July 1989, para. 9.5.

Right to a fair and public trial

Fair and public hearing

The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit of law. The right cannot be limited in the determination of criminal charges. With respect to the determination of rights and obligations in a suit at law, a fair and public hearing must be guaranteed at least at one stage of the proceedings.⁴⁴⁴ The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.⁴⁴⁵ Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.⁴⁴⁶ The concept of a fair hearing necessarily entails that justice be rendered without undue delay.⁴⁴⁷

Tribunal

The notion of “tribunal” in ICCPR article 14(1) “designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.⁴⁴⁸

444 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 18.

445 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 18.

446 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 25. See, for example, HR Committee, *Gridin v. Russian Federation*, Comm. No. 770, Views adopted on 27 June 1996, para. 8.2.

447 HR Committee, *Munoz v. Peru*, Comm. No. 203/1986, Views adopted on 4 November 1988, para. 11.3.

448 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 18.

The WGAD defines a judicial authority as a lawful authority “whose status and tenure should afford the strongest possible guarantees of competence, impartiality, and independence.”⁴⁴⁹

Independence

Independence refers to such matters as procedure and qualifications for the appointment of judges, guarantees regarding their security of tenure, conditions governing promotion, transfer, suspension and cessation of their functions and the actual independence of the judiciary from political interference.⁴⁵⁰ A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of ICCPR article 14(1).⁴⁵¹

Impartiality

"Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. The tribunal must also appear to a reasonable observer to be impartial.⁴⁵²

Applies to all courts and tribunals

The provisions of ICCPR article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.⁴⁵³

With respect to the jurisdiction of military courts, the WGAD in its practice has consistently argued that the trial of civilians by military courts is in

449 HRC, WGAD, Opinion No. 12/2016 (China), A/HRC/WGAD/2016/12, para. 19.

450 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 19.

451 HR Committee, *Ole Bahamonde v. Equatorial Guinea*, Comm No. 468/1991, Views adopted on 20 October 1993, para. 9.4.

452 HR Committee, *Karttunen v. Finland*, Comm. No. 387/1989, Views adopted on 23 October 1992, para. 7.2.

453 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 22.

violation of the ICCPR and customary international law and that under international law, military tribunals can only be competent to try military personnel for military offences.⁴⁵⁴ In *CCPR General Comment No. 32*, the HR Committee notes that the trial of civilians in military or special courts “may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned” and trials of civilians by military or special courts “should be exceptional, i.e. 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”.⁴⁵⁵ The ECtHR has taken a similar position.⁴⁵⁶ In *Case of Martin v. The United Kingdom*, the ECtHR found a violation of ECHR article 6(1) where the composition, structure and procedure of the applicant’s court-martial were in sufficient to raise in him a legitimate fear as to its lack of independence and impartiality.⁴⁵⁷ The ECtHR stated:

While it cannot be contended that the [ECHR] absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with [ECHR article 6]. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.⁴⁵⁸

454 HRC, WGAD, Opinion No. 61/2021 (Israel), A/HRC/WGAD/2021/61, para. 48. See LRWC, Working Paper, “Right to Trial by Civilian Courts: International Law on the use of military tribunals to determine the rights of civilians”, 15 January 2015.

455 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 22.

456 ECtHR, *Case of İçen v. Turkey*, App. no. 45912/06, Judgment of 28 November 2011 (final); *Case of Martin v. the United Kingdom*, App. no. 40426/98, Judgment of 24 January 2007 (final).

457 ECtHR, *Case of Martin v. the United Kingdom*, App. no. 40426/98, Judgment of 24 January 2007 (final), para. 45.

458 ECtHR, *Case of Martin v. The United Kingdom*, App. no. 40426/98, Judgment of 24

Where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks, such courts cannot hand down binding judgments recognized by the State unless the following requirements are met:

- proceedings before such courts are limited to minor civil and criminal matters;
- the proceedings meet the basic requirements of fair trial and other relevant guarantees of the ICCPR; and
- their judgments are validated by State courts in light of the guarantees set out in the ICCPR and can be challenged by the parties concerned in a procedure meeting the requirements of ICCPR article 14.⁴⁵⁹

Public hearing

All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. ICCPR article 14(1) provides that any exclusion from the court of the public and the press must be justified solely 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”. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.⁴⁶⁰

January 2007 (final), para. 44.

459 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 24.

460 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 29.

Right of accused persons to adequate time and facilities for the preparation of their defence

The right to equality of arms requires that accused persons have the right to adequate time and facilities to prepare their defence. “Adequate time” depends on the circumstances of each case. There is an obligation to grant reasonable requests for adjournment when additional time for preparation of the defence is needed.⁴⁶¹ “Adequate facilities” must include access to documents and other evidence, including all materials that the prosecution plans to offer in court against the accused or that are exculpatory.⁴⁶² Individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access.⁴⁶³

Right to be tried in their presence and to defend themselves in person or through legal counsel of their choice

Right to be tried in person

The effective exercise of the right of an accused person to be present during their trial requires that all necessary steps are taken by the authorities to provide adequate notice to the accused regarding the date and place of their trial and to request their attendance.⁴⁶⁴ A trial *in absentia* is compatible with ICCPR article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him.⁴⁶⁵

461 HR Committee, *Chan v. Guyana*, Comm. No. 913/2000, Views adopted on 31 October 2005, para. 6.3; *Phillip v. Trinidad & Tobago*, Comm. 594/1992, Views adopted on 20 October 1998, para. 7.2.

462 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 33.

463 HR Committee, *Concluding observations on the fifth periodic report of Canada*, CCPR/C/CAN/CO/5 (2005), para. 13.

464 HR Committee, *Mbenge v. Zaire*, Comm. No. 16/1977, Views adopted on 25 March 1983, para. 14.1.

465 HR Committee, *Maleki v. Italy*, Comm. No. 699/1996, Views adopted on 27 July 1999, para. 9.3.

Right to defend oneself with or without legal counsel

The right to defend oneself without a lawyer may be restricted, for example, where the accused is substantially and persistently obstructing the proper conduct of justice, or facing a grave charge but unable to act in their own interests, or the presence of legal counsel is necessary to protect vulnerable witnesses. However, any restriction on the right of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.⁴⁶⁶

Right to have competent legal assistance assigned⁴⁶⁷

The gravity of the offence is important in deciding whether counsel should be assigned “in the interests of justice”⁴⁶⁸, as is the existence of some objective chance of success at the appeals stage.⁴⁶⁹ In cases involving capital punishment, the accused must be effectively assisted by a lawyer at all stages of the proceedings.⁴⁷⁰ There is a violation of ICCPR article 14(3)(d) where it is manifest to the judge that the behaviour of the lawyer acting for the accused was incompatible with the interests of justice⁴⁷¹, or if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.⁴⁷²

466 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 37.

467 For the right to legal aid, see Lois Leslie, *The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*, LRWC (2014).

468 HR Committee, *Lindon v. Australia*, Comm. No. 646/1995, Views adopted on 25 November 1998, para 6.5.

469 HR Committee, *Z. P. v. Canada*, Comm. No. 341/1988, Views adopted on 11 April 1991, para. 5.4.

470 HR Committee, *Aliboeva v. Tajikistan*, Comm. 985/2001, Views adopted on 18 October 2005, para. 6.4.

471 HR Committee, *Taylor v. Jamaica*, Comm. No. 705/1996, Views adopted on 2 April 1998, para. 6.2.

472 HR Committee, *Arutyunyan v. Uzbekistan*, Comm. 917/2000, Views adopted on 29 March 2004, para. 6.3.

Right of accused persons to examine and compel witnesses

As an application of the principle of equality of arms, an accused person has the same legal powers of compelling the attendance of witnesses and of examining and cross-examining an witnesses as are available to the prosecution. This guarantee is important for ensuring an effective defence by the accused.⁴⁷³

Right of an accused to have the free assistance of an interpreter

Enshrining another aspect of the principle of equality of arms, an accused person has the right to have the free assistance of an interpreter if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language.⁴⁷⁴ This right applies at all stages of the oral proceedings.⁴⁷⁵

Right not to be compelled to testify against oneself or to confess guilt

The right of an accused not to be compelled to testify against oneself or to confess guilt is a safeguard against the application of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.⁴⁷⁶

Domestic law must ensure that statements or confessions obtained in violation of ICCPR article 7 (freedom from torture or cruel, inhuman or

473 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 39.

474 HR Committee, *Guesdon v. France*, Comm. No. 219/1986, Views adopted on 25 July 1990, para. 10.2.

475 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 40.

476 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 41.

degrading treatment or punishment) are excluded from the evidence, except as such material is used as evidence that torture or other treatment prohibited by the ICCPR occurred.⁴⁷⁷ The burden of proof that a confession was made without duress is on the prosecution.⁴⁷⁸

The term “compelled” under CRC article 40(2)(b)(iv) “should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights”.⁴⁷⁹

Right to appeal conviction

In its interpretation of the CRC, the Committee on the Rights of the Child states that the appeal under CRC article 40(2)(b)(v) should be “decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance”.⁴⁸⁰

ICCPR article 14(5) does not apply to procedures determining rights and obligations in a suit of law or any other procedures not being part of a criminal appeal process.⁴⁸¹ ICCPR article 14(5) is a *lex specialis* in relation to ICCPR article 2(3)(a), such that it is unnecessary to also bring a claim for violation of ICCPR article 2(3) with respect to failure to ensure the right to appeal a conviction.⁴⁸²

477 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 41; *Convention against Torture*, art. 15; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Guideline 12.

478 HR Committee, *Kurbonov v. Tajikistan*, Comm. No. 1208/2003, Views adopted on 16 March 2006, para. 6.3.

479 Committee on the Rights of the Child, General Comment No. 10 (2007), *Children’s rights in juvenile justice*, para. 57.

480 Committee on the Rights of the Child, General Comment No. 10 (2007), *Children’s rights in juvenile justice*, para. 60.

481 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 46.

482 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 58.

There is a violation of ICCPR article 14(5) if the decision by the court of first instance is final. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the ICCPR unless the State party concerned has made a reservation to this effect.⁴⁸³

ICCPR article 14(5) does not require States parties to provide for several instances of appeal;⁴⁸⁴ however, if the domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.⁴⁸⁵ It is a violation of ICCPR article 14(5) where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court.⁴⁸⁶ The right to have one's conviction and sentence reviewed by a higher tribunal imposes on the State party a duty substantially to review the conviction and sentence, both as to sufficiency of the evidence and of the law.⁴⁸⁷ A review that is limited to the formal or legal aspects of the conviction with no possibility of a re-evaluation of the evidence is not sufficient under the ICCPR.⁴⁸⁸

The convicted person is entitled to have access to duly reasoned, written judgments in the trial court and at least in the court of first appeal⁴⁸⁹ and to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.⁴⁹⁰

483 HR Committee, *Terron v. Spain*, Comm. No. 1073/2002, Views adopted on 5 November 2004, para. 7.4.

484 HR Committee, *Rouse v. Philippines*, Comm. No. 1089/2002, Views adopted on 25 July 2005, para. 7.6.

485 HR Committee, *Henry v. Jamaica*, Comm. No. 230/1987, Views adopted on 1 November 1991, para. 8.4.

486 HR Committee, *CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 47.

487 HR Committee, *Bandajevsky v. Belarus*, Comm. No. 1100/2002, Views adopted on 28 March 2006, para. 10.13.

488 HR Committee, *Gomez Vazquez v. Spain*, Comm. No. 701/1996, Views adopted on 20 July 2000, para. 11.1.

489 HR Committee, *Van Hulst v. Netherlands*, Comm. No. 903/1999, Views adopted on 1 November 2004, para. 6.4.

490 HR Committee, *Lumley v. Jamaica*, Comm. No. 662/1995, Views adopted on 30 April 1999, para. 7.5.

A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of ICCPR article 14(5), regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.⁴⁹¹

A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of ICCPR article 14(3)(d), but at the same time also of article 14(5), as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.⁴⁹²

The right to have one's conviction reviewed is also violated if defendants are not informed by the court of the intention of their counsel not to argue any grounds in support of their appeal, thus depriving them of an opportunity to engage other counsel or consider any remaining options open to them.⁴⁹³

Right of anyone who has been arbitrarily or unlawfully deprived of their liberty to an effective remedy

Alongside the general right to an effective remedy for human rights violations, IHRL specifically guarantees to any person arbitrarily or unlawfully detained an enforceable right to access "effective remedies and reparations capable of providing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition".⁴⁹⁴ States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the

491 HR Committee, *Bandajevsky v. Belarus*, Comm. No. 1100/2002, Views adopted on 28 March 2006, para. 10.13.

492 HR Committee, *LaVende v. Trinidad and Tobago*, Comm. No. 554/1993, Views adopted on 29 October 1997, para. 5.8.

493 HR Committee, *Daley v. Jamaica*, Comm. No. 750/1997, Views adopted on 31 July 1998, para. 7.5.

494 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 11.

person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.⁴⁹⁵

For the purpose of the right to a remedy and reparations for arbitrary deprivation of liberty, victims are

persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute arbitrary deprivation of liberty. Victims may also include family members or dependants of the detained person and those who have suffered harm in intervening to assist.⁴⁹⁶ [footnotes omitted]

Reparations should be adequate, effective and prompt and must cover all aspects of the deprivation of liberty by a State, including acts or omissions by its public officers or by individuals acting on its behalf or with its authorization, support or acquiescence in any territory under a State's jurisdiction or wherever the State exercises effective control.⁴⁹⁷ Reparations should be proportional to the gravity of the violations and the harm suffered.⁴⁹⁸

The HR Committee, in *CCPR General Comment No. 31*, states that

[ICCPR Article 2(3)] requires that States Parties make reparation to individuals whose [ICCPR] rights have been violated. Without reparation to individuals whose [ICCPR] rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of [ICCPR article 2(3)] is not discharged. In addition to the

495 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 4.

496 WGAD, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, Adopted on 22 November 2019, para. 4.

497 WGAD, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, Adopted on 22 November 2019, para. 6; *Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 11; *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, para. 25.

498 WGAD, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, Adopted on 22 November 2019, para. 7.

explicit reparation required by [ICCPR articles 9(5) and 14(6)], the Committee considers that the [ICCPR] generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁴⁹⁹

With respect to the right to compensation for unlawful deprivation of liberty under the ICCPR, “the remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time”.⁵⁰⁰ Unlawful arrest and detention within the meaning of ICCPR article 9(5) “include such arrest and detention arising within either the criminal or non-criminal proceedings, or in the absence of any proceedings at all”.⁵⁰¹ The financial compensation required by ICCPR article 9(5) relates to the pecuniary and non-pecuniary harm resulting from the unlawful arrest of detention. When an unlawful arrest arises from the violation of other human rights, the State party may be obligated to provide compensation or other reparations in relation to those violations, as required by ICCPR article 2(3).⁵⁰²

Under Article 5(4) of the ECHR, an individual is entitled to compensation where an arrest and detention were lawful under domestic law, but in breach of Article 5(3).⁵⁰³ To be entitled to an award of compensation under Article 5(5) of the ECHR, the victim may be required to show damage resulting from the breach.⁵⁰⁴

499 HR Committee, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para. 16.

500 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 50.

501 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 51.

502 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 52.

503 ECtHR, *Brogan and Others v. the United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; 11386/85, Judgment of 29 November 1988, para. 67.

504 ECtHR, *Wassink v. The Netherlands*, App. No. 12535/86, Judgment of 27 September 1990, para. 38.

SELECTED CASES FROM WGAD JURISPRUDENCE

WGAD CRITERIA⁵⁰⁵

To assist in its work in investigating cases of alleged arbitrary deprivation of liberty, the WGAD has adopted specific criteria that characterize how a deprivation of liberty is arbitrary. The WGAD may refer to one, multiple or all categories in its determination. However, a violation of one can be sufficient to establish an arbitrary deprivation of liberty. Currently, the WGAD employs five legal categories of when a deprivation of liberty is arbitrary:

Category I: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of their sentence or despite an amnesty law applicable to them);

Category II: When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;

Category III: When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, **is of such gravity as to give the deprivation of liberty an arbitrary character;** [emphasis added]

⁵⁰⁵ This section draws on the very useful analyses of recent WGAD decisions in American University Washington College of Law, Centre for Human Rights & Humanitarian Law, *The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015-2018): An Introduction for Practitioners*, March 2021.

Category IV: When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; and

Category V: When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.⁵⁰⁶

In its analyses of alleged infringement of rights under IHRL, the WGAD relies on a variety of sources, with particular weight given to the interpretation of the HR Committee. For example, in assessing whether a deprivation of liberty linked to or resulting from the use of the Internet is arbitrary, the WGAD will apply the criteria suggested by the HR Committee in *CCPR General Comment No. 10: Article 19 (Freedom of Opinion)*, para. 4.⁵⁰⁷ The established practice of the WGAD, therefore, is that restrictions on the freedom of expression by way of deprivation of liberty can only be justified

when it is shown that the deprivation of liberty has a **legal basis in domestic law, is not at variance with international law and is necessary to ensure the respect of the rights or reputation of others, or for the protection of national security, public order, public health or morals, and is proportionate to the pursued legitimate aims.** A vague and general reference to the interests of national security or public order, without being properly explained and documented, is not enough to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty was necessary. More generally, the Working Group cannot accept the interference of the public authorities with the individual's privacy - including the freedom to communicate among themselves via the Internet - under

506 UN, OHCHR, Working Group on Arbitrary Detention, *About Arbitrary Detention*, online at: <https://www.ohchr.org/EN/Issues/Detention/Pages/AboutArbitraryDetention.aspx>. Note that violations of categories I, II, IV and V are *per se* arbitrary, while violations of Category III are assessed by the WGAD to determine whether they are "so grave as to give the detention an arbitrary character".

507 WGAD, *Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet*, para. 42.

the unsubstantiated pretext that the intrusion was necessary to protect public order or the community.⁵⁰⁸[emphasis added]

Where the WGAD finds widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law the situation may constitute a crime against humanity.⁵⁰⁹

The principle of joint responsibility applies to States when more than one of them were involved in the perpetration of a violation.⁵¹⁰

CATEGORY I - NO LEGAL BASIS TO JUSTIFY DETENTION

A deprivation of liberty that violates the principle of legality is *per se* arbitrary. Such cases include situations where there has been no legal justification for a deprivation of liberty, where the justification for the deprivation has expired, or where the basis for a deprivation of liberty violates a general principle of law. In many cases, this category involves a failure to comply with provisions of ICCPR article 9, e.g. violation of right to be informed of reasons for arrest, violation of right to habeas corpus, etc. In such cases, the facts may also imply Category III violations of rights to due process. Similarly, cases of arbitrary detention often involve criminalization of fundamental rights, including freedom of expression and association.

508 WGAD, *Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet*, para. 43.

509 See HRC, WGAD, Opinion No. 2/2021 (Bahrain), A/HRC/WGAD/2021/2; Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63; Opinion No. 51/2020 (Turkey), A/HRC/WGAD/2020/51; HRC, WGAD, Opinion No. 47/2012 (Democratic People's Republic of Korea), A/HRC/WGAD/2012/47, para. 22.

510 HRC, WGAD, Opinion No. 85/2019 (Libya, Senegal and United States of America), A/HRC/WGAD/2019/85, paras. 35-38.

Arrest without a warrant

International law on deprivation of liberty includes the right to be presented with an arrest warrant, which “is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention, under [UDHR] articles 3 and 9, [ICCPR] article 9 (1) and principles 2, 4 and 10 of the Body of Principles”.⁵¹¹ According to WGAD, “in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant”.⁵¹² An arrest warrant is “an important means of ensuring that the authorities have considered the involvement of an individual in an alleged criminal act and determined that there is a sufficient legal basis for their arrest”.⁵¹³ Failure to present an arrest warrant to the individual being arrested, to give reasons for the arrest, or promptly notify the detainee of the charges against them will result in no legal basis for the arrest and therefore a violation of the right to be free from arbitrary arrest and detention.⁵¹⁴

A valid arrest warrant must be ordered by a competent, independent and impartial judicial authority.⁵¹⁵

Failure to present an arrest warrant to a minor is also a violation of CRC article 37 (b), which requires that the arrest of a child be in conformity with the law.⁵¹⁶

511 HRC, WGAD, Opinion No. 5/2021 (Kazakhstan), A/HRC/WGAD/2021/5, para. 40 .

512 HRC, WGAD, Opinion No. 75/2017 (Viet Nam), A/HRC/WGAD/2017/75, para. 35.

513 HRC, WGAD, Opinion No. 2/2021 (Bahrain), A/HRC/WGAD/2021/2, para. 55.

514 See, for example, HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 27; Opinion No. 46/2017 (Jordan), A/HRC/WGAD/2017/46, paras. 19, 21; Opinion No. 93/2017 (Saudi Arabia), A/HRC/WGAD/2017/93, para. 44.

515 HRC, WGAD, Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10, para. 46.

516 HRC, WGAD, Opinion No. 93/2017 (Saudi Arabia), A/HRC/WGAD/2017/93, para. 44.

Failure to give reasons for arrest or charges at the time of arrest

Failure to do give a detainee the reasons for the arrest or the charges against them at the time of the arrest violates UDHR article 9 and ICCPR article 9 (2), making the deprivation of liberty arbitrary.⁵¹⁷

Failure to be brought promptly before a judge

Failure to be brought promptly before a judge or afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of one's detention is a violation of ICCPR article 9 (3) and (4) and a deprivation of the right to challenge the legality of detention, in violation of UDHR articles 8 and 10 and ICCPR articles 2 (3) and 14 (1).⁵¹⁸

The Working Group recalls that 48 hours are usually sufficient to transport the individual and to prepare for the judicial hearing, and that any delay longer than 48 hours must remain absolutely exceptional and justified under the circumstances.

Detention in violation of domestic law

A deprivation of liberty in violation of domestic law is arbitrary. For example, pretrial detention that extended beyond the permissible period defined in a State's criminal code was held to lack a valid legal basis and was therefore arbitrary.⁵¹⁹

517 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 28.

518 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 29.

519 HRC, WGAD, Opinion No. 41/2016 (Egypt), A/HRC/WGAD/2016/41, para. 26.

Detention under law not authorizing detention

Laws not regarding detention cannot be the lawful basis for arresting or holding a detainee. In Opinion No. 56/2016 (Afghanistan and United States of America), the WGAD found that a general law that gives the power of military operations to the President of the United States cannot be considered as a ground for the detention of anyone without cause.⁵²⁰

Domestic legal basis for detention does not comply with IHRL

Domestic laws that criminalize or restrict the exercise of fundamental rights cannot form an adequate legal basis for a deprivation of liberty. For example, the WGAD has found no legal basis and therefore an arbitrary deprivation of liberty where a domestic law allowed for the trial of a detainee by a military commission rather than the criminal justice system, without the fair trial guarantees enshrined in ICCPR article 14⁵²¹ ; and, in another opinion, where a law criminalized conscientious objection to military service, thus criminalizing the absolutely protected right to hold or adopt a religion or belief under UDHR article 18 of the and ICCPR article 18 (1).⁵²²

Retroactive application of law (ex post facto laws)

An essential principle of legality, *nullum crimen, nulla poena sine lege praevia*, reaffirmed in UDHR article 11(2) and ICCPR article 15(1), is that a law that was not in force at the time of the commission of impugned acts

520 HRC, WGAD, Opinion No. 56/2016 (Afghanistan and United States of America), A/HRC/WGAD/2016/56, para. 40.

521 HRC, WGAD, Opinion No.53/2016 (Afghanistan and United States of America), A/HRC/WGAD/2016/53, paras. 41-44.

522 HRC, WGAD, Opinion No.69/2018 (Republic of Korea), A/HRC/WGAD/2018/69, paras. 20-21.

cannot serve as the legal basis for detention or imprisonment as punishment for the said acts.⁵²³

Ne Bis In Idem (Double Jeopardy)

A conviction obtained in violation of the prohibition against double jeopardy has no foundation in law and is consequently arbitrary.⁵²⁴

Detention not ordered by, or under control of, competent, independent, and impartial judicial authority

In the absence of a ruling by a competent and independent judicial authority on the lawfulness of a deprivation of liberty, there is no legal basis to justify an arrest and detention and it is therefore, arbitrary.⁵²⁵ The imposition of pretrial detention without the provision of any reasons justifying such, as well as the failure of the appellate court to provide such reasons, constitutes a violation of ICCPR article 9 (3).⁵²⁶

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

Principle 6

The court as reviewing body

9. A court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including

523 HRC, WGAD Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10, para. 42.

524 CHR, WGAD, Opinion No. 6/2000 (Pakistan), E/CN.4/2001/14/Add.1, paras. 8,9.

525 HRC, WGAD, Opinion No. 69/2017 (China), A/HRC/WGAD/2017/69, paras. 29-30.

526 HRC, WGAD, Opinion No. 34/2019 (Russian Federation), A/HRC/WGAD/2019/34, para. 63.

the power to order immediate release if the detention is found to be arbitrary or unlawful.

Detained under a vague law

A law which is extremely vague and lacks the requisite degree of precision and legal certainty leads to deprivation of liberty which is unreasonable or unnecessary.⁵²⁷ The WGAD warns that charges involving vague and imprecise offences jeopardize the fundamental rights of those who wish to exercise their freedom of expression and are likely to result in arbitrary deprivation of liberty. The WGAD has recommended that those crimes be defined in precise terms and that legislative measures be taken to introduce an exemption from criminal responsibility for those who exercise peacefully their rights guaranteed in the UDHR.⁵²⁸

The WGAD has also expressed its concern that antiterrorism laws “by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention” with the consequence that “legitimate democratic opposition ... becomes a victim in the application of such laws”.⁵²⁹

The WGAD has found that crimes under Chinese law of “inciting subversion of State power” and “picking quarrels and provoking trouble” were so vague and overly broad that it was impossible to invoke a legal basis justifying the deprivation of liberty.⁵³⁰ In a case involving Saudi Arabia, the WGAD stated that, with regard to ICCPR article 15(1),

the prohibition of terrorist conduct must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.⁵³¹

527 HRC, WGAD, Opinion No. 8/2017 (Pakistan), A/HRC/WGAD/2017/8, para. 36.

528 HRC, WGAD, Opinion No. 69/2017 (China), A/HRC/WGAD/2017/69, para. 32.

529 HRC, WGAD, Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10, para. 56.

530 HRC, WGAD, Opinion No. 62/2018 (China), A/HRC/WGAD/2018/62, para. 58.

531 HRC, WGAD, Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10, para. 56.

Excessive pretrial detention

Detention pending trial that is not based on an individualized determination that is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime is arbitrary.

Incommunicado detention

Holding persons incommunicado effectively places the victims outside the protection of the law in violation of the right to be recognized as a person before the law, as enshrined under UDHR article 6⁵³², and deprives them of any legal safeguards, including access to a lawyer, thereby seriously curtailing their ability to challenge their detention.⁵³³ Furthermore, prolonged incommunicado detention creates the conditions that may lead to violations of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and may itself constitute torture or ill-treatment.⁵³⁴ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has argued that the use of incommunicado detention is prohibited under international law.⁵³⁵ Finally, a denial of access to family violates the right to have contact with the outside world, as enshrined under rules 43 (3) and 58 of the *UN Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules) and principles 15, 16 and 19 of the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

The WGAD concluded in its Opinion regarding the enforced disappearance of a 14 year old in Bahrain that incommunicado detention at an unknown location for 4 days (31 December 2019 to 3 January 2020) violated ICCPR

532 HRC, WGAD, Opinion No. 69/2017 (China), A/HRC/WGAD/2017/69, para. 38.

533 HRC, WGAD, Opinion No. 36/2017 (Iraq), A/HRC/WGAD/2017/36, para. 78.

534 HRC, WGAD, Opinion No. 69/2017 (China), A/HRC/WGAD/2017/69, para. 37.

535 HRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156.

articles 9 and 14 and CRC article 37 (b), and constituted a particularly aggravated form of arbitrary detention without legal basis.⁵³⁶

Continued detention after completion of sentence, early discharge, or acquittal of charges

Detention that continues after completion of a sentence, including across an extradition order⁵³⁷, early release order⁵³⁸, or acquittal of charges⁵³⁹ is without legal grounds and is therefore arbitrary.

Protracted preventative detention

Preventive detention used for reasons of public security or public order present severe risks of arbitrary deprivation of liberty and will normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system would be available.⁵⁴⁰ In *CCPR General Comment No. 35*, the HR Committee states, at para. 15:

If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the

536 HRC, WGAD, Opinion No. 2/2021 (Bahrain), A/HRC/WGAD/2021/2, para. 59.

537 HRC, WGAD, Opinion No. 61/2012, U.N. Doc. A/HRC/WGAD/2012/61, para. 13.

538 HRC, WGAD, Opinion No.20/2016 (Iraq), A/HRC/WGAD/2016/20, para. 26.

539 HRC, WGAD, Opinion No. 53/2016 (Afghanistan and United States of America), A/HRC/WGAD/2016/53, para. 54.

540 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 15.

same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken. [emphasis added]⁵⁴¹

The State's inability to establish that, at the time of his arrest, a detainee posed a "present, direct and imperative threat" that cannot be addressed by alternative measures

and how this threat has persisted during his detention means the detention lacks a legal basis and is therefore arbitrary.⁵⁴²

While the WGAD acknowledges that counter-terrorism measures "might require 'the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial' in a very limited manner" it stresses that "in all circumstances deprivation of liberty must remain consistent with the norms of international law", including the right of anyone deprived of their liberty to bring proceedings before a court to challenge the legality of the detention.⁵⁴³

The WGAD Working Group proposed the following set of principles in conformity with UDHR, articles 9 and 10, and ICCPR, articles 9 and 14, which may be used in relation to deprivation of liberty of persons accused of acts of terrorism:

- (a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems;
- (b) Resort to administrative detention against suspects of such criminal activities is inadmissible;

541 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 15 [footnotes omitted]. HRC, Working Group on Arbitrary Detention, Comm. No. 86/2017 (Israel), 18 December 2017, paras. 31, 32.

542 HRC, WGAD, Opinion No. 86/2017 (Israel), A/HRC/WGAD/2017/86, paras. 31,32.

543 WGAD, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, para. 71.

(c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;

(d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;

(f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(g) In the development of judgements against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process;

(h) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.⁵⁴⁴

Non-punitive detention following punitive detention

When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, to avoid arbitrariness, such an additional detention must be justified by “compelling

⁵⁴⁴ HRC, Report of the Working Group on Arbitrary Detention, A/HRC/10/21, 16 February 2009, p.21.

reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future".⁵⁴⁵ The HR Committee warns that

States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, [ICCPR] articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.⁵⁴⁶

In Opinion No. 21/2015 (New Zealand), the WGAD reaffirmed the requirements laid down in the jurisprudence of the ECtHR and HR Committee, stating that "[t]he conditions of preventive detention regimes must satisfy demanding proportionality requirements and establish a difference between the regimes for preventive detention and for ordinary prison sentences", including "the requirement that the detention must be aimed at the detainees' rehabilitation and reintegration into society".⁵⁴⁷

545 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 21.

546 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 21 [footnotes omitted], affirmed in HRC, WGAD, Opinion No. 32/2016 (New Zealand), A/HRC/WGAD/2016/32, para. 43.

547 HRC, WGA, Opinion No. 21/2015 (New Zealand), A/HRC/WGAD/2015/21, paras. 23-27.

Detention in Psychiatric Hospital without due process

Forcing an individual against his will to stay in a psychiatric institution is an arbitrary deprivation of liberty where there are insufficient safeguards against arbitrary detention, e.g., of political opponents for alleged mental illness.⁵⁴⁸

Arrest and detention of a person protected by immunity

Detention measures cannot lawfully be taken against someone who enjoys the privileges of immunity from arrests, detention and prosecution unless the immunity has been waived in accordance with proper procedures.⁵⁴⁹

Detention after Amnesty

A deprivation of liberty subsequent to the date a detainee should have been released after being amnestied is arbitrary, being in contravention of UDHR, article 9, and falls within category I of the categories applicable to the consideration of cases submitted to the Working Group.⁵⁵⁰ Also, where a detainee is eligible for amnesty and early release, but a prosecutor has denied an order of release, the continued detention is arbitrary.⁵⁵¹

548 CRC, WGAD, Opinion No. No. 1/2002 (China), E/CN.4/2003/8/Add.1, para. 11.

549 HRC, WGAD, Opinion No. 05/2018 (Congo), A/HRC/WGAD/2018/5, paras. 36, 39; HRC, WGAD, Opinion No. 36/2017 (Iraq), A/HRC/WGAD/2017/36, para. 87.

550 CHR, WGAD, Opinion No. 7/2004 (United Arab Emirates), E/CN.4/2005/6/Add.1, para. 10.

551 HRC, WGAD Opinion No. 25/2016 (Iran), A/HRC/WGAD/2016/25, para. 26.

Extraordinary Rendition

The informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries without procedural safeguards, a practice known as “renditions”, is “irremediably in conflict with the requirements of international law” and a Category I violation.⁵⁵²

Detained by non-State actor attributed to State

Where a non-State actor carries out an illegal detention and is funded or on the payroll of a government, the State is responsible for the arbitrary deprivation of liberty.⁵⁵³ Even where the actions of a non-state actor cannot be attributed to the State, the State may be responsible for arbitrary deprivation of liberty where the State failed to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁵⁵⁴ The WGAD finds support for this conclusion in the positive obligation of a State to prevent and punish crimes in order to uphold its human rights duties and in Article 5 of the *Responsibility of States for Internationally Wrongful Acts*, which reads:

The conduct of a person or entity which is not an organ of the State under [these articles] article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.⁵⁵⁵

552 HRC, WGAD, Opinion No. 19/2007 (Saudi Arabia), A/HRC/10/21/Add.1, para. 18; CHR, WGAD, Opinion No. 47/2005 (Yemen), A/HRC/4/40/Add.1, para. 19, 20; CHR, WGAD, Opinion No. 48/1993 (USA), E/CN.4/1994/27, para. 6.

553 HRC, WGAD, Opinion No. 39/2018 (Libya), A/HRC/WGAD/2018/39, paras. 31–32.

554 HR Committee, *CCPR General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 8; HRC, WGAD, Opinion No. 39/2018 (Libya), A/HRC/WGAD/2018/39, para. 32.

555 UN, *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted under General Assembly resolution 56/83 (2001), Article 8.

Under the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court*, principle 3,

3. Any individual who is deprived of liberty in any situation by or on behalf of a governmental authority at any level, **including detention by non-State actors that is authorized by domestic law**, has the right to take proceedings before a court in the State's jurisdiction to challenge the arbitrariness and lawfulness of his or her deprivation of liberty and to receive without delay appropriate and accessible remedies. **Exerting authority over any form of detention will constitute the effective control over the detention and make the detainee subject to the State's jurisdiction. Involvement in detention will give the State the duty to ensure the detainee's right to bring proceedings before a court.** [emphasis added]

CATEGORY II – VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

A deprivation of liberty imposed in response to the legitimate exercise of fundamental human rights is arbitrary under WGAD category V.⁵⁵⁶ As the WGAD states,

the rights to freedom of movement and residence, freedom to seek asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, legal equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in articles 7, 13, 14, 18,

⁵⁵⁶ WGAD, *Revised Fact Sheet No. 26*, 8 February 2019, p.6. See also, HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 17.

19, 20 and 21 of the Universal Declaration of Human Rights and [ICCPR] articles 12, 18, 19, 21, 22, 25, 26 and 27.⁵⁵⁷

IHRL acknowledges that certain fundamental rights may be limited, but only as are prescribed by law and are necessary to protect a legitimate ground set out in international and regional human rights instruments. As noted above, under the ICCPR, limitation clauses shall be interpreted strictly and in favor of the rights at issue, in the light and context of the relevant right and so as not to jeopardize the core meaning of the right itself.⁵⁵⁸

When considering allegations of arbitrary deprivation of liberty of a human rights defender or infringement of any of the rights listed under Category II, a heightened standard of review is applied:

The Working Group would also like to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are restricted or where human rights defenders are involved.⁵⁵⁹

This “heightened standard of review” by international bodies is especially appropriate where there is a “pattern of harassment” by national authorities targeting such individuals.⁵⁶⁰ In Opinion No. 33/2014 (Burundi), the WGAD stated:

in cases such as this, in which there is reliable prima facie information to the effect that a known human rights defender has been deprived

557 HRC, WGAD, Opinion No. 82/2018 (Egypt), A/HRC/WGAD/2018/82, para. 33.

558 See *Siracusa Principles*, supra note 144.

559 HRC, WGAD, Opinion No. 3/2018 (Thailand), A/HRC/WGAD/2018/3, para. 40; Opinion No. 39/2012 (Belarus), A/HRC/WGAD/2012/39, para. 45; Opinion No. 94/2017 (Oman), A/HRC/WGAD/2017/94

para. 49. See *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* (“UN Declaration on Human Rights Defenders”), article 9(3). The WGAD uses an expansive definition of “human rights defender”, including, for example, journalists who are critical of the State (Comm. No. 94/2017, Oman) and social activists (Comm. No. 88/2017 (India)).

560 HRC, WGAD, Opinion No. 39/2012 (Belarus), A/HRC/WGAD/2012/39, para. 45.

of his liberty on questionable charges, where the conviction is not based on trustworthy evidence and where, in fact, the person has been punished for exercising his fundamental rights, it is the Government's responsibility to provide the Working Group with specific evidence justifying the conviction.⁵⁶¹

Where the WGAD determines that a detainee was detained in the exercise of a fundamental human right or in the act of defending fundamental human rights, a State must provide credible evidence that its restriction of that right or rights is necessary and proportionate on the basis of a legitimate objective. In its jurisprudence, with regard to the application of the principle of proportionality, the WGAD has applied the following four-part test:

(a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.⁵⁶²

Freedom of opinion and expression

The right to freedom of opinion and expression includes the freedom to hold an opinion without interference and the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.⁵⁶³ All forms of expression and the means of their dissemination, and all forms of opinion are protected, including opinions of a political, scientific, historic,

561 HRC/ WGAD, Opinion No. 33/2014 (Burundi), A/HRC/WGAD/2014/33, para. 21.

562 HRC/ WGAD, Opinion No. 56/2017 (Thailand), A/HRC/WGAD/2017/56, para. 51.

563 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, paras. 9, 11.

moral or religious nature.⁵⁶⁴ The right to freedom of expression includes the expression of views and opinions that offend, shock or disturb.⁵⁶⁵

The WGAD warns that “[ICCPR] Article 19 (3) may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights”.⁵⁶⁶ Under article 19 of the ICCPR, the right to freedom of expression may only be subjected to such restrictions as are established by law and are necessary for respect of the rights or reputations of others or for the protection of national security or of public order (*ordre public*), or of public health or morals. Restrictions are not allowed on grounds not specified in article 19 (3), even if such grounds would justify restrictions on other rights protected in the ICCPR.⁵⁶⁷

Such restrictions must not be overbroad, must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function and be proportionate to the interest to be protected.⁵⁶⁸ The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. In circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the ICCPR upon uninhibited expression is particularly high.⁵⁶⁹

Where a State invokes one of the enumerated grounds for limiting the right to free expression, the State must show “in specific and individualized fashion” the nature of the threat posed by the speech in question⁵⁷⁰ and

564 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, paras. 9, 12.

565 HRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/17/27, para. 37.

566 HRC, WGAD, Opinion No. 5/2021 (Kazakhstan), A/HRC/WGAD/2021/5, para. 49.

567 HRC, WGAD, Opinion No. 5/2021 (Kazakhstan), A/HRC/WGAD/2021/5, para. 49.

568 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 34.

569 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 38. HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 38.

570 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 35, cited in WGAD Opinion

there must be a “direct and immediate connection” between this threat and the expression in question⁵⁷¹.

Detention for holding an opinion

As the right to hold an opinion is an absolute right, deprivation of liberty solely because of one’s actual, perceived or supposed opinions is arbitrary.⁵⁷²

Refusal to speak or express oneself

The refusal to speak or express oneself in a certain way is also protected. Detention is arbitrary, for example, where imposed for refusing to write articles in support of the government.⁵⁷³

Speech relating to human rights

Detention intended as acts of retaliation and reprisal for active defence of human rights receives heightened scrutiny from the WGAD.⁵⁷⁴ Detention has been found to be arbitrary when based on speech, such as appearing before a human rights committee⁵⁷⁵, disseminating information regarding human rights⁵⁷⁶, activism on behalf of others⁵⁷⁷, calling attention to the need for transparency in public affairs⁵⁷⁸, telling others of one’s own insecure situation⁵⁷⁹, announcing one’s intention to go on hunger strike

571 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para.

572 HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 9. CHR, WGAD, Opinion No. 35/1993 (Syrian Arab Republic), E/CN.4/1994/27, para. 7.

573 CHR, WGAD, Opinion No. No. 52/1993 (Iraq), E/CN.4/1995/31/Add.1, para. 9.

574 HRC, WGAD, Opinion No. 67/2012 (Uzbekistan), A/HRC/WGAD/2012/67, para. 57. See UN Declaration on Human Rights Defenders, articles 1, 5, 6, 7, 8, 9, 12, 13, 17.

575 CHR, WGAD, Opinion No. 2/1996 (Nigeria), E/CN.4/1997/4/Add.1, para. 6.

576 CHR, WGAD, Opinion No. 19/1999 (China), E/CN.4/2000/4/Add.1, paras. 12, 14.

577 HRC, WGAD Opinion No. 55/2015 (Mexico), A/HRC/WGAD/2015/55, para. 27.

578 HRC, WGAD Opinion No. 18/2015 (Mexico), A/HRC/WGAD/2015/18, para. 25.

579 CHR, WGAD Opinion No. 30/2000 (China), E/CN.4/2002/77/Add.1, para. 13.

over violations of human rights⁵⁸⁰, and informing the United Nations about human rights violations⁵⁸¹.

Expression that may offend or disturb the State

Freedom of expression extends to ideas “that offend or disturb the State or any other sector of the population”.⁵⁸² Restrictions on discussion of government policies and political debate are not consistent with ICCPR article 19 (3).⁵⁸³ The “mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties” and “all public figures, including those exercising the highest political authority such as Heads of State and Government, are legitimately subject to criticism and political opposition”.⁵⁸⁴ Lese-majesty laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.⁵⁸⁵

The fact that a detainee’s human rights activism conduct is criminalized under domestic law does not deprive her of her rights under international law, including under the UDHR.⁵⁸⁶

“Peaceful expression of opposition to any regime cannot give rise to arbitrary arrest.”⁵⁸⁷ The penalization of a media outlet, publishers, or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.⁵⁸⁸

580 CHR, WGAD Opinion No. 5/1999 (Tunisia), E/CN.4/2000/4/Add.1, para. 16.

581 HRC, WGAD Opinion No. 4/2010 (Myanmar), A/HRC/16/47/Add.1, para. 22.

582 HRC, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2006/7, para. 45.

583 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 34.

584 HRC, WGAD, Opinion No. 56/2017 (Thailand), A/HRC/WGAD/2017/56, para. 42, citing HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 38.

585 HRC, WGAD, Opinion No. 56/2017 (Thailand), A/HRC/WGAD/2017/56, para. 53.

586 HRC, WGAD, Opinion No. 39/2015 (China), A/HRC/WGAD/2015/39, para. 22,

587 CHR, WGAD, Opinion No. 25/2000 (Myanmar), E/CN.4/2001/14/Add.1, para. 12; Opinion No. 36/2017 (Iraq), A/HRC/WGAD/2017/36.

588 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 34, citing HR Committee, *CCPR General comment No. 34, Article 19: Freedoms of opinion and expression*, para. 42.

National security

While the WGAD recognizes that combatting terrorism is a legitimate government interest, falling within a State's duty to protect public safety, any restrictions related to counter-terrorism must still comply with necessity and proportionality requirements. Applying principle 6 of the Johannesburg Principles⁵⁸⁹, the WGAD finds that the right to freedom of expression cannot be infringed on the basis of the protection of national security or countering terrorism "unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence".⁵⁹⁰

Vague criminal laws restricting expression

Vaguely and broadly worded laws "have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality as codified in [UDHR] article 11 (2) and [ICCPR] article 15 (1)"⁵⁹¹. They also make it difficult to distinguish between expression that is likely to be violent and that which is peaceful and unlikely to incite violence⁵⁹², or between individuals engaged in illegal activity and mere supporters of an organization⁵⁹³.

The investigation and prosecution of journalists for "aiding terrorist organizations, in accordance with the organizational aims of these organizations, without being a member" raises concerns due to the vagueness of the provision, resulting in an arbitrary deprivation of liberty.⁵⁹⁴ Similarly, the WGAD has found that the "criminal offence of 'enemy

589 *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996).

590 HRC, WGAD, Opinion No. Opinion No. 56/2017 (Thailand), A/HRC/WGAD/2017/56, para. 49.

591 HRC, WGAD, Opinion No. 41/2017 (Turkey), A/HRC/WGAD/2017/41, para. 98.

592 HRC, WGAD, Opinion No. 75/2017 (Viet Nam), A/HRC/WGAD/2017/75, para. 40.

593 HRC, WGAD, Opinion No. 11/2018 (Pakistan and Turkey), A/HRC/WGAD/2018/11, para. 74.

594 HRC, WGAD, Opinion No. 41/2017 (Turkey), A/HRC/WGAD/2017/41, para. 103.

propaganda', is extremely vague and may cover conduct which is lawful according to international human rights standards, as in the case of the preparation of documents clearly calling a political system into question"⁵⁹⁵.

Fabricated charges

Detention resulting from fabricated charges to silence activities in defence of minority rights is arbitrary.⁵⁹⁶

Freedom of Religion

The right to freedom of thought, conscience and religion, including the right to change one's religion, is absolute. In commenting on ICCPR Article 18, the HR Committee finds that the right is "far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others", it protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief and the terms "belief" and "religion" are to be broadly construed.⁵⁹⁷ The UN General Assembly has declared that the right to freedom of thought, conscience, religion or belief includes the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;

595 CHR, WGAD, Opinion No. 1/1998 (CUBA), E/CN.4/1999/63/Add.1, para. 13(a).

596 HRC, WGAD, Opinion No. 59/2013 (Republic of Azerbaijan), A/HRC/WGAD/2013/59, para. 66.

597 HR Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, paras. 1-2.

- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief.⁵⁹⁸

Indigenous peoples have the right to

manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.⁵⁹⁹

While the right to “manifest” religion or belief is not an absolute right and may be limited, ICCPR article 18(3) is to be strictly interpreted:

restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the [ICCPR], such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The [HR] Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.⁶⁰⁰

598 *UN Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, article 6.

599 *UN Declaration on the Rights of Indigenous Peoples*, article 12.

600 HR Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, para. 8.

Conscientious Objection

A deprivation of liberty in response to a genuinely held religious and conscientious beliefs as Jehovah's Witnesses in refusing to enlist in military service violates the absolutely protected right to hold or adopt a religion or belief under UDHR article 18 and ICCPR article 18 (1) and is therefore arbitrary.⁶⁰¹

Coercion to renounce one's beliefs

The imposition of "re-education through labour" is a coercive measure to undermine freedom of religion or belief⁶⁰² as is detention as a pretext for attempting to force the detainees to sign a renunciation of their beliefs.⁶⁰³

Banning of certain religions or religious beliefs

The WGAD has found arbitrary detentions for being members of various banned or otherwise disapproved religious minorities, including the Falun Gong in China⁶⁰⁴, the Unified Buddhist Church in Viet Nam⁶⁰⁵, Evangelical Christians in Laos⁶⁰⁶, members of the banned Al Arqam Islamic sect in Malaysia⁶⁰⁷, and the Baha'i in Iran⁶⁰⁸

601 HRC, WGAD, Opinion No. 40/2018 (Republic of Korea), A/HRC/WGAD/2018/40, para.

602 CHR, WGAD, Opinion No. 21/2003 (China), E/CN.4/2005/6/Add.1, para. 18.

603 CHR, WGAD, Opinion No. 26/2000 (Lao People's Democratic Republic), E/CN.4/2001/14/Add.1, para. 12.

604 CHR, WGAD, Opinion No. 21/2003 (China), E/CN.4/2005/6/Add.1

605 CHR, WGAD Opinion No. 11/2002 (Viet Nam), E/CN.4/2002/77/Add.1.

606 CHR, WGAD, Opinion No. 26/2000 (Lao People's Democratic Republic), E/CN.4/2001/14/Add.1.

607 CHR, WGAD Opinion No. 4/1997 (Malaysia), E/CN.4/1998/44/Add.1.

608 HRC, WGAD Opinion No. 34/2008 (Iran), A/HRC/13/30/Add.1.

Freedom of Peaceful Assembly and Association

Freedom of assembly includes the right to peaceful assemblies in many forms including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs whether they are stationary or mobile.⁶⁰⁹ The freedom of association includes the right to feely associated with others and join unions for the protection of one's interests.⁶¹⁰ The rights to peaceful assembly and association under ICCPR articles 21 and 22 may be restricted only for the purpose of protecting national security, public safety public order, public health or morals or the rights and freedoms of others. Any restrictions must conform to the principles of legality, necessity and proportionality – it must be the least intrusive instrument among those which might achieve the legitimate purpose, and it must be proportionate to the interest involved.⁶¹¹

Being a member of a human rights organization

The conduct of individuals stating views against an "electoral referendum", distributing propaganda in support of their beliefs, and belonging to a human rights organization is simply legitimate exercise of the rights set out in UDHR articles 19, 20 and 21 and ICCPR articles 19, 21 and 22.⁶¹²

Associating with a banned television network

Detaining persons on the basis of real or alleged ties with a banned television network is arbitrary as it violates UDHR article 20 and ICCPR article 22.⁶¹³

609 ICCPR article 21.

610 ICCPR article 22.

611 HR Committee, *CCPR General Comment No. 27(1999); Article 12, Freedom of Movement*, para. 14; OSCE Guidelines, para. 2.4.

612 HRC, WGAD, Opinion No. 10/1993 (Syrian Arab Republic), E/CN.4/1994/27, p. 55; Opinion No. 15/2010 (Turkmenistan), A/HRC/16/47/Add.1, p. 85; Opinion No. 45/2016 (Cambodia), A/HRC/WGAD/2016/45, para. 47.

613 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 35.

Freedom of movement

The right to freedom of movement includes the right of individuals within a State to move freely and choose a residence, the right of anyone to leave a country, and the right of anyone to return to their country.⁶¹⁴

The right to take part in public affairs

The right to engage in public affairs includes the right to take part in the government of one's country, either directly or through chosen representatives, to vote and be elected in genuine, periodic elections by universal and equal suffrage, and to have equal access to public service.⁶¹⁵ Citizens also take part in the conduct of public affairs "by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves".⁶¹⁶

A deprivation of liberty is a violation of UDHR, article 21 and ICCPR, article 25 and, therefore, arbitrary, where imposed, for example, for activist work promoting the rights of women⁶¹⁷ or for engaging in advocacy relating directly to government policies⁶¹⁸.

614 ICCPR article 12.

615 UDHR, article 21; ICCPR, article 25; ICERD, article 5(c); ICMW, article 41; CRPD, article 29; ACHR, article 23; Convention of Belém Do Pará, article 4(j); Arab Charter on Human Rights, article 24(2); Banjul Charter, article 13; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African (Maputo Protocol)*, articles 9, 18; *UN Declaration on Human Rights Defenders*, article 8; *UN Declaration on The Rights of Indigenous Peoples*, articles 3,4,18; *UN Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, articles 2, 3.

616 HR Committee, *CCPR General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, para. 8; HRC, WGAD, Opinion No. 1/2016 (Islamic Republic of Iran), A/HRC/WGAD/2016/1, para. 36.

617 HRC, WGAD, Opinion No. 1/2016 (Islamic Republic of Iran), A/HRC/WGAD/2016/1, para. 36.

618 HRC, WGAD, Opinion No. 45/2018 (Viet Nam), A/HRC/WGAD/2018/45, para. 49.

CATEGORY III – VIOLATION OF RIGHTS OF TO A FAIR TRIAL

The WGAD will find a violation of the right to freedom from arbitrary deprivation of liberty when “the total or partial non-observance of the international norms relating to the right to a fair trial, established in the [UDHR] and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character”.⁶¹⁹

Violation of the right to be informed of reasons for arrest and charges and to be brought promptly before a judge

Where a detainee was arrested without an arrest warrant, not promptly informed of the reasons for the arrest and detention, detained incommunicado for 13 days before being brought before a judge, all in violation of ICCPR article 9, the arrest and detention were found to be without legal basis and therefore arbitrary under category I.⁶²⁰

The right to be promptly informed of charges concerns notice of criminal charges and this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.⁶²¹

619 HRC, *Methods of work of the Working Group on Arbitrary Detention*, A/HRC/36/38, 13 July 2017, para. 8(c).

620 HRC, WGAD, Opinion No. 58/2018 (Morocco), A/HRC/WGAD/2018/58, para. 43.

621 HRC, WGAD, Opinion No. No. 4/2018 (Turkmenistan), A/HRC/WGAD/2018/4, para.

Torture, cruel or inhumane treatment

In communications raising allegations of torture, the WGAD refers these cases to the Special Rapporteur on torture, but will also consider whether the State's use of torture undermined fair trial rights, thereby resulting in an arbitrary deprivation of liberty. Similarly, the WGAD refers allegations concerning dire health conditions to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health for consideration and appropriate action. In the view of the WGAD,

it is not possible for a person who is subjected to torture or other forms of ill-treatment or punishment to be capable of preparing an adequate defence for a trial that respects the equality of both parties before the judicial proceedings. Moreover, the extraction of forced confessions, in violation of article 5 of the Universal Declaration and the *jus cogens* norm that it enshrines, cannot be accepted under international human rights law. Torture or ill-treatment of detainees under prosecution is a denial of the fundamental principles of a fair trial.⁶²²

In the case of a minor who was subjected to excessive use of force during arrest, badly beaten, stripped naked, had cold water poured over him and was threatened with death, the WGAD found the non-observance of the international norms relating to the right to a fair trial established in the UDHR and in the relevant international instruments accepted by the State of Israel, is of such gravity as to give the deprivation of liberty of the minor an arbitrary character (category III).⁶²³ The WGAD held that "the use of a taser on an unarmed, non-violent individual, let alone a child, is an extremely serious abuse of power, entirely lacking in necessity and proportionality, constituting a prima facie breach of article 37 of the Convention on the Rights of the Child".⁶²⁴

622 HRC, WGAD, Opinion No. 62/2018 (China), A/HRC/WGAD/2018/62, para. 78.

623 HRC, WGAD, Opinion No. 3/2017 (Israel), A/HRC/WGAD/2017/3, para. 35. See also, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principles 4-9; *Code of Conduct for Law Enforcement Officials*, articles 2,3, and 5.

624 HRC, WGAD, Opinion No. 3/2017 (Israel), A/HRC/WGAD/2017/3, para. 30.

The WGAD has found that inhuman treatment that was intended to weaken the detainee and to force him to make a confession, in violation of ICCPR articles 7, 10 (1) and 14 (3), CAT articles 1 and 4, UDHR article 5, *Banjul Charter* article 5, and principles 6 and 21 (2) of the Body of Principles violated the detainee's rights to a fair trial as well as his right under ICCPR article 14 (3) (g) not to be compelled to incriminate himself.⁶²⁵

Harsh conditions of detention and the denial of medical care violate UDHR articles 5 and 25 and ICCPR articles 7 and 10.⁶²⁶

Incommunicado detention

Holding a person incommunicado breaches the right to challenge the lawfulness of detention before a judge by placing them out of the protection of the law and by denying them effective access to legal assistance, in violation of UDHR articles 8, 10 and 11.⁶²⁷

Violation of right to legal assistance and adequate time and facilities to prepare a defence

The right to have access to legal assistance of one's choosing applies from the moment of arrest, in order to ensure an effective exercise of the right to challenge the legality of detention before a court.⁶²⁸

The inability of a detainee to communicate with his lawyer at any stage of the proceedings was a violation of the right enshrined in ICCPR article 14 (3) (b), which states that the accused is entitled "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".⁶²⁹ The denial of access to a lawyer during the

625 HRC, WGAD, Opinion No. 58/2018 (Morocco), A/HRC/WGAD/2018/58, para. 47.

626 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 40.

627 HRC, WGAD, Opinion No. 93/2017 (Saudi Arabia), A/HRC/WGAD/2017/93, para. 40, 49; Opinion No. 56/2016 (Afghanistan and United States of America), A/HRC/WGAD/2016/56, para. 43.

628 HRC, WGAD, Opinion No. 4/2018 (Turkmenistan), A/HRC/WGAD/2018/4, para. 54.

629 HRC, WGAD, Opinion No. 58/2018 (Morocco), A/HRC/WGAD/2018/58, para. 48..

investigation, as well as the determination of 45-day extensions of pretrial detention violated the detainee's rights under ICCPR article 14 (3) (b) and (d).⁶³⁰ With respect to a minor who was denied legal assistance prior to and during his interrogation, the WGAD found a violation of CRC article 37 (d), ICCPR article 14 (3) (b), principle 17.1 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and principle 9 of the *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*.⁶³¹

A trial resulting in a conviction and a sentence to three years' imprisonment, which lasted only 10 minutes is

a blatant violation of the guarantees of a fair trial and of equality of arms as enshrined in [ICCPR] article 14 since a trial of only 10 minutes cannot, under any circumstances, be said to fulfil such guarantees. In such a short period of time, it would have been impossible for the prosecution to present its case and witnesses, let alone for [the accused] and his lawyers to present their defence, examine the prosecution witnesses and present their own witnesses. In fact, it appears to the Working Group that the [hearing] was nothing more than a mere "rubber stamping" of a predetermined decision.⁶³²

The denial of full access to the case file to the lawyer of an accused is a serious violation of the principle of equality of arms under UDHR article 10 and CCPR article 14 (1) and (3) (b) concerning the right to a fair hearing and to have adequate time and facilities for the preparation of his or her defence in full equality.⁶³³

630 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 38.

631 HRC, WGAD, Opinion No. 3/2017 (Israel), A/HRC/WGAD/2017/3, para. 31.

632 HRC, WGAD, Opinion No. 4/2018 (Turkmenistan), A/HRC/WGAD/2018/4, paras. 70-71.

633 HRC, WGAD, Opinion No. 4/2018 (Turkmenistan), A/HRC/WGAD/2018/4, para. 72.

Automatic or excessive pre-trial detention

A failure to provide an individualized review of the necessity for pre-trial detention or a consideration of alternatives to pre-trial detention, such as bail, violates ICCPR article 9(3). Automatic pretrial detention regimes which preclude consideration — or reconsideration on a periodic basis — of a detainee’s individual circumstances, a failure to provide an individualized review of the necessity for pre-trial detention or a consideration of alternatives to pre-trial detention, such as bail, are incompatible with international standards.⁶³⁴ The WGAD has stated that

[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as “public security”. Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.⁶³⁵

Regimes that make pretrial detention automatic based on the offence charged and provide no opportunity for judicial review have no legal basis and may also be arbitrary under Category I.⁶³⁶

CATEGORY IV – VIOLATION OF RIGHTS OF ASYLUM SEEKERS

The right to seek asylum in other countries from persecution, serious human rights violations and other serious harm is a universal human right, enshrined in UDHR, article 14, and in the CSR and its 1967 Protocol and must not be criminalized.⁶³⁷ Detaining individuals in the course of immigration proceedings is not *per se* arbitrary. Asylum seekers who unlawfully enter a

634 HRC, WGAD, Opinion No. 61/2018 (Phillipines), A/HRC/WGAD/2018/61, paras. 47, 48.

635 HRC, WGAD, Opinion No. 17/2018 (Romania), A/HRC/WGAD/2018/17, para. 37.

636 HRC, WGAD, Opinion No. 61/2018 (Phillipines), A/HRC/WGAD/2018/61, para. 53.

637 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 9.

State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.⁶³⁸ As the HR Committee warns, to detain them further while their claims are being resolved, however, would be arbitrary in the absence of particular reasons specific to the individual, such as

an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.⁶³⁹

Under Category IV, the WGAD will find the detention of asylum seekers, immigrants and refugees arbitrary when they are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.⁶⁴⁰ To avoid arbitrariness, States' administrative custody of individuals must be prescribed by law, justified as reasonable, necessary and proportionate in the light of the circumstances, reassessed as it extends in time, must not be punitive in nature and must be based on the individual assessment of each individual.⁶⁴¹ Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.⁶⁴²

The WGAD elaborates on the principles of reasonableness, necessity, and proportionality in its *Deliberation No. 5*:

638 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 18.

639 HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 18.

640 HRC, *Methods of work of the Working Group on Arbitrary Detention*, A/HRC/36/38, 13 July 2017, para. 8(d).

641 HRC, WGAD, Opinion No. 42/2017 (Australia), A/HRC/WGAD/2017/42, para. 30; HR Committee, *CCPR General Comment No. 35, Article 9: Liberty and security of person*, 16 December 2014, CCPR/C/GC/35, para. 18; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 20.

642 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para. 36.

The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention. Such reasons that would legitimize the detention include the necessity of identification of the person in an irregular situation or risk of absconding when their presence is necessary for further proceedings.

The element of necessity requires that the detention be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person who is in an irregular migration situation.

The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned. To ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered.⁶⁴³ [footnotes omitted]

The principle of non-refoulement must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.⁶⁴⁴

Blanket policy of mandatory detention of immigrants

Detention must comply with the principle of proportionality and as such, automatic and/or mandatory detention in the context of migration is arbitrary.⁶⁴⁵ The WGAD notes that a policy of mandatory immigration detention breaches ICCPR article 9 as it fails to respect the requirements of reasonableness, necessity and proportionality of detention as no

643 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, paras. 22-24.

644 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 43.

645 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 19.

individualized assessment of the need to detain is carried out and breaches the right to seek asylum as envisaged in international law.⁶⁴⁶

Failure to provide opportunity for judicial or administrative review

Detention in the immigration context must be ordered or approved by a judicial authority and there should be automatic, regular and judicial, not only administrative, review of such detention in each individual case which would extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review.⁶⁴⁷ The State must demonstrate that immigration detention is necessary and proportionate, and that alternatives to detention have been adequately considered and exhausted.⁶⁴⁸ Any detention in the course of migration proceedings that makes it impossible to mount an effective challenge to the continued detention is arbitrary.⁶⁴⁹ The ability to challenge one's detention while detained in administrative immigration detention does not abrogate the State's responsibility to provide automatic, periodic review at set time limits.⁶⁵⁰ A failure to ensure such periodic, automatic review of detention is a breach of ICCPR article 9.⁶⁵¹

Because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. Where an immigration system permits indefinite detention of asylum, refugee and regular migrants until they obtain immigration status, a habeas action aimed at challenging illegal detention does not provide a realistic avenue for redress because under domestic law the detention is lawful.⁶⁵²

646 HRC, WGAD, Opinion No. 42/2017 (Australia), A/HRC/WGAD/2017/42, paras. 34, 36.

647 HRC, WGAD, Opinion No. 42/2017 (Australia), A/HRC/WGAD/2017/42, para. 40; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, paras. 12-24.

648 HRC, WGAD, Opinion No. 15/2014 (Canada), A/HRC/WGAD/2014/15, para. 24.

649 HRC, WGAD, Opinion No. 42/2017 (Australia), A/HRC/WGAD/2017/42, para. 20.

650 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 60.

651 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 60.

652 HRC, WGAD, Opinion No. 20/2018 (Australia), A/HRC/WGAD/2018/20, para. 64.

Access to justice in immigration proceedings should not depend on the generosity of legal service providers; it should be guaranteed and funded by the Government.⁶⁵³

Prolonged or indefinite detention

A maximum detention period in the course of migration proceedings must be set by legislation, and such detention shall be permissible only for the shortest period of time.⁶⁵⁴ Upon the expiry of the detention period set by law, the detained person must automatically be released.⁶⁵⁵ Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.⁶⁵⁶

The inability of a State party to carry out the expulsion of an individual does not justify detention beyond the shortest period of time or where there are alternatives to detention, and under no circumstances indefinite detention.⁶⁵⁷

Detention used as a deterrent

Detention cannot be used as a punitive or dissuasive measure, but only as a last resort and for the shortest possible period of time.⁶⁵⁸ The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.⁶⁵⁹

653 HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, para. 39.

654 HRC, WGAD, Opinion No. 56/2011 (Lebanon), A/HRC/WGAD/2011/56, para. 13; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 25.

655 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 25.

656 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, paras. 26.

657 HRC, WGAD, Opinion No. 15/2014 (Canada), A/HRC/WGAD/2014/15, para. 23.

658 HRC, WGAD, Opinion No. 56/2011 (Lebanon), A/HRC/WGAD/2011/56, para. 13; HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, para. 27.

659 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para. 22.

Failure to provide realistic alternatives to detention

To ensure that detention in the course of immigration proceedings is an exceptional measure used only as a last resort, consideration must be given to alternatives.⁶⁶⁰ Alternatives must not be dependent on an individual's ability to pay for them.⁶⁶¹ To offer only unrealistic alternatives to detention [such as setting bail too high to afford] which is "to disregard the requirement to make detention in the course of immigration proceedings an exception, is a serious breach of [ICCPR] article 9".⁶⁶² Alternatives to detention must not become alternatives to release.⁶⁶³ In its 2017 report on a visit to the United States, the WGAD expressed concern that

many "alternatives to detention", such as the imposition of excessive bond amounts, ankle bracelets and electronic monitoring, are more appropriate to criminal settings and are not true alternatives that would allow an individual to be released, and that some of these "alternatives" may affect other human rights, such as the prohibition of discrimination and the presumption of innocence and of the inherent dignity of individuals.⁶⁶⁴

Detention of migrants in prisons or by police

Holding migrants in prisons or in situations tantamount to that of detainees or prisoners is not in conformity with the standards and principles of IHRL, and more specifically violates UDHR article 9 and ICCPR articles 9 and 10.⁶⁶⁵

660 HRC, WGAD, Opinion No. Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 59; Opinion No. 32/2012 (Iraq), A/HRC/WGAD/2012/32, para. 34.

661 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 59.

662 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 59.

663 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para. 24.

664 HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, para. 30.

665 HRC, WGAD, Opinion No. 16/2012 (Iraq), A/HRC/WGAD/2012/16, paras. 16-17; Opinion No. 32/2012 (Iraq), A/HRC/WGAD/2012/32, paras. 30,36.

Inhumane conditions

It is not permissible to house irregular migrants, asylum-seekers and refugees in substandard conditions of detention, for example, in overcrowded facilities that affect their health, including mental health.⁶⁶⁶ When private companies have day-to-day operational control of detention facilities, it raises suspicions of inadequate state protection.⁶⁶⁷ The combination of harsh conditions, protracted periods of closed detention and uncertainty about the future creates serious physical and mental pain and suffering.

Detention of unaccompanied children and families

The best interests of the child is to be a primary consideration in all actions concerning children. Accordingly, the deprivation of liberty of children should be consistent with the best interests of the child, which means it should be prohibited.⁶⁶⁸ The detention of children on the basis of their own, or their parents' migration or residency status (or lack thereof), is not in the best interests of the child. Furthermore, when the child's best interests require keeping the family together, the requirement not to deprive the child of liberty extends to the child's parents and family members and requires the authorities to choose alternative measures to detention for the entire family.⁶⁶⁹

666 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), 13 February 2015, para. 24.

667 HRC, WGAD, No. 8/2015 (Australia), A/HRC/WGAD/2015/8, para. 23; HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, paras. 34-36.

668 HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, para. 42.

669 HRC, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, A/HRC/36/37, 17 July 2017, para. 46.

Discriminatory policies and/or procedures

Detaining someone solely on the basis of a distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, economic position, birth, nationality or any other status will always be arbitrary.⁶⁷⁰

State diversion of asylum seekers to Third Countries

The housing of asylum seekers in a Third Country does not relieve a State from its international law obligations. In *Reza Raessi v Australia and Papua New Guinea*, the WGAD found that the transfer of asylum seekers from Australia to a centre in Papua New Guinea, as an arrangement agreed by two Convention States, in which, for indefinite periods, detainees are housed in inhumane conditions, with no freedom of movement, denied access to family and legal counsel, and with an inadequate framework for review of the decision to detain, does not extinguish the legal responsibility of the transferring State for the protection of the asylum seekers affected by the arrangements.⁶⁷¹ The WGAD stated that

[d]omestic law cannot erect barriers such as immunities, jurisdictional limitations, procedural hurdles or defences based on an “act of State doctrine” in any form that would limit the effectiveness of international law. One basis for jurisdiction is the exercise of control over individuals; under international law, such control exists whenever an act attributable in the widest sense to a State has an adverse effect on anyone anywhere in the world.⁶⁷²

670 WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, paras. 21, 32.

671 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52.

672 HRC, WGAD, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para. 51.

CATEGORY V – DISCRIMINATION ON PROTECTED GROUNDS

The right to non-discrimination, equality before the law and equal protection of the law, without discrimination, constitute a basic and general principle relating to the protection of human rights.⁶⁷³ Under category V, the WGAD will find a deprivation of liberty arbitrary for reasons of discrimination based on status, and which is aimed towards or can result in ignoring the equality of human rights. In considering whether the source of a communication has demonstrated a prima facie case of deprivation of liberty on discriminatory grounds, the WGAD takes into account a number of factors, including whether:

- (a) The deprivation of liberty was part of a pattern of persecution against the detained person (e.g. a person was targeted on multiple occasions through previous detention, acts of violence or threats);
- (b) Other persons with similarly distinguishing characteristics have also been persecuted (e.g. several members of a particular ethnic group are detained for no apparent reason, other than their ethnicity);
- (c) The authorities have made statements to, or conducted themselves toward, the detained person in a manner that indicates a discriminatory attitude (e.g. female detainees threatened with rape or forced to undergo virginity testing, or a detainee is held in worse conditions or for a longer period than other detainees in similar circumstances);
- (d) The context suggests that the authorities have detained a person on discriminatory grounds or to prevent them from exercising their human rights (e.g. political leaders detained after expressing their political opinions or detained for offences that disqualify them from holding political office);
- (e) The alleged conduct for which the person is detained is only a criminal offence for members of his or her group (e.g. criminalization of consensual same-sex conduct between adults).⁶⁷⁴

673 HR Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 1.

674 HRC, *Report of the Working Group on Arbitrary Detention*, A/HRC/36/37, 19 July 2017,

Discrimination on the basis of national origin or ethnic identity

The targeting of foreign nationals for detention or a deprivation of liberty based solely on ethnic or national identity is a violation of UDHR articles 2 and 7 and ICCPR articles 2(1) and 26 and an arbitrary deprivation of liberty under WGAD category V.⁶⁷⁵ In a case in which laws provided for automatic detention of a specific group of individuals accused of certain offences, in this case an indigenous migrant woman who was not fluent in Spanish and therefore was at a disadvantage in terms of her ability to exercise her rights to an adequate defence and due process, causing her to be treated in a disproportionately discriminatory manner, the WGAD found a violation of UDHR articles 1, 2 and 7 and ICCPR articles 2 and 26.⁶⁷⁶

Discrimination on the basis of religion

The WGAD has found an arbitrary deprivation of liberty under Category V where an individual was targeted for detention and particularly severe torture, in part because of their faith.⁶⁷⁷ In a case concerning the arrest, harassment, detention and torture by the Islamic Republic of Iran of 24 individuals, motivated solely by their religious beliefs as members of the Baha'i faith, the WGAD found a violation of their right to freedom of religion under UDHR article 18 and ICCPR article 18, their rights to equality before the law and to the equal protection of the law under UDHR articles 2 and 7 and ICCPR articles 2 and 26 and a violation of their right as a religious

para. 48.

675 HRC, WGAD, Opinion No. 58/2018 (Morocco), A/HRC/WGAD/2018/58, para. 51; Opinion No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3, para. 38; Opinion No. 52/2018 (Islamic Republic of Iran), A/HRC/WGAD/2018/52, para. 82; No. 54/2018 (China and the Democratic People's Republic of Korea), A/HRC/WGAD/2018/54, para. 50; Opinion No. 84/2018 (Turkey) A/HRC/WGAD/2018/84, para. 72.

676 HRC, WGAD, Opinion No. 35/2021 (Mexico), A/HRC/WGAD/2021/35, para. 63.

677 HRC, WGAD, Opinion No. No. 29/2017 (Uzbekistan), A/HRC/WGAD/2017/29, para. 71; Opinion No. 89/2017 (United States of America), A/HRC/WGAD/2017/89; Opinion No. 36/2017 (Iraq), A/HRC/WGAD/2017/36; Opinion No. 84/2018 (Turkey), A/HRC No. 84/2018, A/HRC/WGAD/2018/84.

minority under ICCPR article 27 not to be denied the ability to profess and practise their own religion, constituting arbitrary deprivation of liberty under WGAD categories II and V.⁶⁷⁸

Detention because of one's religious objection to military service is discrimination on the basis of religious belief, in violation of international law, especially ICCPR article 26 and is therefore arbitrary under WGAD category V.⁶⁷⁹

Discrimination on the basis of citizenship status

While citizenship is not specifically mentioned in the text of Category V, the WGAD has included it under the aegis of "any other status", finding, for example, arbitrary deprivation of liberty in cases where, while Australian citizens were able to challenge administrative detention, non-citizens were not, leaving them with no effective remedy against their continued administrative detention.⁶⁸⁰

Discrimination on the basis of health or physical impairment

The involuntary committal or internment of persons purely on the grounds of the existence of an impairment or perceived impairment is prohibited and an arbitrary deprivation of liberty.⁶⁸¹ The WGAD has stated that

any instance of deprivation of liberty, including internment in psychiatric hospitals, must meet the standards set out in [ICCPR] article

678 HRC, WGAD, Opinion No. 09/2017 (Islamic Republic of Iran), A/HRC/WGAD/2017/9, para. 27. See also HRC, WGAD, Opinion No. 62/2017 (Kazakhstan), A/HRC/WGAD/2017/62.

679 HRC, WGAD, Opinion No. 43/2017 (Tajikistan), A/HRC/WGAD/2017/43, para. 36; Opinion No. 69/2018 (Republic of Korea), A/HRC/WGAD/2018/69.

680 HRC, WGAD, Opinion No. 21/2018 (Australia), A/HRC/WGAD/2018/21, 16 June 2017, para. 78; Opinion No. 20/2018 (Australia), A/HRC/WGAD/2018/20, para. 63; Opinion No. 50/2018 (Australia), A/HRC/WGAD/2018/50, para. 80. See also HRC, WGAD Opinion No. 89/2017 (United States of America), A/HRC/WGAD/2017/89.

681 HRC, WGAD, Opinion No. 68/2017 (Trinidad and Tobago), A/HRC/WGAD/2017/68; HRC, WGAD, Opinion No. 8/2018 (Japan), A/HRC/WGAD/2018/8.

9 ... where a person with a disability is deprived of his or her liberty through any process, that person is, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of person, reasonable accommodation and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities.⁶⁸²

Discrimination on the basis of economic condition

The practice of posting excessively large bonds, which result in continued detention, does not provide an alternative to detention to those who are detained, and is discriminatory, as it disproportionately affects those of humble economic backgrounds.⁶⁸³

Discrimination on the basis of language

A failure to provide a Spanish-speaking detainee with the assistance of counsel and access to the services of a translator or interpreter or legal materials in Spanish, thereby adversely affecting his ability to challenge the legality of his continued detention, constitutes a serious violation of article ICCPR 9 and is also discriminatory on the basis of status as a member of a linguistic minority.⁶⁸⁴

682 HRC, WGAD, Opinion No. 68/2017 (Trinidad and Tobago), A/HRC/WGAD/2017/68, para. 26.

683 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72, para. 68.

684 HRC, WGAD, Opinion No. 72/2017 (United States of America), A/HRC/WGAD/2017/72.

Discrimination on the basis of sexual orientation

Deprivation of liberty on the basis of sexual orientation is a violation of rights to equality before the law, equal protection of the law and freedom from discrimination under UDHR articles 2 and 7 and ICCPR articles 2 and 26 and thus also arbitrary according to WGAD categories II and V.⁶⁸⁵

Discrimination on the basis of occupation

Human Rights Defenders

Being a human rights defender is a status protected by ICCPR article 26.⁶⁸⁶ Where an arrest and detention is a targeted action by the authorities against individuals because of their peaceful activities as human rights defenders, this is an arbitrary deprivation of liberty under Category V.⁶⁸⁷

Journalists

Detention based solely on one's alleged journalistic affiliation is a violation of UDHR articles 2 and 7 and ICCPR articles 2 (1) and 26 and is therefore arbitrary under WGAD Category V.⁶⁸⁸

685 HRC, WGAD, Opinion No. 14/2017 (Cameroon), A/HRC/WGAD/2017/14, para. 50; See also HRC, WGAD Opinion Nos. 25/2009, 42/2008, 22/2006 and 7/2002.

686 HRC, WGAD, Opinion No. 5/2021 (Kazakhstan), A/HRC/WGAD/2021/5, para. 51.

687 HRC, WGAD Opinion No. 45/2021 (Egypt), A/HRC/WGAD/2021/45; Opinion No. 4/2018 (Turkmenistan), A/HRC/WGAD/2018/4, para. 74; Opinion No. 82/2018 (Egypt), A/HRC/WGAD/2018/82; Opinion No. 26/2017 (Viet Nam), A/HRC/WGAD/2017/26. See UN Declaration on Human Rights Defenders.

688 HRC, WGAD, Opinion No. 63/2018 (Egypt), A/HRC/WGAD/2018/63, para. 45; Opinion No. 31/2018 (Morocco), A/HRC/WGAD/2018/31, para. 51.

Discrimination on the basis of perceived political opinion

Deprivation of liberty based on political or other opinion is contrary to UDHR articles 2 and 7 and ICCPR articles 2(1) and 26, and in violation of rights to equality before the law and equal protection of the law and is therefore arbitrary under WGAD category V.⁶⁸⁹ In the view of WGAD, when a detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.⁶⁹⁰ In an opinion concerning four human rights defenders in Egypt, the WGAD a deprivation of liberty on discriminatory grounds owing to both their status as human rights defenders and on the basis of their political or other opinions in seeking to hold the authorities to account.⁶⁹¹

Discrimination on the basis of “other status”

Discrimination against a person charged with a certain offense

Where constitutional provisions allowing automatic pretrial detention create two categories of defendants, i.e., persons accused of offences for which detention is not automatic, who can benefit from alternative measures, such as bail, and persons who are accused of criminal offences for which such alternatives are not permitted, such distinction discriminates against defendants, in a manner that ignores the equality of human rights, on the basis of “other status”, resulting in arbitrary deprivation of liberty.⁶⁹²

689 HRC, WGAD, Opinion No. 9/2018 (Cambodia), A/HRC/WGAD/2018/9; Opinion No. 10/2018 (Saudi Arabia), A/HRC/WGAD/2018/10; Opinion No. 15/2018 (Equatorial Guinea), A/HRC/WGAD/2018/15.

690 HRC, WGAD, Opinion No. 45/2021 (Egypt), A/HRC/WGAD/2021/45, para. 104.

691 HRC, WGAD, Opinion No. 45/2021 (Egypt), A/HRC/WGAD/2021/45, para. 105.

692 HRC, WGAD, Opinion No. No. 75/2018 (Mexico), A/HRC/WGAD/2018/75, para. 82; Opinion No. 01/2018 (Mexico), U.N. Doc. A/HRC/WGAD/2018/1, para. 69.

Discrimination in application of amnesty law

Differential treatment in the application of an amnesty law breaches the principle of equality before the law, in violation of ICCPR article 26 and UDHR article 1, and is arbitrary under WGAD category V.

APPENDIX A: INTERNATIONAL STANDARDS

UN Instruments

UNIVERSAL DECLARATION ON HUMAN RIGHTS (UDHR)

1. All human beings are born free and equal in dignity and rights...
2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
3. Everyone has the right to life, liberty and security of person.
5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
6. Everyone has the right to recognition everywhere as a person before the law.
7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
9. No one shall be subjected to arbitrary arrest, detention or exile.

-
10. 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.
-
11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.
-
13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.
-
14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
-
18. 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.
-
19. 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.
-
20. (1) Everyone has the right to freedom of peaceful assembly and association.
-
21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

-
29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

(3) Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

4. (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

6. (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...
(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.

-
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.
-
8. (1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
- (2) No one shall be held in servitude.
-
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.
-
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.

11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

12. (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence...

14. (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.

15. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

16. Everyone shall have the right to recognition everywhere as a person before the law.

17. (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.

18. (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...

19. (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.

20. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

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.

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.

24. (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;...

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, 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.

OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

2. Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

15. (1) States Parties shall accord to women equality with men before the law.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
- (a) The right to equal treatment before the tribunals and all other organs administering justice;
 - (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
 - (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
 - (d) Other civil rights, in particular:...(viii) The right to freedom of opinion and expression;(ix) The right to freedom of peaceful assembly and association;...(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.
-

-
6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICMW)

7. States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
-
13. (2) Migrant workers and members of their families 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 their choice.

(3) The exercise of the right provided for in paragraph 2 of the present 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 reputation of others; (b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals; (c) For the purpose of preventing any propaganda for war; (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

16. (1) Migrant workers and members of their families shall have the right to liberty and security of person.

(2) Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

17. (1) Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

(2) Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

(3) Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

(4) During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

(5) During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

(6) Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

(7) Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

(8) If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

-
26. (1) States Parties recognize the right of migrant workers and members of their families: (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;...
- (2) No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others.
-

-
40. (1) Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.
(2) No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.
-
41. (1) Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.
(2) The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.
-
83. Each State Party to the present Convention undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.
-

UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

2. (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.
-
3. (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
-
6. (1) States Parties recognize that every child has the inherent right to life.
-
9. (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...
- (3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

13. (1) The child 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 the child's choice.

(2) The exercise of this right may 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; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

15. (1) States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

(2) No restrictions may be placed on the exercise of these rights 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.

37. States Parties shall ensure that:... ..(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

39. States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

40. (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- (2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
- (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings.

UN CONVENTION RELATING TO THE STATUS OF REFUGEES (CSR)

16. (1) A refugee shall have free access to the courts of law on the territory of all Contracting States.
(2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
(3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.
-
32. (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.
-

UN CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE (ICPPED)

17. (2) Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:... (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
-
24. (1) For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
- (2) Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.
- (3) Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.
- (4) Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
- (5) The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.

(6) Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

(7) Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

1. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

3. The principles of the present Convention shall be: (a) Respect for inherent dignity...

8. States Parties undertake to adopt immediate, effective and appropriate measures: (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

14. (1) States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

(2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

-
29. States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to: (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected... (b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

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 (DECLARATION ON HUMAN RIGHTS DEFENDERS)

1. Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.
-

-
5. For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organizations, associations or groups; (c) To communicate with non-governmental or intergovernmental organizations.
-
6. Everyone has the right, individually and in association with others: (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.
-
7. Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.
-
8. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.
- (2) This includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.
-

9. (1) In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.
- (2) To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.
- (3) To the same end, everyone has the right, individually and in association with others, inter alia: (a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay; (b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments; (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

(4) To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.

(5) The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

12. (1) Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

(2) The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

(3) In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

13. Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

17. In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

UN DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF

6. In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia , the following freedoms: (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) To establish and maintain appropriate charitable or humanitarian institutions; (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) To write, issue and disseminate relevant publications in these areas; (e) To teach a religion or belief in places suitable for these purposes; (f) To solicit and receive voluntary financial and other contributions from individuals and institutions; (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
-

UN DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

2. (2) Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
- (3) Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
- (4) Persons belonging to minorities have the right to establish and maintain their own associations.
- (5) Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.
-
3. (1) Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
-

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

1. Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
-
2. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
-

-
3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
-
5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
-
7. (1) Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
(2) Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to an- other group.
-
8. (2) States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.
-
12. (1) Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
-

-
18. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
-
44. All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT

-
1. All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
-
2. Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.
-
3. There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.
-
4. Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.
-
5. (1) These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

(2) Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

6. No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

7. (1) States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

(2) Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

(3) Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

8. Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

9. The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

-
10. Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.
-
11. (1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
(2) A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
-
12. (1) There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody.
(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.
-
13. Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.
-
14. A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.
-

-
15. Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.
-
16. (1) Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
-
17. (1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
-
19. A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.
-
28. A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.
-
32. (1) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

(2) The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

33. (1) A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

35. (1) Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

36. (1) A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

-
37. A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.
-
38. A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.
-
39. Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

UN BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
-
5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

-
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
-
6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.
-
7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.
-
8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.
-
9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

UN CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

2. In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
-
3. Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
-

5. No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from: (a) Treaties to which a State is a party; (b) Customary international law; (c) The domestic law of each State.
-
3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation, as described below.
-

-
4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.
-
11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms.
-
12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.

To that end, States should: (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law; (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims; (c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.
-

-
15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
-
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

UN GUIDELINES ON THE ROLE OF PROSECUTORS

13. In the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
-
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
-

-
18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

2. 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.

Regional Instruments

AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (BANJUL CHARTER)

2. Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
-
3. (1) Every individual shall be equal before the law.
(2) Every individual shall be entitled to equal protection of the law.
-
4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
-

-
5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
-
6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
-
7. (1) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
- (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.
-
9. (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.
-
10. (1) Every individual shall have the right to free association provided that he abides by the law.
- (2) Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.
-

-
11. Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.
-
13. (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
-
19. All peoples shall be equal; they shall enjoy the same respect and shall have the same rights...
-

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

3. Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.
-
4. (1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
-
7. Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.
-
8. Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.
-
10. No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.
-

-
13. (1) Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
-
16. (1) State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.
-
17. (1) Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
- (2) State Parties to the present Charter shall in particular:
- (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment; (b) ensure that children are separated from adults in their place of detention or imprisonment; (c) ensure that every child accused of infringing the penal law: (i) shall be presumed innocent until duly recognized guilty; (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used; (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence; (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;...

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (MAPUTO PROTOCOL)

4. (1) Every woman shall be entitled to respect for her life and the integrity and security of her person.
-

-
8. Women and men are equal before the law and shall have the right to equal protection and benefit of the law...
-
9. (1) States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:...(c) women are equal partners with men at all levels of development and implementation of State policies and development programmes .
- (2) States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.
-
18. (2) States Parties shall take all appropriate measures to:
- (a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
-
22. The States Parties undertake to: (a) Provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training; (b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.
-
23. The States Parties undertake to:...(b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.
-
24. The States Parties undertake to: (a) Ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs; (b) Ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.
-

-
25. States Parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA

- I. (1) Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
- (2) Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.
-
- II. (1) No one shall be subject to arbitrary interference with his or her freedom of expression.
- (2) Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.
-
- IV. (1) Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN (AMERICAN DECLARATION)

- I. Every human being has the right to life, liberty and the security of his person.
-
- II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
-
- IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.
-

-
- XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.
-
- XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.
-
- XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.
- No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.
- Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.
-
- XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
-
- XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.
- No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.
- Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.
-

XXVI. Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)

1. (1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

5. (1) Every person has the right to have his physical, mental, and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

(3) Punishment shall not be extended to any person other than the criminal.

(4) 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.

(5) Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

(6) Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

-
7. (1) Every person has the right to personal liberty and security.
- (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
- (3) No one shall be subject to arbitrary arrest or imprisonment...
- (4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
- (5) Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
- (6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
-
8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

(2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; (b) prior notification in detail to the accused of the charges against him; (c) adequate time and means for the preparation of his defense; (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; (g) the right not to be compelled to be a witness against himself or to plead guilty; and (h) the right to appeal the judgment to a higher court.

(3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

(4) An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

(5) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

-
9. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.
-
10. Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.
-
13. (1) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
- (2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
- a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
- (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions....

(5) Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

15. The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

16. (1) Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

(2) The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

(3) The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

23. (1) Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;...

(2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

-
24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.
-
25. (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
- (2) The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.
-
27. (1) In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
- (2) The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
-

-
63. (1) If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELEM DO PARA)

3. Every woman has the right to be free from violence in both the public and private spheres.
-
4. Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: (a) The right to have her life respected; (b) The right to have her physical, mental and moral integrity respected; (c) The right to personal liberty and security; (d) The right not to be subjected to torture; (e) The rights to have the inherent dignity of her person respected and her family protected; (f) The right to equal protection before the law and of the law; (g) The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; (h) The right to associate freely; (i) The right of freedom to profess her religion and beliefs within the law; and (j) The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.
-
5. Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.
-

-
6. The right of every woman to be free from violence includes, among others:
 - a. The right of women to be free from all forms of discrimination; and
 - b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

OAS DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.
-
2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.
-
4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
-

-
10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.
 11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws," restrict freedom of expression and the right to information.
-

OAS DECLARATION OF CHAPULTEPEC

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
-

ARAB CHARTER ON HUMAN RIGHTS

3. (3) Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.
-

-
4. (2) In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14, paragraph 6, article 15, article 18, article 19, article 20, article 22, article 27, article 28, article 29 and article 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.
-
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 guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.
-
11. All persons are equal before the law and have the right to enjoy its protection without discrimination
-
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.
-
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.
-
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.

15. No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.

16. Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

(1) The right to be informed promptly, in detail and in a language which he understands, of the charges against him.

(2) The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family.

(3) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.

(4) The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.

(5) The right to examine or have his lawyer examine the prosecution witnesses and to summon defence according to the conditions applied to the prosecution witnesses.

(6) The right not to be compelled to testify against himself or to confess guilt.

(7) The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.

(8) The right to respect for his security of person and his privacy in all circumstances.

17. Each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and enforcement of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society.

18. No one who is shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned.

-
19. (1) No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.
- (2) Anyone whose innocence is established by a final judgement shall be entitled to compensation for the damage suffered.
-
20. (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- (2) Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons.
-
21. (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.
-
22. Everyone shall have the right to recognition as a person before the law.
-
23. Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.
-
24. Every citizen has the right:
- (1) To freely pursue a political activity.
- (2) To take part in the conduct of public affairs, directly or through freely chosen representatives.
- (3) To stand for election or choose his representatives in free and impartial elections, in
- conditions of equality among all citizens that guarantee the free expression of his will.

1(4) To the opportunity to gain access, on an equal footing with others, to public office in his

country in accordance with the principle of equality of opportunity.

(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.

30. (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.

32. (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.

-
35. (1) Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interests.
(2) No restrictions shall be placed on the exercise of these rights and freedoms except such as are prescribed by the laws in force and that are necessary for the maintenance of national security, public safety or order or for the protection of public health or morals or the rights and freedoms of others.
-
40. (1) The States parties undertake to ensure to persons with mental or physical disabilities a decent life that guarantees their dignity, and to enhance their self-reliance and facilitate their active participation in society.

ASEAN HUMAN RIGHTS DECLARATION

1. All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.
-
2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.
-
3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.
-
5. Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.
-

-
8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.
-
12. Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.
-
14. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.
-
20. (1) Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.
- (2) No person shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
- (3) No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.
-
21. Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.
-

-
22. Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.
-
23. Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.
-
24. Every person has the right to freedom of peaceful assembly.
-
35. The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

3. (1) Everyone has the right to respect for his or her physical and mental integrity.
-
4. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
-
6. Everyone has the right to liberty and security of person.
-
7. Everyone has the right to respect for his or her private and family life, home and communications.
-

-
10. (1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
-
- (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.
-
11. (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
-
12. (1) Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
-
15. (1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
-
20. Everyone is equal before the law.
-
21. (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
- (2) Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.
-
23. Equality between women and men must be ensured in all areas, including employment, work and pay.
- The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
-

-
24. (1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
-
26. The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.
-
47. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
-
48. (1) Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- (2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed.
-
49. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
-
50. No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
-

EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
-
5. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

6. (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) 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; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

7. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

8. (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

11. (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

-
13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
-
14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
-
15. (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
-
41. If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
-

PROTOCOL NO. 4 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1. No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

PROTOCOL NO. 7 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

2. (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
-

-
3. 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 the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.
-
4. (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
- (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
- (3) No derogation from this article shall be made under Article 15 of the Convention.
-

APPENDIX B: TREATIES, DECLARATIONS AND OTHER INSTRUMENTS

The international law and principles setting out the standards for the rights of detained persons are found in the following international instruments: (Numbers of states parties indicated is current to December 2022.)

United Nations (UN) Treaties, Declarations and Other Instruments

The UDHR

- *Universal Declaration of Human Rights* (“UDHR”), adopted 10 Dec. 1984, U.N. Doc. A/810, at 71 (1948), online <<http://www.un.org/en/documents/udhr/>>.

UN Treaties

- *Vienna Convention on the Law of Treaties* (“Vienna Convention”), adopted 23 May 1969, entered into force 27 Jan. 1980, U.N. Doc. A/CONF. 39/26, reprinted in 8 ILM 679 (1969), online <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>. 116 States Parties.
- *International Covenant on Civil and Political Rights* (“ICCPR”), adopted 16 Dec. 1966, entered into force 23 March 1976, U.N. Doc. A/6316, 999 U.N.T.S. 171, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>. 173 States Parties.
- *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, entered into force 23 March 1976, U.N. Doc. A/6316, 999 U.N.T.S. 171, online <<http://www1.umn.edu/humanrts/instree/b4ccprp1.htm>>. 117 States Parties.
- *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), adopted 16 Dec. 1966, entered into force 3 Jan. 1976, U.N. Doc. A/6316, 999 U.N.T.S. 3, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>. 171 States Parties.
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”), adopted 10 Dec. 1984, entered into

force 26 June 1987, U.N. Doc. A/39/51, at 197 (1984), online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>. 173 States Parties.

- *Convention on the Elimination of All Forms of Discrimination against Women* (“CEDAW”), adopted 18 December 1979, entered into force 3 September 1981, UN Doc. A/34/46, at 193 (1979), online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>>. 189 States Parties.
- *International Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”), adopted 21 December 1965, entered into force 4 January 1969, U.N. Doc. A/6014 (1966), online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>. 182 States Parties.
- *Convention on the Rights of the Child* (“CRC”), adopted 20 Nov. 1989, entered into force 2 Sept. 1990, U.N. Doc. A/44/49, at 166 (1989), online <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>. 196 States Parties.
- *Convention relating to the Status of Refugees*, adopted 28 July 1951, entered into force 22 April 1954, United Nations, Treaty Series, vol. 189, p. 137, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>>. 146 States Parties.
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (“ICMW”), adopted 18 December 1990, entered into force 1 July 2003, A/RES/45/158, online <<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>>. 58 States Parties.
- *International Convention for the Protection of all Persons from Enforced Disappearance*, adopted 20 December 2006, entered into force 23 December 2010, United Nations, Treaty Series, vol. 2716, p. 3, online <<http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>>. 68 States Parties.
- *Convention on the Rights of Persons with Disabilities*, adopted 13 December 2006, entered into force 3 May 2008, United Nations,

Treaty Series, vol. 2515, p. 3, online <<http://www.un.org/disabilities/convention/conventionfull.shtml>>. 185 States Parties.

Other UN Instruments

- *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 2 October 2007, by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the U.S.A.) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), A/RES/61/295, online <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. Canada and the other 3 States who voted against the Declaration have all since reversed their position.
- *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted 9 December 1998, A/RES/53/144, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>>.
- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, adopted 25 November 1981, A/RES/36/55, online <<http://www.un.org/documents/ga/res/36/a36r055.htm>>.
- *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted 18 December 1992, A/RES/47/135, online <<http://www.un.org/documents/ga/res/47/a47r135.htm>>.
- *Basic Principles on the Role of Lawyers*, unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), online <<http://www1.umn.edu/humanrts/instree/i3bprl.htm>>.
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988, A/RES/43/173, online <<https://www.refworld.org/docid/3b00f219c.html>>.

- *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 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, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>>.
- *Code of Conduct for Law Enforcement Officials*, 5 February 1980, A/RES/34/169, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>>.
- *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted 16 December 2005, A/RES/60/147, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>>.
- *Guidelines on the Role of Prosecutors*, 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, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>>.
- *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>.

African Union (AU) Treaties and Other Instruments

AU Treaties

- *African (Banjul) Charter on Human and Peoples' Rights* ("Banjul Charter"), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, online <<http://www.achpr.org/instruments/achpr/>>. 54 States Parties.

- *African Charter on the Rights and Welfare of the Child*, July 11, 1990, OAU Doc. CAB/LEG/24.9/49, entered into force Nov. 29, 1999, online <<http://www.achpr.org/instruments/child/>>. 55 States Parties.
- *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, entered into force 25 November 2005, online <<http://www.achpr.org/instruments/women-protocol/>>. 55 States Parties.

Other African Union Instruments

- Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“The Robben Island Guidelines”), adopted by the African Court on Human and Peoples’ Rights during its 32nd ordinary session, October 2002, online <<http://www.achpr.org/sessions/32nd/resolutions/61>>.

Organization of American States (OAS) Treaties, Declarations and Other Instruments

OAS Treaties

- *American Convention on Human Rights* (“ACHR”), “Pact of San Jose”, Costa Rica, 22 November 1969, entered into force 18 July 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, online <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>. 25 States ratified/acceded, but 2 States later renounced their ratification (Trinidad and Tobago, Venezuela). (9 States, including Canada and the U.S.A., have not ratified the Convention).
- *American Declaration on the Rights and Duties of Man* (“American Declaration”), adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948, OEA/Ser.L./V/11.71, at 17 (1988), online <<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>>.
- *Inter-American Convention On The Prevention, Punishment And Eradication Of Violence Against Women* (“Convention of Belém Do Pará”), adopted 06 September 1994, entered into force 03 May 1995,

online <<http://www.oas.org/juridico/english/treaties/a-61.html>>. 32 States Parties.

Council of Europe (COE): Treaties and Other Instruments

COE Treaties

- *European Convention on Human Rights* (“ECHR”), Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online <<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>>. 47 States Parties. Ratification is required for entry into the European Union.
- *Charter of Fundamental Rights of the European Union*, proclaimed at the Nice European Council on 7 December 2000, entered into force 01 December 2009, online <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>>.

Other Instruments

- *Arab Charter on Human Rights*, adopted by the League of Arab States, 22 May 2004, entered into force 15 March 2008, online <<http://hrlibrary.umn.edu/instree/loas2005.html>>.
- Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration and the Phnom Penh Statement on the adoption of the ASEAN Human Rights Declaration (AHRD)*, adopted February 2013, online <https://www.asean.org/storage/images/ASEAN_RTK_2014/6/AHRD_Booklet.pdf>.

APPENDIX C: OTHER RESOURCES

- American Bar Association Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure* (2010), online < <http://www.cejamericas.org/manualsaj/%5BABA%5DHandbookofInternationalStandardsonPretrialDetentionProcedure2010.pdf> >.
- American University, Washington College of Law, Centre for Human Rights and Humanitarian Law, *The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention* (2020), March 2021, online < <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/annex-i-the-legal-methods-and-jurisprudence-of-the-un-wgad-2020/>>.
- American University, Washington College of Law, Centre for Human Rights and Humanitarian Law, *The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015-2018): An Introduction for Practitioners*, March 2021, online < <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/the-legal-methods-and-jurisprudence-of-unwgad/>>.
- Council of Europe, European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights, Right to Liberty and Security*, (updated on 31 August 2022), online < https://www.echr.coe.int/documents/guide_art_5_eng.pdf>.
- Council of Europe, European Court of Human Rights, *Guide on Article 7 of the European Convention on Human Rights, No Punishment without law; The Principle that only the Law can define a Crime and prescribe a Penalty*, (updated on 31 August 2022), online < https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf>.
- Office of the High Commission for Human Rights, Counter-Terrorism Implementation Task Force Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide, Right to a Fair Trial and Due Process in the context of Countering Terrorism*, October 2014, (United Nations, New York, 2015), online < <https://www.ohchr.org/sites/default/files/newyork/Documents/FairTrial.pdf>>.

- Office of the High Commissioner for Human Rights, *Professional Training Series No. 7: Training Manual On Human Rights Monitoring – Chapter IX: Visits to Persons in Detention* (United Nations, New York and Geneva, 2001), online <<https://www.ohchr.org/sites/default/files/Documents/Publications/training7Introen.pdf>>.
- Office of the High Commissioner for Human Rights in association with the International Bar Association, *Professional Training Series No. 9: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, New York and Geneva, 2003), online <<https://www.ohchr.org/sites/default/files/Documents/Publications/training9Titleen.pdf>>.
- UN Centre for Human Rights (1994) *Professional Training Series No.3: Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (United Nations), online <<http://www.humanrightseducation.info/images/stories/pdf/HRandPreTrialDetention.pdf>>.
- UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, online <<https://www.refworld.org/docid/4dc935fd2.html>>.

Lawyers' Rights Watch Canada

Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law by providing support internationally to human rights defenders in danger. LRWC promotes the implementation and enforcement of international standards designed to protect the independence and security of human rights defenders around the world. In its work, LRWC:

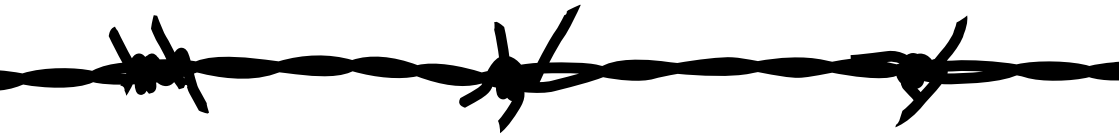
- Campaigns for lawyers whose rights, freedoms or independence are threatened as a result of their human rights advocacy;
- Produces legal analyses of national and international laws and standards relevant to human rights abuses against lawyers and other human rights defenders; and
- Works in cooperation with other human rights organizations.

Around the world, lawyers and others who defend human rights are often singled out as targets of repression, much of which is perpetrated by governments or government-controlled agencies. Criminal offences against human rights defenders occur with alarming frequency. In addition, authorities use existing laws and legal procedures to prosecute or otherwise intimidate advocates representing unpopular clients or causes, often in violation of international standards. Methods used to silence, intimidate or punish advocates are often illegal pursuant to the law of the state itself.

LRWC seeks to identify illegal actions against advocates, campaign for the cessation of such actions, and lobby for the implementation of effective immediate and long-term remedies.

LRWC was incorporated as a non-profit society on June 8, 2000 and Lawyers' Rights Watch (Legal Research) Canada – LRW(LR)C – was incorporated January 2, 2002, pursuant to the provisions of the Canada Corporations Act. LRWC is run by volunteers and funded solely by membership fees and donations from individuals. Donations are gratefully accepted.

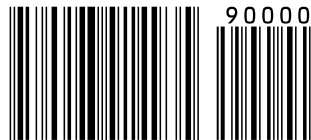
www.lrwc.org



THE RIGHT TO FREEDOM

*From Arbitrary or Unlawful
Deprivation of Liberty*

ISBN 978-0-9939149-3-5



9 780993 914935

