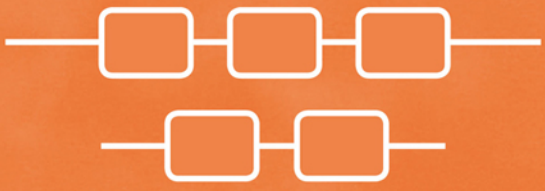
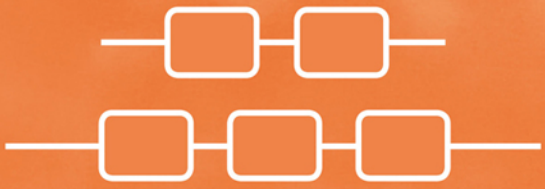


HUMAN RIGHTS MONITORING

A Field Mission Manual



Edited by
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MARTINUS NIJHOFF PUBLISHERS

Human Rights Monitoring

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A Field Mission Manual

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FOREWORD

The Council of Europe and the European Convention on Human Rights were created as a response to some of the worst forms of war and barbarity that humankind has ever experienced. The Convention and other instruments developed subsequently—notably against torture, for social rights, for the protection of national minorities—provided inspiration and support to individuals and non-governmental organisations who have fought injustice, oppression and discrimination. Much has been achieved. But much progress remains to be made; ensuring full respect of everyone's human rights remains a continuing challenge.

Of course, human rights cannot be defended by legal texts only. They need to be protected on a day-to-day level through concrete actions. This is where field workers have a particular contribution to make. I trust that this manual will assist field workers in understanding human rights and speaking up for them, thus fulfilling their mandates in real-life situations where human rights are violated or are at risk, and where field workers constitute the first indispensable line of defence.

Philippe Boillat
Director General of Human Rights—DG II
Council of Europe

FOREWORD II

For the last few decades implementation has been a top priority for human rights defenders. Although the international community has established clear and well defined human rights standards and instruments, efficient protection and realization have lagged behind. However it is clear that Human Rights monitoring is a crucial mechanism to secure and improve implementation.

Field officers and other human rights defenders are key agents in monitoring and thus contributing to securing human rights in practice. This Manual is intended to provide information on the basic monitoring techniques as well as focused overviews of current human rights law and practice in selected areas of importance. It is aimed at the majority of practitioners working with human rights monitoring and I am convinced that it will serve as a useful tool for human rights defenders as well as human rights trainers in the field and elsewhere.

Morten Kjaerum
Director
Danish Institute for Human Rights

FOREWORD III

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The opinions expressed in this publication are those of the authors and do not engage the responsibility of the DIHR, the CoE, the OSCE, and the ODIHR. They should not be regarded as placing

upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member States, OSCE's or CoE's statutory organs or any organ set up by virtue of any of the Conventions mentioned in it.

PREFACE

This guide to European and other human rights standards and legal instruments was produced with the support of the Danish Institute for Human Rights (DIHR), the Council of Europe (CoE), the Organisation for Security and Cooperation in Europe (OSCE) and the Office for Democratic Institutions and Human Rights (ODIHR).

It is aimed towards a wide audience, in particular the staff of international governmental and non-governmental organisations. Nevertheless, the manual is prepared so that it is readable for people with varying backgrounds, including field officers and activists with no specific legal training.

Chapters 1 and 2 offer an introduction to the basic concepts and techniques in human rights monitoring (Chapter 1), and provide a brief overview of general principles of international law that apply to human rights (Chapter 2).

The *thematic chapters*, 3–15, describe a number of particular human rights, or human rights law within specific areas. The themes of these chapters have been chosen because they are amongst the most relevant during the conflict, post-conflict or transition situations in which human rights field officers most frequently find themselves deployed.

Each right is briefly set out in this section and discussed primarily in relation to the European Convention on Human Rights. Other relevant international instruments, including UN and OSCE documents, and relevant case-law, are also noted. The thematic chapters are not meant to provide exhaustive descriptions of the selected themes. The intention is rather to explain the core content of the European, UN and OSCE provisions related to the chapter theme. In addition, the scope and limits of the protection is assessed in the discussion of current interpretation, including case law.

These descriptions of human rights law will serve as bench-marks against which potential violations can be judged. Furthermore, each chapter presents the most pertinent instruments, institutions, and focus areas to assist the field officer in monitoring the areas. Each thematic chapter contains a checklist for the monitor, as well as references to

key literature, handbook, and web resources for further information. Furthermore, annotated lists of instrument provisions relevant to each theme are added at the end of the chapter.

It is the hope of the DIHR, the CoE, ODIHR, and OSCE that this monitoring handbook will be useful for the important yet often difficult endeavours undertaken in the field to strengthen and improve the protection of human rights.

CHAPTER 1

HUMAN RIGHTS MONITORING

This chapter will outline the basic concepts and methods in human rights monitoring. It is meant to explain frequently used terminology, introduce the most common techniques, and point to the necessary precautions. For more detailed and specialized information, readers are referred to the list of references at the end of the chapter.

1.1. Definition

Human rights monitoring can be defined as the systematic collection, verification, and use of information to address human rights problems or compliances. The compiled data will have to be analyzed against agreed standards. These standards primarily entail the human rights obligations and commitments that the State is a party to, and thus has committed itself to live up to; as well as additional human rights provisions which have come to be recognized as customary law applicable to all authorities regardless of the State's formal acknowledgement (cf. chapter 2, section *International Law and Human Rights Law*).

1.2. Purposes

Ultimately, monitoring should contribute to improving implementation of human rights. As a means to reach this purpose, monitoring covers various activities and goals. It can have the concrete and specific objective of preventing human rights violations, for instance by following and recording individual cases. Or it may aim to document developmental trends in the implementation of human rights by collecting statistical data over longer periods of time. However, the purpose of the monitor's collecting facts is to substantiate claims of better protection of human rights with the authorities, and with regional and international organizations. Moreover, monitoring information can be used by civil society organizations and the media when advocating for improvements in human rights.

It can be an important effect of a monitoring effort to avoid immediate violations of rights. However, monitoring should also aim to influence and reinforce democratic structures and human rights culture as a long term objective. This means that monitoring endeavours should seek not only to protect people and to secure remedies against violations, but should as far as possible strive to include preventive measures to avoid similar situations in the future. This means that all monitoring activities in principle should be part of a more comprehensive strategy to reinforce State responsibility to protect human rights supported by informed and active citizens. Consequently, monitoring tasks must, if at all feasible, be organised so that local government bodies as well as civil society are involved. The monitors should avoid taking over local authorities' commitment and responsibility to protect and ensure human rights.

1.3. Planning Base

Solid knowledge of and information about the social, economic, cultural, and historic context in which one is working will optimize a monitoring intervention. One aspect that will require particular research in relation to monitoring is the specific human rights obligations with which the government has undertaken to comply. These include the international and regional human rights treaties to which the country is a State Party. Recommendations and decisions from treaty bodies that overlook States' compliances with the treaties can help in identifying current problems in implementation of the international obligations (cf. Boxes 5 and 6 below where the major human rights treaties' reporting and communications mechanisms are listed).

Also, politically binding documents applying to the country under the OSCE should be consulted. The following thematic chapters of this book describe the most important State obligations flowing from these instruments. It may also be useful to consult the most recent political declarations and action plans acceded to by the government, such as those issued by the Council of Europe's Council of Ministers, OSCE's Ministerial Council and other decision-making bodies.

Furthermore, it will be necessary to familiarize oneself with pertinent national legislation, directives, and instructions covering the areas of the monitoring activities. The starting point of such a study will be to identify human rights provisions of the national Constitution.

Some basic knowledge of the country's penal code and other laws is often required. If national human rights institutions are operating in the host country—for instance, a human rights commission or an ombudsman—particular attention should be paid to studying their mandate and annual reports. Such institutions could be important collaboration partners as human rights monitoring is often included in their mandate.

Information about other agents' activities in the region in relation to human rights monitoring is also vital to avoid overlapping efforts, or infringing on other organizations' or institutions' preserves. Collaboration and some agreed division of labour between the relevant organizations and institutions in the local area will be more cost effective and open up for collaborative operations if that is expected to give momentum to a concrete task.

Monitoring can be a controversial exercise. It must therefore be adjusted to the mandate given or adopted by the monitor's organization or institution. Normally, it will be necessary to secure a decision from the management or the governing bodies of the organization to allow its personnel to embark on monitoring activities. Furthermore, it is helpful to develop more detailed policies and guidelines outlining the purpose of the involvement, as well as procedures for handling the compiled information and for follow-up *vis-à-vis* the authorities. Often the mandate is broad or even unclear, leaving it up to the personnel in charge at the local field office to determine their focus. It will most probably also be necessary to set up priorities for which areas or cases to address first. The gravity of the situation for victims or potential victims combined with prospects for a successful intervention will influence the order of priority. However, endeavours that would best contribute to supporting or fulfilling the mission mandate will often have the strongest argument for support within the organization.

If demanding and time-consuming preparations are not feasible because there is an urgent need for action, thorough consultation with the office manager is required as a minimum. Monitoring human rights violations, in particular, is too sensitive to be left to, much less initiated by, newcomers in the field or isolated staff members without explicit institutional backing.

The major international and regional organizations that undertake monitoring activities have devised guidelines, check lists, and formats covering many aspects of monitoring, cf. Box 1.1. For more detailed guidelines, see e.g. the United Nations' comprehensive handbook on

Human Rights Monitoring, and the OSCE's handbook on individual human rights complaints listed in the resource section below.

Box 1.1. Guiding Principles for Monitoring

Some important key rules to be observed in all monitoring are:

1. Do no harm
   a. keep strict confidentiality
   b. *render* security
   c. show sensitivity
2. Maintain your role
   a. follow your mandate
   b. know the standards
   c. respect the authorities
3. Secure high quality
   a. maintain objectivity
   b. ensure accuracy

Security

Security is often a critical issue in monitoring activities. Protection must be secured for the collected data and the monitor, as well as for other people involved, including victims or potential victims of human rights violations, witnesses, other informants, and assistants. The large international and regional organizations normally have guidelines to ensure the personal security of field service staff and the security of office premises. Personnel will often be given a security briefing prior to or upon their posting—and if not they should ask for it. If adequate guidelines have not been developed, the issue should be taken up with the office management to address potential security risks in relation to the mandate commitments.

In most situations, however, it will not be the staff of international or regional organizations that are exposed to the greatest security risks. Normally, they will be relatively well protected by agreements between the host government and their organization. The local contacts, informants, victims, potential victims, and even interpreters and other staff employed by the mission, on the other hand, often face a greater risk of reprisals. Such risks might encompass violent attacks, threats to the person and/or his or her family, and sanctions directed against property, as well as diminished future job or carrier options.

Hence, security considerations concerning local contacts and sources must always be given the highest attention and priority. No involve-

ment from the human rights monitor should contribute to increased security risks for victims, witnesses, local staff, or other contacts. Normally, confidentiality is the lead principle in all relations with informants. However, in some situations it may have a protective effect that representatives of the international community, in this case the monitor and his/her organization, stay in visible contact with local groups or individuals, and keep a watch on particular developments.

Box 1.2. Protection of Human Rights Monitors

Human rights monitoring is not explicitly mentioned in the legally binding human rights treaties. Nonetheless, several instruments have emerged during the last decades to enhance protection of individuals and groups involved in human rights activities, including monitoring.

In the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE (1990) member States have committed themselves to respect the rights of individuals and groups, non-governmental groups, trade unions and human rights monitoring groups, to seek and disseminate information on human rights, to study and discuss the observance of human rights, and to have contact and receive funding from organization at home and abroad, Article 10(1–4)

The Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) expresses the willingness of member States to allow NGOs to observe compliance with CSCE commitments in the field of human dimension, and to convey their views on this matter to governments of all participating States, Article 43(2–5).

In 1998, the United Nations General Assembly adopted the so-called Declaration for the Human Rights Defenders.[1] Although not a legally binding treaty, it is the first global instrument that explicitly aims to establish protection for human rights monitors.

The Declaration reinforces civil and political rights, including freedom of speech, association and assembly, with a specific focus on the protection of these freedoms in relation to human rights promotion and realization—Articles 5, 6, 7, 8(1). Furthermore, it emphasises citizens' right to criticize, protest and complain to domestic as well as international organs over a lack of human rights fulfilment—Articles 8(2), 9(2–4), 12(1); the Declaration also establishes the right to protection and remedy in cases where human rights activities have lead to threats to or violations of rights—Articles 9(1), 9(5), and 12(2–3). To give support to implementation of the Declaration a Special Rapporteur on Human Rights Defenders was appointed in year 2000 (cf. Box 7 below).

In 2004, the European Union adopted a set of guidelines called The Protection of Human Rights Defenders within the European Union. The title is somewhat misleading, as the aim of this initiative is primarily to support UN instruments on human rights defenders (including the Special Representative on Human Rights Defenders, cf. Box 2) and activists in third countries. The document is meant as a tool primarily for EU missions (embassies and consulates of EU member States and European Commission delegations) in their approach to human rights defenders. It states that missions should address the situation of human rights defenders in

[1] The full title is "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".

their reporting, noting in particular the occurrence of any threats or attacks against human rights defenders. Furthermore, heads of EU missions may make recommendations for possible EU actions, including condemnation of threats and attacks against human rights defenders, as well as for public statements whenever human rights defenders are at immediate or serious risk (Article 8). Measures that EU missions could take include: maintaining suitable contacts with human rights defenders, as well as receiving them in missions and visiting their areas of work (Article 10). The human rights component of political dialogue between the EU and third countries and regional organisations, will, where relevant, include the situation of human rights defenders. The EU will underline its support for human rights defenders and their work and raise individual cases of concern whenever necessary (Article 11).

Since 1997, two NGOs, the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), have organized an Observatory for the Protection of Human Rights Defenders. The programme, *inter alia*, collects information on violations of the rights and freedoms of human rights defenders and, furthermore, sends out urgent appeals in cases of threats or harassments against activists.

When initiating contact with informants, the monitor should be careful in choosing the means and place for the first appointment. Neither phones, mobile phones, mail, nor e-mail can be regarded as safe communication channels, and seeking out informants by personal appearance in their community will always create some attention among the neighbours. It is always wise to inquire among people with local knowledge on how best to approach one's potential sources. After having established the first contact, it may be left to the source, witness, or victim to decide on meeting place and contact channels.

Contact and dialogue with informants are based on confidentiality. Nevertheless, anonymity of victims and witnesses of human rights violations should only be accepted as an exception to the rule. Anonymous testimonies may give important data, but they can be difficult to verify and will generally not be considered as reliable and credible as information from an identifiable source. On the other hand, confidentiality means that the names and other personal data of informants are handled very circumspectly; that they are not mentioned, nor handed over to others without the express permission of the individual concerned. Generally, the monitor works on a need-to-know basis similar to methods employed in intelligence services, which means that only a bare minimum of information on sources and contacts is exchanged with others, including other informants. Even unspecific conversations on monitoring activities and cases in public places, including typical expatriate meeting places, must be avoided.

Data security is another crucial aspect of most monitoring tasks. All personal details of victims, potential victims, and witnesses must

be filed with care. Even the organization's own office premises cannot be regarded as a safe repository for sensitive personal data. There are ways to encrypt personal information and it can be filed separate from the testimonies. Sensitive computerized data files should be saved on floppy discs, memory sticks, removable hard discs, or, better, submitted to the main office or others outside the host country. The informants may be informed about data handling procedures and security measures and must always, if possible, give their approval to the usage of their testimony or other information they have provided to the monitor. Likewise, local sources should be informed about all follow-up measures taken by the monitor or his/her organization in relation to the information he or she has provided. In particular, all representation to government authorities should be carried out only with the informed consent of the informants.

States in Emergency

Monitoring activities in States in emergency, including armed conflicts, raise special challenges. In emergency situations, States are allowed to derogate from some of their normal human rights obligations. The scope and procedures for this right to derogation, as it is termed, is further explained in chapter 2. Furthermore, in armed conflict situations other regulations, namely the Geneva Conventions, may replace human rights—depending on the category of the conflict. The distinctions between such categories are also described in chapter 2.

Access to information for monitoring, as well as other purposes, might be impeded or obstructed. Direct censorship is often introduced and manipulation of data, in particular on human rights violations, will often be systemic and deliberate from either side of the conflict. This may render data collection, including fact-finding missions, even more needed.

It is decisive to uphold strict impartiality and to appear as a non-partisan agent to all sides. If possible there should be contact with all parties to the conflict, including armed opposition groups, if this can be undertaken under adequate security. Non-recognized armed groups often do not pay the same attention to human rights or humanitarian law obligations as they do not have any legitimacy considerations, and this may aggravate security risks in relation to monitoring. Also, establishing contacts with armed opposition groups could often be regarded as a symbol of recognition of them by all sides of the conflict. From a

legal perspective, this is definitely not the case, as explicitly stated in the common Article 3 of all Geneva Conventions, which regulate armed conflicts. Politically speaking, however, it may be perceived differently. The only response to allegations of taking part in a conflict is to try openly and visibly to maintain contact with both sides, while at the same time not accepting attempts to interfere with independent and unrestricted investigations. If a government insists on escorted access only to areas under special security regulation or under martial law, or if a government agent demands to sit in during interviews with victims of any kind, the monitoring efforts risk loosing both reliability and credibility, and the best choice may be to postpone or completely abandon the mission.

1.4. Monitoring Categories

Two main categories of monitoring are prevalent in the human rights literature. The first has its focus on concrete events or cases. This type will often centre on human rights violations or the prevention of violations. It is sometimes labelled **case monitoring**, **act-based monitorin**g, or **event monitoring**. This category typically covers individual cases, for instance through trial observations or registering of incidents of torture or ill-treatment. It may also, for instance, include documentation of police interventions in public meetings or detention of political prisoners.

The second type has a broader scope and is sometimes termed **situation monitoring**. It aims to depict situations in or development of whole sectors or policy areas, for instance by assessing employment of violent interrogation methods in a country's police stations and detention centres; following implementation in rural districts of an access to justice reform; or measuring the completion of elementary education for girl children in relation to boys. The amount of data collected for this activity is larger than the typical event registration. This type of monitoring has a macro-oriented character. It is indicator-based and will often require a long-term strategy and a long-term perspective.

Watching over a government's commitment to those rights that are meant to be realized progressively must follow the development over some time. The gradual implementation strategy is recognized in international human rights law as a legitimate method with regards to

State Party obligations that are particularly resource-demanding, and it is expressly mentioned in Article 2 of The United Nations Covenant for Economic, Social and Cultural Rights.

The distinction between the different monitoring categories is not a sharp one. A systematic and continuous events monitoring of, say, incidences of torture in police stations and detention centres may be developed into an indicator-based situation monitoring of the respect for the right to personal security. However, the methods employed in the two types of monitoring are different. While the event monitoring methods demand careful and systematic registration, the situation or development monitoring often entails statistical methods to process and select representative and large quantities of data.

When planning a monitoring programme the field officer will, as a matter of course, focus on current human rights issues and problems in the region, always with due consideration to the mandate commitments. In addition to this, however, all human rights programmes should pay special attention to vulnerable groups that may experience particular difficulties and violations of their rights. Often these violations are less visible at first sight. Women's exposure to sexual abuse during armed conflicts is often silenced even by the victims; damage to children's physical and mental health may be a particular risk among displaced people; and under-privileged minority groups may need special monitoring attendance in situations where humanitarian aid is distributed. The common anti-discrimination clause adopted in all human rights treaties can serve as a check list to support the awareness of both direct and indirect unfair treatment (cf. chapter 14, section *Direct and Indirect Discrimination)*.

1.5. Monitoring Techniques

The preparation phase for systematic human rights monitoring programmes will include active information retrieval and development of contacts in the region. This can be facilitated through meetings with representatives from the media; from civil society organizations, including religious groups; and visits to municipal authorities, including local politicians, judges, and police representatives. It is advisable to learn about current affairs not only in the major cities, but also in provinces and rural areas, for instance by organizing trips across the entire area of operation, municipality by municipality.

Contacts to other international and regional organizations working in similar or related fields are important. Regular exchange of information provides knowledge on who is monitoring what, and can lead to a certain division of labour according to cutting-edge competences.

Most monitoring initiatives will commence, first with a preliminary assessment of the available information in order to test whether this is a human rights case in the first place and secondly, whether the mission has the resources and mandate to take the investigation further.

In some cases, collating information may involve local authorities. In situations where concrete or alleged violations of human rights have taken place, the relevant authorities must be informed in order for them to examine the situation and address the problems. The monitor should endeavour to reinforce government authorities in their responsibilities. Nonetheless, if the official capacity or will to deal adequately with such investigations is lacking or questionable, the monitor will have to collect information, including personal data, about victims and witnesses and take steps to conduct an investigation. Some of the frequently used investigative methods are explained below.

Interviews

A monitor's interview is a systematically prepared occasion to get information from individuals concerning a human rights event or situation. The data from interviews may afterwards feed into a follow-up activity. Consequently, the interview process includes three phases: preparation, the actual interview, and follow-up.

Naturally, the preparations for an interview will vary according to the interviewee's situation—whether (s)he is a victim of human rights violations, a witness, or a government representative. It is, however, possible to outline some points of general relevance in most situations:

Prior to the interview, the monitor should review the case or situation, including previous similar issues. It is advisable to prepare a checklist of questions, including as a minimum the essential: 'who, when, where, how, why', or to employ an interview format. The time and place of the meeting should be decided in order to secure the highest possible degree of convenience, confidentiality, and safety for the interviewee. It is generally recommended to interview only one informant at a time. A group of more people will often influence the testimonies and complicate the interpretation. Sufficient time must be set aside for

the interview—no pressing meetings should be scheduled immediately after the expected end of the interview.

It may be necessary to work with an interpreter. The interpreter should be chosen carefully so that he or she will neither use the information from the interviews to report about the mission's activities nor intimidate or cause harm to the informants. The interpreter's sex, religious, political, ethical, professional, and family background could be considered as selection criteria in order to secure his/her impartiality. The interpreter should be given proper guidelines on his/her job, including the demand to reproduce the phrases spoken by the interviewer as well as interviewee unabridged. He or she should adhere to the exact wording, e.g. use 'I' if the informants talks about himself/herself, not 'he' or 'she'. The interpreter should not try to explain a question if it is not understood by the interviewee, but should instead inform the interviewer about it and have the question reformulated. The monitor should direct questions to the informants, not to the interpreter. It is important to maintain a high degree of confidentiality by not divulging the identities of other witnesses or victims to the interpreter, thereby protecting the witnesses and victims. Similarly, the monitor must protect the interpreter's security. He or she may be the target of attempts to obtain confidential information, and it is worth considering if something can be done to minimise that risk (for more detailed information on working with interpreters, cf. the Reference section).

Recording equipment can be convenient, but may cause anxiety for the interviewee and will, furthermore, require measures to store the data securely. Taking notes may also intimidate a witness or victim, so the monitor should make sure to get permission to do so by the interviewee prior to the conversation.

The interviewee must also be informed about how the monitor and his/her organization intend to use the information given during the session. It is of particular importance to get the informant's acceptance of a possible follow-up where his or her name is revealed; for instance, when presenting the case to the authorities or the media.

The interview should ideally be conducted by two persons. One may concentrate on asking questions and maintaining continuous eye contact with the informant while the other takes minutes. Also, if recording is not welcomed by the interviewee, it is advisable that two people collaborate on reporting afterwards in order to document the information as completely and accurately as possible. Yet if the

victim feels uncomfortable with three people (two monitors and one interpreter) on the other side of the table, it may be preferred that only one monitor conducts the interview.

The setting for the interview should be as calm and confidential as possible; most often a separate room where there will be no interruptions should be chosen. If the interviewee and the monitor(s) have the opportunity of being introduced to each other and to discuss and agree on the conditions for and arrangement of the interview, this can enhance confidence and trust-building with victims and witnesses.

The actual interview should be conducted using open, non-leading questions such as: "How was the police's reaction to the demonstration?", rather than "Did the police interfere with the demonstration?" If information appears unclear or inconsistent, control questions should be added to obtain a clear and detailed picture, or to test the reliability of the informant. An interviewee may present a biased or exaggerated version of a case, or may even purposely mislead the interviewer. If there are such suspicions, the interviewer may ask the interviewee to provide names and other details on other informants that can contribute to the verification and/or further description of the event. Still, a polite and non-confrontational attitude should be maintained.

Interviewing special groups like refugees, victims of violence or other abuse, or witnesses to such incidents often requires special care and experience. In situations where one may risk re-traumatizing victims or arousing strong emotional stress, the interviewer should seek advice from specialists or people with particular experience in working with psychologically vulnerable informants (cf. the thematic chapters 4, 11, 12, and 15 for further references).

Other groups that may require special preparations include children, indigenous and minority groups, rural people, and other poor and/or vulnerable populations. It may be preferred to collaborate with local organizations in order to reduce the comprehensibility gap.

Interviewing authority representatives or alleged perpetrators poses different challenges. Well prepared research, including the legal basis for the functioning of the unit or institution concerned, is necessary. Nevertheless, a neutral and non-judgmental attitude must still be upheld.

It is important that the monitor or the interpreter takes notes or otherwise gets the correct and sufficient information about names and locations. Information about where the recorded event took place in relation to well-known localities must also be secured. The time and

place of the interview itself, including all relevant data about the interviewer (name, position), translator (name, contact data, languages of translation), and interviewee (name, age, sex, contact details, if appropriate also ethnic and national origin as well as political and religious affiliation) should also be recorded along with the interview information.

The monitor should refrain from drawing conclusions on the basis of the testimony, whether to the informant or in the report, before sufficient verification has been obtained. Moreover, it is not possible to promise or predict any specific outcome of the case. It is, however, only fair to apprise the informant of how the case will be followed up and to suggest ways for the interviewee to be given notice about developments; for instance, through the monitor and the mission.

Immediately after the interview notes should be checked and finalized. The personal details might be recorded and stored separately from the other data obtained.

Fact-Finding Missions

A fact-finding mission normally implies a visit to a location in order to secure information regarding an event or situation centred there, or a trip to a place where a bulk of information can be gathered.

Planning the mission will often require careful considerations concerning conditions for investigations on the spot: Depending on what kind of data could be gathered in the field, proper equipment for the mission should be determined (i.e. camera, tape recorder), including information to identify places and informants. It should be considered what documents should be brought along on the mission; including relevant material from the authorities or the organization behind the mission. How can informants be informed in advance? Can the fact-finding team gain access to a sufficient number of informants on safe and free terms? Can the necessary verification be conducted immediately on location, or will other sources have to be included? Will it be possible to collect official documents at the local premises, including medical or death certificates? May the local people risk any kind of reprisals as a result of the mission?

Some fact-finding missions need trained specialists such as medical examiners to inspect incidents of physical abuse, alleged torture, and killings, including disinterment. It is generally the rule that monitors shall leave things and places untouched if they do not have the required

technical skills, and in particular avoid undermining any subsequent investigation by the police or by other specialists.

If the mission team consists of high ranking members or specialists, it may necessitate considerable procedural preparation. Since this may be time-demanding, it should be considered whether a prolonged timeframe may compromise the quality of evidence and information.

Election observation is another type of fact-finding that has been developed to a high degree of specialization. Particularly ODIHR (and the United Nations as well) have devised detailed methods for this; cf. the Reference list for this chapter.

Visits to detention centres and prisons are yet another type of fact-finding mission that can draw from vast experience and relatively developed internationally agreed standards. For more detailed information, please consult the reference section of chapter 5 on right to liberty and security of person.

Some institutions, such as children's homes, orphanages, and handicap institutions, are not directly and specifically protected by international standards. Thus they will often be lacking protection of the most basic rights for their residents—who are at the same time among society's most vulnerable groups. Still, if a mission is willing to extend its monitoring commitments to such institutions, important legal support can be inferred from the Convention on the Rights of the Child, which has gained almost universal acceptance.

Data Gathering

Data gathering may cover all forms of collection of information, but normally refers to more macro-oriented monitoring efforts such as situation monitoring (see above).

Data gathering at a macro level depends on larger quantities of data that must have a standardized form in order to be processed systematically. The ideal situation analysis would cover the entire population; however, as this is rarely feasible, the solution is to prepare a **sample survey**. There are different categories of sample surveys. The most reliable and valid is the **probability sample** with a mathematically (randomly) chosen collection of data. This requires statistical skills and is rarely possible in human rights monitoring.

A less demanding category is the **haphazard sample**. This means a collection of the data that has been available to the monitor without a systematic selection. A haphazard sample survey may be useful to

trace a pattern or indicate more widespread occurrences of human rights violations than is documented through individual cases or events. An example of this could be to address groups of street children and interview as many of them as possible within a given period, regardless of their age, sex, or situation in general. The interviewer may inquire whether the children have had contacts with the police. If two thirds of the children report that they have been beaten by the police at least once, the monitor does not need a precise percentage based on probability samples to ascertain beyond reasonable doubt that police brutality against street children is an existing human rights issue.

If a sample is collected following certain selection criteria, it is called a **judgmental survey**. For instance, if the monitor wants to measure whether repatriation of groups of refugees from two different ethnic groups is organized with uniform efficiency from the same refugee centre, he or she can choose to interview ten refugees from each group. This may serve as an indication of whether there are greater hindrances to repatriation for one group than for the other, which might then lead to investigation into whether discrimination is a problem in the official handling of cases.

Statistical data from other sources, including official statistics such as police or prison records, may also be employed. Such figures must be assessed critically, as much as possible, to check their reliability. The information should be scrutinized for its consistency; the methods of data collection and the populations included should be tested by examining introductory chapters and references. Alternatively, external experts—such as statisticians at the university or other more independent institutions—may be asked to assess the validity of the official sources.

A sample survey must provide information about the methods employed, and the number of 'units' included in the survey—be they refugees, street children, or others. Making sound estimates on the basis of a sample to cover a larger population requires reflections on the precision of the effort. Only a probability sample can provide a measurement of the estimate's precision, usually calculated by a statistician. With such samples it is possible to estimate proportions of the human rights issue being monitored, e.g. the proportion of pre-trial detentions exceeding three months among juvenile detainees; or certain developments can be charted, for instance the numbers of internally displaced people before and after a peace accord (cf. the reference list

on handbooks that introduce methods of carrying out sample surveys adapted to human rights monitoring).

Monitoring at a macro level may seek to establish documentation of a social or political situation or developments in a country or region. This type of monitoring often makes use of so-called **indicators**. An indicator is a unit of measurement designed to depict a situation or follow developments within a given area. For instance, an indicator for measuring respect for the right to life could be the number of reported missing persons suspected to be arbitrarily executed or 'disappeared'; an indicator for respect of freedom of association could be the number of NGOs denied formal registration or experiencing procrastinating registration procedures in a country. Hence, indicators will often be quantifiable units designed to communicate exact and comparable yardsticks on human rights situations and issues.

In human rights programmes, indicators are sometimes used to test if a project or other initiative meets the intended goals. The following will provide an example of this. An access to justice programme has the purpose of strengthening the training and appointment of low and juvenile court judges with the overall aim of reducing pre-trial detention. A **benchmark** for this programme could be to reduce the number of detained persons awaiting trial by 50 per cent in five years. The indicator in this case is the number of detained persons awaiting trial per year in a given country or region. This type of indicator is sometimes called a **result indicator** if used as a tool in a development programme. The indicator would thus show the result of the programme, in this case a decreased number of detainees. The programme might also define **process indicators** with the aim to describe initiatives that will influence the result indicators. In our example, a process indicator could be the number of judges appointed for low courts and juvenile courts per year. The process indicator thus measures the development of the justice sector's ability to comply with the human rights obligations to secure the right to a fair trial.

Indicators may, furthermore, provide a basis for political decisions or development programmes. They can also provide supplementary information adding credibility and significance to case monitoring because they reveal the magnitude and patterns of human rights issues and violations.

1.6. Documentation

If monitoring is a regular task, it is often an advantage to standardize the recording of incidents or examples of human rights violations in model formats. Such standardization can, furthermore, be a means of systematizing larger amounts of data that eventually may be used for statistical purposes and comparisons.

Standard Formats

A **standard format** is a questionnaire with blank spaces, or **fields**, meant for specific information to be inscribed in a standardized order and, as far as possible, with a standardized content. Standard formats are used for recording events or cases which happen with some frequency. The larger organizations will often have their own standard formats, e.g. for recording individual complaints over human rights violations or other individual cases, or for registering information during fact-finding missions.

A standard record in human rights monitoring may often be designed as an **event format** organizing the data in so-called entities. One **entity** may include information on the **act** suspected of violating human rights and will contain fields for registration of the time, place, and category of the reported incident. A **victim**(s) entity may typically contain fields to note the victim(s) name(s) and other personal data; a **perpetrator**(s) entity may include information on the alleged perpetrator(s)' name(s), rank(s), and institutional affiliation(s). Finally, an entity registers information about the **recording** itself, such as date, place, name, position, and contact details of the reporting person (if it is not the victim him/herself who is reporting) and the recording person.

The standard format is most useful if it is adapted to the specific monitoring tasks and purposes of the organization. Each monitoring programme might thus develop its own tailor-made system; however, experience and inspiration can be gained from the handbooks and manuals listed in the Reference section below.

The advantages of using standard formats are not only that they systematize data and facilitate sample surveys, but also that they may facilitate specification and greater accuracy in human rights monitoring. This has particularly been a feature of computerized monitoring programmes. Systems of indexation have been devised in so-called thesauri. A **thesaurus** is a set of categorizations, or so called **controlled**

vocabulary, for instance of rights, violations of rights, or of methods of violence. The categorizations may be further combined in more complex systems (see Box 1.3).

Box 1.3. Controlled Vocabulary—An Example

The HURIDOCS network has been very active in developing human rights documentation systems. An example from one of its publications may be illustrative.[2]

Violations of rights can be divided into types, including

- direct actions
- acts of omission
- violations in terms of legislation or policy-making
- violations in terms of non-implementation of law and policy
- non-fulfilment of a right

This typology may subsequently be applied to specific rights in order to provide a detailed typology of violations of that right.

Violations of the right to free movement can be categorized into:

1. Direct actions which violate the right to movement or residence with subcategories:
   a. internal exile
   b. exile
   c. eviction
   d. displacement
   e. blockading
   f. restriction on travel
   g. denial of right to return
2. Violations of the right to movement or residence in terms of legislation or policy-making with subcategories:
   a. promulgation of laws or policies which violate the right to movement or residence
   b. repeal of laws or policies which used to guarantee the right;
   c. promulgation of laws or policies which reduce guarantees of liberty of movement or residence
   d. lack of laws or policies to guarantee/fulfil the right

Employing a consistent or controlled set of terms and categories is necessary in the generation of statistics and surveys. The method is also useful in recording individual cases if it contributes to clarification of terminology and ideas. However, if monitoring is not undertaken regularly and on a relatively comprehensive scale, it may be too bureaucratic to generate and use such rather complex instruments.

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[2] Judith Dueck, Manual Guzman and Bert Verstappen, *Microthesauri. A Tool for Documenting Human Rights Violation*. (Versoix, HURIDOCS, 2001).

Verification

Ideally, all collected data in a monitoring process must be checked and verified. Thus also testimonies from victims and witnesses of human rights violations must be examined in order to avoid exaggeration, inaccuracy, bias, or, at worst, falsehood. During an interview, the monitor will assess the informant's credibility by noting lack of consistency and coherence, or an outspoken tendency or bias in a description. Whether it is firsthand or second-hand information or simply hearsay must also be noted. Political motives for reporting on human rights violation also constitute an element of risk. Nonetheless, if the informant gives detailed descriptions of incidents, places and individuals involved in the reported event, crosschecking can often be organized by asking for similar descriptions from other witnesses and by visits to the scene of the event.

If firsthand witnesses are not available, **corroboration** may be the way to strengthen a case. Corroborating information is data from independent sources that supports the testimony in a broader context. It may, however, be difficult to judge whether sources are truly independent of each other. If the monitor has developed good and reliable local contacts, these might help in determining this—although the confidentiality clause may complicate it. Relying on corroborative information is often necessary, e.g. in refugees' cases when on-site visits can not be made. If groups of people tell similar stories, the credibility of individual cases will normally increase. A significant rise in the number of abortions recorded at hospitals in a war zone is corroborative information in relation to rendering probable rumours that mass rape has taken place.

Cases of human rights violations can rarely be proven following the same high standards as in a court case. If possible, the method of hearing both sides in a case or conflict is recommended. It is important to state clearly the sources of information about an event; as well as indicating if information cannot be verified, and why. Some organizations have employed categorizations of reliability. Categories used in the event formats could be: highly reliable; likely reliable; unsure; likely unreliable; highly unreliable;[3] or categories could be added as case summations for use in reports about human rights violations, ranging

[3] Judith Dueck, Manual Guzman and Bert Verstappen, *Microthesauri. A Tool for Documenting Human Rights Violations*. (Versoix, HURIDOCS, 2001), p. 165.

from **overwhelming proof**, and **substantial proof** to **sufficient proof**.[4]

It is normally a management issue to decide when a case is sufficiently verified to be acted upon; e.g. by addressing the government, or by informing the media. Generally speaking, the graver and more systematic abuses of human rights appear, the better documented and accurately reported they need to be. Only when there is a threat to people's personal security could lower demands of verification be accepted.

1.7. Reporting

The collected and verified information has to be analyzed, summarized, and reported. Initially in the monitoring process, reports are prepared as mere documentation of findings in individual cases or fact-finding missions. In more elaborated forms, a monitoring report can present the findings and conclusion of a monitoring project in a systematized form and be employed in the follow-up activity.

Reporting is time-consuming, but will often secure greater accuracy than oral communication. In addition to this, written information is more sustainable in bureaucratic structures and controversial information about abuse and neglect of human rights needs to be communicated carefully in order to be credible and convincing.

Most often larger organizations will have reporting systems and guidelines for the different types of reports: interview forms, events or incident report forms, complaint forms, periodic report forms, and emergency report forms.

An **event report** should ideally be prepared immediately after the interview or visit while the data is best remembered. If an interpreter has been used for interviewing, he or she should be asked to go through the report; important data, including names, places, and maybe special expressions can then be added in the translated language as well as in the reporting language. Reporting language is kept as factual and neutral as possible. When reporting from interviews, direct quotes should be used and the monitor's and colleagues' assessments or other

[4] Employed by the UN Truth Commission in El Salvador; D.J. Ravindran et al. (eds), *Handbook on Fact-finding and Documentation of Human Rights Violations*. (Bangkok, Asian Forum for Human rights and Development, 1994), p. 16.

comments should be clearly distinguished from the bare reporting of facts. Adjectives such as 'alleged', 'presumed', or 'reported' are helpful to emphasize the level of verification.

Reports circulated beyond the internal filing systems should ideally present all information in a verified form. Means of verification, including failure to verify certain data sufficiently, should be mentioned.

It is generally recommended that the relevant government bodies be informed about the monitoring activities and asked to provide their comments. Ideally, authorities should initiate their own investigation of an alleged human rights violation within their domain. It is basically the objective of monitoring to reinforce State organs' responsibility to protect citizens' rights; including to secure redress of violations of these rights. Yet this procedure should only be followed if there is no risk of retaliation against victims or witnesses and limited possibilities of destruction of evidence of the cases. Moreover, the government should not be given an opportunity to delay the report. Comments must be submitted within a reasonable deadline, after which the report will be finalized—with or without the official comments. The report should eventually include information about which government offices have been contacted and the conditions given for the reply.

Box 1.4. The Monitoring Report

A monitoring report could include:

- an overall summary
- key information on the situation generally within the monitored sector (e.g. law enforcement, courts, media, etc.)
- the monitoring objectives
- the mandate and professional details of the monitoring team
- the period of time covered
- methods of monitoring (e.g. interviews with alleged victims, interviews with witnesses, on-site visits)
- the number of informants divided into categories (i.e. victims, witnesses,
- local NGO representatives, etc.)
- accounts of visits and other (including medical) investigations
- methods of verification (e.g. independent witnesses, corroborating information such as previous similar cases)
- a summary of information from victims and witnesses
- a presentation of the relevant international human rights obligations and domestic legislation in the area of investigation
- an analysis of the information on alleged violations in relation to the country's human rights commitments

- a record of statements from government authorities relating to the alleged human rights violations
- government responses to the findings
- recommendations to reinforce the government's human rights protection
- recommendations for the mission and relevant regional or international human rights bodies

1.8. Follow-Up

If monitoring findings point to human rights violations, by direct action or indirectly by omission, or if monitoring findings reveal situations likely to develop into human rights issues, a follow-up action is warranted. It is a management or governing body decision what reaction will be the most appropriate, and what options the mission mandate allows for.

Domestic Remedies

Human rights law is based on the principle that local or national bodies should be the primary protectors of citizens' rights. Hence, a follow-up initiative should seek to address and involve local authorities and relevant bodies, such as human rights institutions, to act on the information gathered; including to make their own investigations and to remedy any human rights violation or problem. Most human rights violations also violate domestic legislation, making it relevant to consider referring the case(s) to the courts.

Oral or Written Interventions

This notwithstanding, it is useful to keep in mind how the objective of the follow-up action is best pursued. In some situations, an *ad hoc* solution may be accomplished with an informal contact to the key officer in charge. In other instances, a meeting with the relevant authorities could be a channel to redress a problem. It is always recommended that two people from the monitoring institution attend. The person with the greatest seniority, and preferably equal to that of the host officer, leads the presentation and concludes on the agreements made during the meeting. The other representative should be the person who has firsthand information about the case and can provide knowledge of all details and secure that all documentation is in place.

The person in charge of the case may also take notes during the meeting. In situations where a mission mandate or an agreement between the host country and the visiting organization is supportive of the request made to the authorities, this document should be at hand during the meeting. A written approach is often seen as a tightening step and should not be instigated as the first attempt if oral negotiations are feasible.

Referrals

A communication may begin with a request that the government provide information on the issue concerned or an urging that official investigations be initiated on the case. The next stage could suggest specific remedies to address an issue which is considered sufficiently documented. If no reaction is received, the government may be informed that a report will be prepared and distributed within the relevant institutional machinery, including regional or international human rights bodies.

Redress initiatives may be controversial from the host government's perspective; hence monitoring reports and subsequent decisions and activities should be recorded in all relevant detail in order to secure documentation for all actions taken. Due attention should always be paid to security issues, including obtaining permission from the individuals involved as to the character of follow-up efforts.

Visibility and Publicity

If the government does not react even after several approaches at still higher levels, other measures are available; the same applies if direct action is not feasible, or if the victims or others have well-founded fears of retaliation from local authorities. It may be a preventive protection measure to publicly show interest and concern over the issue in question. This can be done without uttering direct public criticism, but by exposing the monitoring endeavours, e.g. by paying visits to groups or organizations at risk, e.g. in prisons, refugee camps, and minority communities, or by attending political meetings of opposition parties.

Public criticism of human rights violations is a step that will always complicate relationships and collaboration with the authorities. Hence, other means of reaction should be considered first. Media contact and press statements are normally regulated in internal guidelines,

at least in larger organizations. Professional organizations will have a public relations strategy which includes criteria for disseminating and publicizing monitoring findings and reports. It is a paramount task for the monitor to secure reliability, accuracy, and sufficiency of the findings and conclusions. Only if no doubt can be raised as to the trustworthiness of the documentation will it stand a chance of making an impact for change.

Capacity Building

In other instances, a more long-term capacity building effort is the appropriate measure. In situations where there is no need for urgent intervention to protect concrete potential victims, the follow-up activities may be handed over to domestic bodies such as the ombudsman's office or to a human rights commission; possibly supported by training or documentation assistance from the monitor and his/her organization.

It is also important to contact NGOs in the region. Some provide direct assistance to victims of human rights violations, including legal aid. In some countries, cases and human rights issues can be dealt with in national human rights commissions or ombudsman institutions. It can be a useful tool to prepare a hand-out or information leaflet about domestic institutions and organizations providing advice or assistance in human rights cases. Such initiatives, however, should preferably be organized in collaboration with these local players in order to facilitate an efficient division of labour and possibly contribute to capacity building with regards to taking action in human rights cases.

1.9. International Monitoring Mechanisms

Documentation and reports about human rights cases and situations may be submitted to inform regional and international monitoring bodies.

Treaty-Based Reporting

Generally, human rights treaty control mechanisms are organized under so-called treaty bodies, consisting of committees of experts elected from and by the member States. This system is part of all major human

rights treaties of the United Nations except the Refugee Convention. Similar systems are established in relation to the Social Charter and the Framework Convention on National Minorities under the Council of Europe, while the European Human Rights Convention has the European Human Rights Court as its control mechanism. The treaty committees review States Parties' periodical reports about the domestic implementation of the treaty obligations and developments herein.

The reporting requirements and intervals are specified in the respective treaties and the committee mandates. Furthermore, the committees have developed guidelines for the information to be included in State reports (cf. this chapter's list of Internet Sites). The State reports are reviewed at meetings by the expert committees in a dialogue with the government representatives. The committee concludes the review with a set of recommendations for further legal and political initiatives to address current problems and endorse progressive realization processes. Although the reporting duty rests with States, treaty committees welcome supplementary information from NGOs and others. All UN treaty bodies have developed modalities for interaction with NGOs.[5]

There is no single format for shadow reports, but they should generally be organized according to the articles of the particular treaty, as a commentary on the State Party report. A shadow report should analyze a particular problem rather than merely describe it. NGOs that work on particular problems may produce reports that merely shadow one or a few articles of a convention.[6] In some cases, furthermore, specialized NGOs have prepared reporting guidelines and undertaken to give advice in order to streamline submission of alternative information in accordance with the committees' working procedures (See Box 1.5).

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[5] Cf. *Report on the Working Methods of the Human Rights Treaty Bodies relating to the State Party Reporting Process*, May 2005, Internet: http://daccessdds.un.org/doc/UNDOC/GEN/G05/422/35/PDF/G0542235.pdf?OpenElement. The UN treaty bodies are currently considering a draft set of harmonised guidelines on reporting for all seven of the human rights treaties; cf. *Proposed Common Guidelines on Reporting to the International Human Rights Treaty Monitoring Bodies*, June 2005. Internet: http://daccessdds.un.org/doc/UNDOC/GEN/G05/422/26/PDF/G0542226.pdf?OpenElement.

[6] "A Note on Shadow Reporting", Stop Violence Against Women, Nov. 2003: http://www.stopvaw.org/printview/A_Note_About_Shadow_Reports.html.

Box 1.5. Treaty-Based Reporting Mechanisms and NGOs' Shadow Reporting

Treaty: *UN*	*States Parties* (*Jan. 2008*)	*Guidelines for reporting*	*Participation of NGOs and National Human Rights Institutions*[7]
International Covenant on Civil and Political Rights, ICCPR (1966)	160	CCPR/C/66/GUI/Rev.2: "*Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights*"	Invites NGOs to provide reports containing country-specific information on States Parties with reports due for consideration. While there are no general guidelines for NGO counter-reports, NGOs are advised to follow the same guidelines for drafting of reports as States; further information available from the NGO 'Human Rights First'.[8]
International Covenant on Economic, Social and Cultural Rights, ICESCR (1966)	157	E/C.12/1991/1: "*Revised General Guidelines Regarding the Form and Contents of Reports to be submitted under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*"	The Committee has specific guidelines on NGO participation in the treaty body's work, cf. E/C.12/2000/6. This document recommends that alternative reporting follow the State reporting guidelines.
International Convention on the Elimination of all forms of Racial Discrimination, ICERD (1965)	173	CERD/C/70/Rev.5: "*General Guidelines regarding the Form and the Contents of Reports to be submitted by the States Parties under Article 9, paragraph 1 of the Convention*"	Invites NGOs to provide reports containing country-specific information on States Parties with reports due for consideration. Guidelines for NGO reports developed by 'The International Human Rights Law Group'.[9]

[7] National Human Rights Institutions are independent public institutions that promote, protect, and monitor human rights in their home countries in accordance with the so-called Paris Principles (1993).

[8] For further information on NGO reporting to CCPR, cf. Internet: http://www.humanrightsfirst.org/pubs/descriptions/ngoguide/role.htm#contribute.

[9] Link to the guidelines available on www.narcc.ca (National Anti-Racism Council of Canada): http://action.web.ca/home/narcc/attach/USA%20-%20CERD%20shadow%20report%20guide%20-%20IHRMG%20-%202001.pdf.

Treaty: UN	*States Parties (Jan. 2008)*	*Guidelines for reporting*	*Participation of NGOs and National Human Rights Institutions*
Convention on the Elimination of all forms of Discrimination Against Women, CEDAW (1979)	185	HRI/GEN/2/Rev.2, pp. 41–45 (replaces all earlier reporting guidelines by the Committee)	Welcomes written information from national and international NGOs at pre-sessional working groups, during drafting of the list of issues, and at the full committee session at which the State Party report will be considered. Guidelines for NGO reports developed by 'International Women's Rights Action Watch'.[10]
Convention Against Torture, CAT (1984)	145	*Initial reports*: CAT/C/4/Rev.3 *Periodic reports*: CAT/C/14/Rev.1	Invites NGOs to provide reports containing country-specific information on States Parties with reports due for consideration. Alternative reporting should follow the State reporting guidelines.
Convention on the Rights of the Child, CRC (1989)	193	*Initial reports*: CRC/C/5 *Periodic reports*: CRC/C/58	Expressly envisages a role for NGOs in the treaty body's work, cf. the Convention's Article 45(a). The Committee has specific guidelines on NGO participation in the treaty body's work, cf. CRC/C/90, annex VII. Guidelines for NGO reports developed by 'The NGO Group for the Convention on the Rights of the Child'.[11]

[10] Guidelines for alternative reporting to CEDAW: http://iwraw.igc.org/shadow.htm.

[11] Guidelines for alternative reporting to the CRC: http://www.crin.org/docs/resources/publications/NGOCRC/NGOCRC-Guide-en.pdf. For further information on NGO reporting to CRC, cf.: http://www.crin.org/resources/infoDetail.asp?ID=630&flag=.

Treaty: UN	*States Parties (Jan. 2008)*	*Guidelines for reporting*	*Participation of NGOs and National Human Rights Institutions*
International Convention on Migrant Workers, ICRMW (1990)	37	A/69/48, annex V: "*Provisional Guidelines regarding the form and content of initial Reports to be submitted by States Parties under Article 73 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*"	In accordance with Article 74(4) of the Convention, the committee may invite non-treaty bodies to submit written information (cf. HRI/GEN/3/Rev.1/Add., p. 13). Alternative reporting should follow the State reporting guidelines.

Individual or Group Cases

Some treaty bodies also handle individuals', groups' or organizations' complaints about alleged violations of rights contained in the respective conventions (see Box 6). These complaint mechanisms, or communications as they are often called, need States Parties' specific acknowledgement beyond the treaty ratification proper (cf. chapter 2, section *International Monitoring*, para. six).

The committee in question examines the complaints based on information submitted from both the government and the complainant and eventually issues a decision on the case, including guidelines for the follow-up from the government to secure an appropriate remedy to the problem. Although committee decisions are not legally binding, as rulings from the European Court of Human Rights are, they are generally recognized as authoritative interpretations of the treaty provisions. There is no legal mechanism to secure that committee decisions are implemented, though committees do try to follow up on their cases.

Box 1.6. Treaty-Based Complaint Mechanisms

Treaty Bodies: UN	*Treaty*	*Complaint Mechanism (no. of States Parties, Jan. 2008)*	*Communications received from or on behalf of*
Human Rights Committee (HRC)	International Covenant on Civil and Political Rights	First Optional Protocol to the Convention (110 States Parties)	Alleged victims (individuals) of violations of rights enshrined in the treaty
Committee on the Elimination of Discrimination Against Women (CEDAW)	Convention on the Elimination of All Forms of Discrimination Against Women	Optional Protocol to the Convention (89 States Parties)	Alleged victims of violations of rights enshrined in the treaty or representatives of victims
Committee on the Elimination of Racial Discrimination (CERD)	International Convention on the Elimination of all Forms of Racial Discrimination	Article 14 of the Convention (52 States Parties)	Alleged victims (individuals or groups) of violations of rights enshrined in the treaty
Committee Against Torture (CAT)	Convention Against Torture	Article 22 of the Convention (61 States Parties)	Alleged victims or their representatives
Council of Europe			
The European Court of Human Rights, ECtHR	The European Convention on Human Rights	Section IV Article 46 of the Convention (47 States Parties)	Individual or legal entity, directly and personally a victim of a violation
The European Committee of Social Rights, ESCR	The European Social Charter	Additional Protocol of 1995 (11 States Parties)	Labour market organizations and others, cf. the Add. Protocol, Article 1

Non-Treaty-Based Mechanisms

The United Nations, the Council of Europe, and the OSCE all have mechanisms which are not linked to special human rights treaties and thus do not require specific acknowledgement from governments. The UN has several mechanisms, including working groups, special representatives, and special rapporteurs that receive information or com-

plaints from individuals and groups about human rights violations that fall within their mandate. Under the specific procedure mechanisms a great deal of discretion may be exercised regarding whether or how to intervene in concrete cases, according to the criteria developed within the particular mandate. (cf. Box 1.7).

Box 1.7. Special Procedures Mandates[12]

Established by Commission on Human Rights[13]	*Year Established*	*Activities undertaken within mandate*
1. Special Rapporteur on **Adequate Housing**	2000	Report; carry out country visits; promote assistance to governments; develop dialogues with governments and other bodies; respond to information on housing rights.
2. Working Group on **Arbitrary Detention**	1991	Investigate cases; act on information by sending urgent appeals and communications to governments concerned; seek out and receive information; consider individual complaints; carry out country visits, report.
3. Special Rapporteur on the Sale of **Children**, Child Prostitution and Child Pornography	1990	Investigate exploitation of children; report; make recommendations.
4. Working Group on Enforced or Involuntary **Disappearances**	1980	Assist families in finding information on relatives; establish channels of communication between families and governments; ensure that individual cases are investigated.
5. Special Rapporteur on the Right to **Education**	1998	Report; promote assistance to governments; develop dialogues with relevant organisations/bodies; identify types/sources of financing; carry out country visits; transmit communications to States.

[12] Link to overview of thematic mandates: http://www.ohchr.org/english/bodies/chr/special/themes.htm.

[13] In 2006 the UN Human Rights Council was established to take over from the Commission on Human Rights. In the time to come, the Council will decide on the future for the individual rapporteurs and other special mechanisms.

Established by Commission on Human Rights	*Year Established*	*Activities undertaken within mandate*
6. Special Rapporteur on Extrajudicial, Summary or Arbitrary **Executions**	1982	Examine situations of executions; transmit urgent appeals to States in particular when executions covered by the mandate is imminent; carry out fact-finding country visits; report.
7. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental **Health**	2002	Gather and receive health information; dialogue with relevant actors; carry out country and other visits; transmit communications to States; report.
8. Special Representative of the Secretary-General on the Situation of **Human Rights Defenders**	2000	Seek, examine and respond to information; dialogue with governments; carry out country visits; submit urgent action letters to prevent imminent violations, and allegation letters to ensure that governments investigate cases of violations against human rights defenders; follow-up with governments concerned; report.
9. Special Rapporteur on the Independence of **Judges and Lawyers**	1994	Act on information by sending allegation letters and urgent appeals to clarify and bring attention to substantial cases; carry out country visits upon the invitation of the government; report.
10. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of **Indigenous Peoples**	2001	Receive and request information; carry out country visits; transmit allegations and urgent appeals to governments; follow up on previous interventions and recommendations; report.
11. Representative of the Secretary-General on the Human Rights of **Internally Displaced Persons**	2004	Advocate and raise awareness of the rights of IDP's; dialogue with governments and others; conduct country missions, report.
12. Special Rapporteur on the Human Rights of **Migrants**	1999	Request and receive information on violations; send urgent appeals and communications to concerned governments; carry out fact-finding country visits upon invitation of governments; report.

Established by Commission on Human Rights	*Year Established*	*Activities undertaken within mandate*
13. Independent Expert on **Minority Issues**	2005	Promote implementation of rights of minorities; receive information; undertake country visits upon invitation from governments; report.
14. Special Rapporteur on the Promotion and Protection of the Rights to Freedom of **Opinion and Expression**	1993	Gather information on violations including discrimination relating to freedom of opinion and expression; transmit urgent appeals and communications to States; carry out fact-finding country visits; report.
15. Special Rapporteur on Contemporary Forms of **Racism**, Racial Discrimination, Xenophobia and Related Intolerance	1993	Examine incidents and governmental measures; transmit information or case summaries to States concerned; carry out country visits; report.
16. Special Rapporteur on Freedom of **Religion or Belief**	1986	Examine incidents and governmental actions; recommend remedial measures; transmit urgent appeals and communications to States; carry out fact-finding country visits; report.
17. Special Rapporteur on the Promotion and Protection of Human Rights while Countering **Terrorism**	2005	Gather information and communications from all concerned, carry out country visits; identify and recommend measures to counter terrorism while respecting human rights; develop dialogues; report.
18. Special Rapporteur on **Torture** and other Cruel, Inhuman or Degrading Treatment or Punishment	1985	Examine incidents and cases; transmit urgent appeals and communications on past cases to States; carry out fact-finding country visits; report.
19. Special Representative on Human Rights and **Trans-national Corporations** and other business enterprises	2005	To clarify standards of corporate responsibility in regard to human rights; to develop methodologies to measure human rights impact assessment of the activities of trans-national corporations and other business enterprises.
20. Special Rapporteur on **Trafficking** in Persons, Especially in Women and Children	2004	Receive information and communications, take action on violations; carry out country visits; formulate recommendations to governments; report.

Established by Commission on Human Rights	*Year Established*	*Activities undertaken within mandate*
21. Special Rapporteur on the **Violence** Against Women, Its Causes and Consequences	1994	Seek and receive information and respond to violations; transmit urgent appeals and communications to States; carry out fact-finding country visits; report.

There are other mechanisms to deal with allegations of systematic or gross violations of human rights and procedures to open discussions with a government facing allegations of consistently and continuously violating human rights. In the UN, one such procedure is attended to by the Working Groups of Communications, also known as the 1503 Procedure (named after the initial resolution that established the mechanism). The procedure is confidential, and even the complainant will not be informed about what measures may be taken to address the problem. Only lists of the countries that have been considered under the procedure are published annually. Obviously, it is difficult to assess the effect of this secret diplomacy.

The Council of Europe's Commissioner for Human Rights has as one aspect of his mandate to identify shortcomings in law and practice with regards to human rights. The Commissioner may act on information relevant to his functions from both individuals and organizations. He may contact member States directly; he may also request information from governments and express opinions and recommendations on current human rights issues.

The Council of Europe Parliamentary Assembly (PACE) has a Legal Affairs and Human Rights Committee where human rights cases and situations can be dealt with and rapporteurs can be appointed to follow certain cases.

Furthermore, PACE has a Monitoring Committee (the official name is the Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe) that follows the development of human rights standards in new member countries until the level is deemed to comply with the minimum standards required for membership.

Under the OSCE, cases and human rights issues are discussed in the Permanent Council where all member States are represented. Concerns about general human rights situations or specific cases can be raised in the Permanent Council, for instance, by heads of OSCE field operations.

The OSCE Chairman-in-Office can take up human rights cases and issues with all member States and appoint Special Representatives to intervene in certain conflicts or regions.

The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) follows developments of human rights and their implementation in member States, and may address human rights violations directly with member States' representatives or via the Permanent Council.

Specialized Organs Addressing Human Rights Issues

Yet other organs of the international and regional organizations receive monitoring information with the aim of entering into dialogue with governments on more specific obligations and commitments. Further details are provided on these specialized bodies in the thematic chapters.

The European Commission against Racism and Intolerance (ECRI) monitors instances of racism and racial discrimination by examining the situation in each of the member States of the Council of Europe. ECRI draws up reports containing its analyses and recommendations as to how each country might deal with the problems identified. The ECRI rapporteurs organize a contact visit before the preparation of each new country report. The input from non-governmental organisations and other institutions or individuals active in this field are welcome in this process.

The OSCE's Representative on Freedom of the Media observes media developments in all member States and receives information on the situation in this field from different sources including NGOs. The Representative concentrates on rapid response to serious non-compliance with freedom of media standards, including OSCE commitments by taking direct contact to the government and others involved.

The OSCE High Commissioner for Minorities overlooks the situation for minorities in member States with a particular view to seeking early resolutions of ethnic tension. Although the mandate precludes that individual cases be dealt with, the High Commissioner is open to receiving information on the situation of national minorities.

The Contact Point for Roma and Sinti Issues under the OSCE specifically undertakes to monitor Roma people's conditions in member States, for instance participation in elections. Furthermore, a series of special monitoring tasks regarding Roma people in South Eastern Europe has been included in the Stability Pact of that region.

The European Commission against Racism and Intolerance has a mandate to examine Council of Europe member States' situation and political efforts within their mandate area as a regular task, while the Steering Committee on the Media and New Communication Services may decide to examine and report about aspects of their mandate as they find it relevant.

Non-Governmental Organizations (NGOs)

Civil organizations play a very important role in human rights monitoring. Domestic organizations may conduct their own local monitoring of national human rights performance and will thus often be important sources of information and collaboration for regional and global organizations in charge of overseeing human rights implementation.

Furthermore, a still growing number of regional and global human rights NGOs are involved with human rights monitoring. Many organizations specialize in certain fields or issues such as children's rights, refugee protection, prevention of torture, etc. Others have broader mandates. Some collect information on individual human rights cases. Human rights NGOs may provide useful and pertinent data for the monitor; some organizations and institutions prepare annual monitoring reports with a global, regional or national scope which can be very useful introductory material for the monitor who is a newcomer in the field or the region. Most of the larger human rights NGOs have well-developed internet sites where reports and other information can be accessed, including Amnesty International, Human Rights Watch, International Helsinki Federation for Human Rights, and others.

1.10. References

Election Observation Handbook. OSCE/ODIHR (2005)
The handbook outlines the general methodology of ODIHR election observation in addition to providing a set of practical guidelines for the conduct of an election observation mission. Available online at: http://www.osce.org/item/14004.html.

English, Kathryn and Adam Stapleton, *The Human Rights Handbook: A Practical Guide to Monitoring Human Rights* (United Kingdom: Human Rights Centre, University of Essex, 1995).
A handbook with brief descriptions of key concepts and principles of international human rights law in plain informal language. Other chapters deal with codes of conduct, guidelines and principles developed for professional groups that may be involved in monitoring, i.e. lawyers, judges, law enforcement personnel, and medical doctors. Other chapters give practical advice on monitoring special institutions like prisons, trials, hospitals, and on dealing with vulnerable groups.

Guzman, Manuel and Bert Verstappen, *What is Monitoring*. Human Rights Monitoring and Documentation Series, Vol. 1 (Versoix, 2001).
A (very) brief introduction to the basic terminology of international human rights law and its monitoring mechanisms. In addition to this, one will find introductions to different forms of monitoring, including situation and case monitoring. Furthermore, some examples of how to analyze (smaller) samples of statistical data are given. Available online at: http://www.hri.ca/docCentre/docs/basmonen.html.

Human Rights Defenders: Protecting the Right to Defend Human Rights. Fact Sheet No. 29 (OHCHR. 2004), Internet: http://www.ohchr.org/english/about/publications/docs/fs29.pdf
Comment: *Individual Human Rights Complaints: A Handbook for OSCE Field Personnel*. OSCE/ODIHR (Poland, 2003), Internet: http://www.osce.org/item/13594.html.
The handbook encompasses descriptions of human rights standards and provisions within selected thematic areas and with a special emphasis on OSCE commitments. Furthermore, practical advice for the monitor is given with regards to interviewing, investigating, reporting, and follow-up measures.

Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers. Norwegian Institute of Human Rights (Oslo, 2001), Internet: http://www.humanrights.uio.no/nordem/manualen.html.
The manual is a collection of articles by different specialists covering such themes as international human rights law and machinery, the OSCE; monitoring techniques, including chapters on the special challenges in the administration of justice, trial, and election observation, as well as case preparation for the International Criminal Tribunal for the former

Yugoslavia. The final chapter discusses health (including stress management) and security issues. The site text explaining the access to the manual is in Norwegian, the manual itself is in English. It can also be purchased in paper version via the e-mail address: sv-uvavd@sio.uio.no.

OSCE/ODIHR, *Working with or as an interpreter: OSCE handbook for field work 2002*.
A manual prepared for OSCE field personnel. Describes concepts and principles in relation to interpretation, and gives guidelines for both the interpreters' work and for field mission personnel on their collaboration with interpreters. The handbook is available from osce@info.org.

Ravindran, D.J., Manuel Guzman and Babes Ignacio (eds), *Handbook on Fact-Finding and Documentation of Human Rights Violations*. (Thailand: Asian Forum for Human Rights and Development (Forum-Asia), 1994).
A handbook prepared for NGO activists and held in easily accessible language. Deals with how to establish reliable data, with security issues, and monitoring methods, i.e. interviews, fact-finding missions, and documentation, including models for autopsy, skeletal analysis and disinterment protocols.

Spirer, Herbert F. and Louise Spirer, *Data Analysis for Monitoring Human Rights* (Washington, DC: American Association for the Advancement of Science, 1993).
A handbook about data analysis, including thorough descriptions of different sample survey methods. Discussion on how to apply correlation, exceptional cases and estimates in monitoring; all described with examples from human rights work.

UN Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (New York/Geneva, 2001).
A comprehensive manual prepared for UN field officers in particular. One part describes the human rights standards in the areas of right to life, to liberty and security of person, and rights in the administration of justice. Another focuses on monitoring methods, including interviewing, visiting persons in detention, working with children as well as refugees and displaced persons. There are chapters on monitoring trials, elections, and demonstrations; monitoring during armed conflicts; and monitoring economic, social, and cultural rights. There is a section dealing with reporting and follow-up, as well as safety and security issues for the field officer.

Internet Sites

Mandates, guidelines, and most other resources related to the monitoring mechanisms mentioned above can be found via the following sub-sites at the home pages of the organizations below:

UN Office of the High Commissioner for Human Rights
http://www.ohchr.org/english/bodies/

Council of Europe
http://www.coe.int/T/E/Human_rights/

OSCE
http://www.osce.org/documents/

An internet portal covering a number of mainly international and regional human rights NGOs can be found at: http://www.humanrightsinfo.com/links-ngo.html.

CHAPTER 2

HUMAN RIGHTS LAW—AN INTRODUCTION

International human rights have been defined in documents negotiated under the auspices of global and regional organizations such as the United Nations (UN) and the Council of Europe (CoE). Each human right entails a specific normative obligation and defines a legal relationship between individuals and the authorities. Taken together, human rights aim to secure all human beings a series of fundamental rights, and to commit their respective governments to honour and protect those rights under the supervision of international or regional treaty control organs.

Human rights are thus **individual rights** that must be respected, ensured, and protected by the State. This means that the State must refrain from interfering with the individual's exercise of certain rights such as freedom of assembly, expression, association, and worship. Furthermore, the State must take positive legislative and other steps to effectuate these rights; for instance, by establishing an independent and effective court system, by securing the right to a fair trial, or by organizing sufficient schools and teachers to protect the right to basic education for all. Finally, the individual must be protected against interferences with his or her human rights by non-State actors, individuals, organizations, or others (the **horizontal effect** or '***Drittwirkung***'); for instance, through effective protection against being held in slavery. Cases of civil violence are not human rights cases as such, they are criminal offences. However, if the authorities refrain from investigating violent incidents and bring offenders to justice, we can speak about a human rights violation of, in this case, the right to personal security.

Hence, the State is seen as the **duty bearer**, and the individual as the **rights holder** in relation to human rights. Nevertheless some rights, in particular certain rights for minority groups, can be seen as **collective rights**.

Categories of Human Rights

The traditional categorization into **civil and political rights** on the one hand and **economic, social and cultural rights** on the other has historic and political roots. It associates the former with the liberal constitutional movements of 18th and 19th Century Europe and America and is therefore sometimes referred to as first generation rights. The latter are connected to the 19th and 20th Century labour and socialist movements, and are thus considered the second generation of rights. These categories were kept alive during the Cold War by the different political preferences of the Western and Eastern blocs. In current human rights thinking this division is toned down while the **interdependence** of all human rights is emphasized. This more uniform discourse was one of the main results achieved from the **World Conference of Human Rights** held in Vienna in 1993, heralding a new common acceptance in the international community of the **universality** of human rights.

However, the traditional division of human rights still persists in the distribution of rights into separate instruments (see below), and the generally stronger control mechanisms attached to civil and political rights in contrast to economic, social and cultural rights. Furthermore, a difference in the nature of the legal obligations also exists: Some rights must be immediately implemented, for instance freedom from torture, freedom of expression, freedom of religions, non-discriminatory access to all human rights, etc. Others can be realized progressively, such as the right to free education, the right to health services, etc. If it is very costly to implement a certain right, the realization can be done gradually.

Box 2.1. Immediate or Progressive Realization

The differences in modes of realization of rights are illustrated by the introductory articles of the International Covenant of Civil and Political Rights (ICCPR) and the International Convention of Economic, Social and Cultural Rights (ICSECR), respectively.

The ICCPR states that "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." Article 2(1)

The ICESCR has an often cited description of how resource demanding obligations are meant to be implemented by States Parties: "Each State Party to the present Covenant undertakes to take steps (…), to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Article 2

2.1. Legally Binding Treaties

The horrors of World War II led to the acceptance of human rights as a cornerstone of the post-war international order. The promotion of respect for human rights and fundamental freedoms everywhere in the world has since become a major concern of the international community. The Universal Declaration of Human Rights of 1948 (UDHR) attempted to set down universal human rights norms in international law. Since 1948, the international community has succeeded in codifying these rights into **legally-binding treaties**. Such documents are mostly termed **conventions**, and in a few cases **covenants**, or **charters.**

Universal or Regional

The rights mentioned in the non-binding UDHR were subsequently given legally binding form in the twin treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR); together, they cover all fundamental human rights. In conjunction with the UDHR, the two Covenants are sometimes called the **International Bill of Rights**.

Parallel to these basic instruments, other conventions have been drawn up both at the international and regional level with the aim to protect and promote the human rights of special groups such as refugees, women, children, and migrant workers or to enhance implementation within special fields such as protection against racial discrimination and protection against torture (cf. Box 2).

Several of the conventions have later been amended by **protocols** adding a higher or supplementary degree of protection to the initial text; or offering supplementary control mechanisms, such as complaint procedures, to the specific convention. The protocols are legally binding like the documents they are attached to; however, they are often optional for the States Parties to the convention, and thus require separate ratification.

The human rights treaties under the UN are universal in scope. Others, such as the European Convention on Human Rights (ECHR), the African Charter of Human and Peoples rights, and the American Convention on Human Rights were drawn up to protect human rights in specific regions of the world.

To a large extent, the ECHR and the European Social Charter under the Council of Europe (CoE) cover the same rights as the International Bill of Rights, although there are variations in substance in some instances; the ECHR, for example, protects the right to property in an additional protocol while this is not encompassed in the ICCPR. The variations are presented and discussed further in the thematic chapters. Yet the main differences relate to the control mechanisms attached to the instruments. This will be dealt with below.

To be **legally binding** for a State, an international or regional human rights treaty or its protocol must be ratified by the State which subsequently becomes a **party** to the convention. Often a State will first sign a treaty, and thus become **signatory**, as a first indication of interest in the instrument. However, it is the **ratification** which is the legal manifestation of the State's commitment to be bound by the treaty. Moreover, following ratification, the State subjects itself to possible international or regional control procedures which are often specified in the treaty.

Box 2.2. Major Global and European Human Rights Conventions

Conventions	*No. of States Parties***
Global UN Conventions (UN members: 192):	
Civil and Political Rights, ICCPR (1966/1976*)	160
Optional Protocol, Individual Complaints, ICCPR-OP1 (1966/1976*)	110
Second Optional Protocol, Death Penalty, ICCPR-OP2 (1989/1991*)	64
Economic, Social & Cultural Rights, ICESCR (1966/1976*)	155
Refugee Convention, European Coverage (1951/1954*)	144
Protocol, Universal Coverage (1967/1967*)	144
Racism Convention, ICERD (1965/1969*)	173
Women's Convention, CEDAW (1979/1981*)	185
Optional Protocol, Complaints and Inquiries, OP-CEDAW (1999/2000*)	89
Torture Convention, CAT (1984/1987*)	145
Optional Protocol, Visits, OP-CAT (2002/2006*)	34
Children's Convention, CRC (1989/1990*)	193
Optional Protocol Armed Conflict, OP-CRC-AC (2000/2002*)	119
Optional Protocol Sale of Children, OP-CRC-SC (2000/2002*)	124
Migrant Workers' Convention, ICRMW (1990/2003*)	37
International Criminal Court, ICC (1998/2002*)	105

Conventions	*No. of States Parties***
European Conventions (CoE members: 47)	
European Convention on Human Rights (1950/1953*)	47
Protocol on Property, education and free elections (1952/1954*)	44
Protocol 2 Replaced by Protocol 11 (1963/1970*)	47
Protocol 3 Replaced by Protocol 11 (1963/1970*)	47
Protocol 4 Various supplemental rights (1963/1968*)	41
Protocol 5 Replaced by Protocol 11 (1966/1971*)	47
Protocol 6 Abolition of death penalty in peace time (1983/1985*)	46
Protocol 7 Various supplemental rights (1984/1988*)	40
Protocol 8 Replaced by Protocol 11 (1985/1990*)	47
Protocol 9 Replaced by Protocol 11 (1990/1994*)	24
Protocol 10 Replaced by Protocol 11 (1992/not in force*)	25
Protocol 11 Rationalization of complaint mechanism (1994/1998*)	47
Protocol 12 General prohibition of discrimination (2000/2005*)	15
Protocol 13 Total ban on death penalty (2002/2003*)	40
Protocol 14 Reform of complaint procedure (2004/not in force*)	46
European Social Charter (1961/1965*)	27
Additional Protocol Various supplemental rights (1988/1992*)	13
Protocol amending the Charter Improves control machinery (1991/not in force*)	22
Additional Protocol: Collective complaints (1995/1998*)	11
European Social Charter, revised (1996/1999*)	22
European Convention for the Prevention of Torture (1987/1989*)	47
Framework Convention to the Protection of National Minorities, FCNM (1995/1998*)	39
European Charter for Regional or Minority Languages (1992/1998*)	22
European Convention on Nationality (1997/2000*)	16

* The years in parentheses after each instrument indicate when the convention was opened for signature and when it entered into force (the latter requires a certain number of States Parties which is specified in the text).

** The numbers of ratifications are as of January 2008

International Monitoring

Any State party to a legally binding human rights convention must accept international supervision of its compliance with the treaty obligations. Often, the supervision or monitoring system of each human rights treaty is concomitant with the same instrument; thus each treaty will have its individual supervisory **treaty body**, often in the form of a **committee** of experts elected by the States Parties.

There are three principal control modalities applied in international human rights law. The most common system is that State Parties submit **periodical reports** and have them examined by the treaty body

in a dialogue with the government. The treaty committee concludes its examination by drawing up its main concerns with regard to the implementation of the treaty obligations in the country in question. These conclusions are communicated to the government together with recommendations for initiatives that can improve the realization of the critical areas. Such a mechanism is built into all the major UN human rights treaties, and with some modifications also into the European Social Charter and the Framework Convention on National Minorities under the Council of Europe. Only the UN Refugee Convention does not require any reporting from its States Parties.

Obviously, this State reporting procedure is a rather weak control mechanism, although the treaty bodies may invite, say, monitoring civil society organizations to submit information on the State Party's human rights compliance to supplement the government report. The report, moreover, is made public together with the committee's conclusions and recommendations (cf. chapter 1, Box 1.5). In many cases strong civil society organizations have utilized this reporting mechanism; for instance, by including committee recommendations in their advocacy strategies.

On-the-spot inspection of the State Parties by the treaty organ is another monitoring model. This is the mechanism concomitant with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (in short: ECPT); and in the Optional Protocol to the International Convention against Torture (CAT) (see further chapter 4).

Examination of **individual cases** is the third measure. This can be done by a court as Decisions from the European Court of Human Rights (ECtHR) attached to the ECHR are binding on State Parties. An individual country must follow up on the Court's rulings against it. Even more importantly, though, relevant decisions from the entire ECtHR case corpus must inform and guide all legal cases dealing with human rights issues throughout the member States.

Some treaties, including the ICCPR, the ICERD, the CAT, and the Convention for the Elimination of Discrimination against Women (CEDAW), allow individuals or representatives acting on their behalf to complain over alleged State Party violations of the rights covered by the specific convention. This mechanism must be acknowledged specifically by the State Party. Hence, a State may be party to a human rights treaty without accepting a right to complaint over lack of fulfilment of the provisions of said treaty. The individual complaint, or

communication as it is often termed, is examined by the treaty committee alongside the State Party's response to the allegations. The procedure concludes with a decision from the committee on the case. This does not have the status of a court judgment, as it is not legally binding. However, committee decisions are structured the same way as court judgments with reasoned conclusions and requests for appropriate remedy if the complainant has experienced a violation of his/her rights. The committee conclusions are published and the committees endeavour to monitor States Parties' compliance with their conclusions and recommendations, although no sanctions or other immediate effects can be applied to governments that do not cooperate; and this is inevitably a serious shortcoming to the procedure. Nevertheless, as interpretative tools in specifying for instance legitimate or illegitimate restrictions on human rights, committee conclusions enjoy a very high status.

All international human rights mechanisms require that a complaint is dealt with firstly throughout the domestic legal system, and only then by an international body, which in practical terms means that most complaints of human rights violations are dealt with locally or domestically and only a small fraction of cases move to the international level.

Reservations or Declarations Concerning Rights

A State can decide to be bound by a convention, but make a **reservation** that excludes the application of one or more of the treaty provisions. A State Party may also by making a **declaration** specify a certain interpretation of a given provision. Both such statements must be attached to the country's ratification document. Lists of States Parties to human rights conventions including their reservations and declarations are publicized, often at the home pages of the organizations under whose auspices the specific treaty has been adopted, e.g. the UN or the CoE.

A general rule in international law is that a reservation should not be incompatible with the object and purpose of the treaty.[1] Also, some treaties include articles regulating the use of reservations.[2] The European Convention for the Prevention of Torture rules out any

[1] Vienna Convention on the Law of Treaties, Article 19(c).
[2] ICCPR, Article 4.

reservation.[3] The ECHR allows State Parties to make reservations on specific provisions if existing domestic legislation is not in accordance with the Convention's requirement on the time of ratification, while general reservations are prohibited.[4] Other Convention texts do not say anything about reservations. Hence, some monitoring treaty bodies have developed guidelines to assess the admissibility of a State Party's reservation.[5] The Human Rights Committee (HRC), the treaty body to the ICCPR, sees it as its duty to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Furthermore, the Committee states that reservations cannot contradict peremptory norms (which will be explained further below). Moreover, reservations must not be general, but should refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.

If the treaty organ has the mandate to give legally binding status to its decisions, as does the ECtHR, it can determine if a reservation is valid or not. Treaty bodies with less decisive power, such as the committees attached to the UN conventions, can deliver their opinion on reservations which will have an authoritative status.

Limitations of Rights

A State has the right to limit the exercise of some human rights; the extent to which such limitations are permissible are often described in relation to the specific rights. These restriction clauses are designed to leave State Parties room for balancing individual human rights with legitimate societal interests, thus opening a certain space for adapting the implementation to local conditions. This is also referred to as the **margin of appreciation**,

In convention texts, the lawful limitation to a specific human right often appears as the second section of an article. Such legitimate limitations of human rights must be prescribed by law (this refers to both statutory law and regulations, instructions and other official rules and procedures), moreover, the limitation must be 'necessary in

[3] European Convention for the Prevention of Torture, Article 21.

[4] ECHR, Article 64.

[5] Human Rights Committee, General Comment 24/52 on Issues Relating to Reservations to the UN Covenant on Civil and Political Rights, adopted on 2 November 1994.

a democratic society' (cf. Box 2.3). This means that any restriction of a human right must serve a pressing social need, and they generally relate to national security, public order, public health, morals, or to protecting the rights and freedoms of other people. The limitation must also be proportionate to the aim that it is trying to achieve and only comprise strictly necessary restrictions given the demands of the situation.

The criteria that should be adhered to in all restrictions on human rights are rather broadly described and could be understood in many different ways. Nonetheless, decisions from competent bodies on specific situations and cases, i.e. **case law**, provide much more clear-cut information as to how these criteria should be interpreted in practice. Such competent bodies at the global and regional (European) level are primarily the European Court of Human Rights (ECtHR) and treaty monitoring bodies.

Box 2.3. Criteria for Limitations of Human Rights

An example of the typical formulation of human rights as they are expressed in the convention texts: Section 1 gives a description of the right; Section 2 sets criteria for any justified limitation of the right.

ECHR, Article 8: The right to family life

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 well-being 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.

Derogation

In very grave situations such as public emergencies a State Party may decide to free itself, to **derogate**, from some of the obligations in a human rights treaty. The conditions for and restrictions on lawful derogations are in some cases enshrined in the treaty text. Both the ECHR and the ICCPR have rather detailed descriptions of the requirements for legitimate derogations.[6] It takes a situation which threatens the life of the nation; for instance, a war situation. A valid derogation requires, moreover, special procedures in which the government concerned must

[6] ECHR, Article 15, and ICCPR, Article 4.

notify an international body of the derogation and the reasons for it; in the case of ECHR, the Council of Europe General Secretary; in relation to ICCPR, the UN Secretary-General. States must also provide information on the measures undertaken in relation to the derogation, and the reasons for such steps, and also communicate to the relevant organs the specified extent and duration of the derogation.

There can be varying interpretations as to when a situation is grave enough to allow a State to derogate from its human rights obligations. However, derogations from the EHRC can be tried by the ECtHR both occasioned by an individual complaint and a complaint from other States Parties; this has indeed happened a few times. In one instance, in a case against Greece filed by a group of other member States after a coup d'etat in 1967, the derogation was found unjustified, and a decision by the Committee of Ministers ruled that Greece should be expelled from the Council of Europe. But Greece withdrew from the organization before that decision could be implemented. The Human Rights Committee has stated that derogation must always be of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened.[7] The HRC has several times ruled a derogation to be a violation of the covenant in specific cases.

Certain human rights obligations can not be set aside, i.e. derogated from, under any circumstances. They can be regarded as **peremptory norms** or ***jus cogens***, **i.e.** accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.[8] These include the right to life and freedom from slavery and torture. These are mentioned in both the ECHR and the ICCPR. The latter, furthermore, includes the prohibition of retroactive criminal legislation, freedom of conscience and religion, and the right not to be imprisoned for failure to perform a contractual obligation. The covenant also prohibits derogation measures that involve discrimination solely on the ground of race, colour, gender, language, religion, or social origin.[9] These provisions are often referred to as **non-derogable** human rights.

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[7] See e.g. CCPR General Comment No. 5, 31/07/81, on derogation of rights under Article 4 of the Covenant.

[8] The Vienna Convention on the Law of Treaties, Article 53.

[9] See ECHR, Article 15, and ICCPR, Article 4.

2.2. Other Mechanisms

The legally binding human rights treaties and case law are supplemented by other international or regional standards.

Politically Binding Instruments (OSCE Documents)

The Organization for Security and Co-operation in Europe (OSCE) is essentially a political forum that develops common standards and policies among member States based on consensus. Since the termination of the Cold War, the OSCE and its predecessor, the Conference for Security and Co-operation in Europe (CSCE), have adopted a series of documents committing all member States to respect and protect human rights, under the so-called Human Dimension. The Copenhagen Document 1990[10] is the most important of these instruments. It outlines the major principles, recognized by the member States, for democratic government and the division of powers. The document declares member States' commitment to a detailed list of primarily civil and political rights, some of which are more itemized than in the covenants. Furthermore, the States express their will to abide by a very strict interpretation of derogation. Moreover, the Copenhagen Document introduced detailed protection of national minorities and developed new election commitments.

Another important approval followed the year after, with the Moscow Document 1991.[11] It explicitly gave support to the idea that human rights in all member States are a matter of common concern and not an issue that can solely be taken care of by individual States as internal matters.

Thus, the OSCE does not create legally binding norms and principles, and the OSCE commitments cannot be enforced in a court of law. Yet the agreements decided upon in the organization still bind member States. The political nature of OSCE documents means that once consensus among the member States has been achieved, decisions enter into force immediately and, in principle, are binding for all OSCE member States (the so-called universality principle). The OSCE

[10] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

[11] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE.

endeavours continuously to increase consensus and commitment to implement human rights among member States. The organization's Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, also monitors compliance with the agreements on human rights standards and commitments. And lack of implementation of the obligations and decisions in a country can be taken up and discussed directly with the government within the organization.

Soft Law

The treaty-based law is sometimes referred to as 'hard law.' The non-treaty standards, expressed in declarations, recommendations, guidelines, standard minimum rules, basic principles, etc. are, consequently, often called 'soft law.' These instruments often give policy guidelines. Although not directly binding, soft law standards have the persuasive power of having been negotiated by governments and/or adopted by political bodies such as the UN Human Rights Commission, World Conferences or Summits. As such they also play a key role in the political realm, i.e. as part of political strategies. Soft law documents may also have impact on legal developments, e.g. by preparing the ground for a later adoption of similar norms in legally binding forms such as conventions. Soft law instruments may also be utilized as a source or instrument in the interpretation of hard law or customary international law.

2.3. National Implementation

When a State becomes party to a human rights convention it is obliged to secure implementation of the treaty provisions in the domestic context. The treaty texts often suggest means such as legislative, administrative and other steps, but rarely determine how these must be handled at the national level.

Monist and Dualist Principles

National implementation of an international human rights treaty can be gone about in different ways. Two positions often referred to as the monist and dualist doctrines, have traditionally influenced the States' practice. The **monist** doctrine was based on the assumption

or theory of one coherent legal order from the international to the national level. The **dualist** theory, in contrast, emphasized that the international and domestic legal systems are separate orders and that the application of international law in a domestic context is generally not possible. Today, the practical distinction between the two legal systems is often not sharp. Nevertheless, a divergence of opinion can still be found between the view supporting the primacy of international law *vis-à-vis* a dualist oriented position that would emphasize that no international enforcement mechanism is available and, consequently, national implementation is ultimately the competence of States.

The two approaches have directed two main methods of implementation: The **adoption** system, inspired from the monist doctrine, will make an international convention part of national law when a State has concluded the ratification process. In this system, international human rights are applicable in the domestic legal order. However, the hierarchical position of international conventions in relation to national legislation may vary from one country to the next. In some States, this is determined in the constitution; in others it may be decided by a Constitutional Court or other bodies. Generally, following a monist principle, specific issues and disputes related to human rights obligations can be tried in national courts.

The dualist system does not ascribe formal law status to the international treaty in the domestic system and consequently the rights enshrined in the treaty are **not adjudicative** (i.e. directly applicable in domestic courts). For an international human rights convention to be enforceable in the domestic legal order, a special enactment procedure of the convention is required. Many States adhering to the dualist system actually have adopted one or more human rights conventions by statute. Through this procedure, the human rights provisions made domestic law are judiciable in courts. Hence, the distinction between the two systems diminishes in practice. Often, if a human rights convention is enacted as a domestic statute, its position in the legal hierarchy—above, equal to or below domestic acts—is described in this new act.

If in a dualist system a convention is not enacted into domestic law it is still a source to be consulted by the legislators in order to avoid conflicts with national legislation. If necessary, the legislative body must amend existing laws in order to secure implementation of the State's international obligations. If a convention is not transformed into domestic law, the courts and other law-applying authorities must follow

the so-called **rules of interpretation and presumption,** which means that in the application of domestic laws they interpret acts and directives in accordance with the State's human rights obligations as far as possible; and, moreover, presume that lawmakers intended the law to be understood in this way.

General Principles for Interpretation in a Domestic Context

A State's commitment to human rights would generally require that it is a party to one or more treaties encompassing human rights. Furthermore, the obligations of a human rights convention can be modified by valid reservations or derogations concerning the rights enshrined in the treaty. However, as mentioned above, certain human rights will always apply, regardless of whether a State is party to human rights conventions or not—namely the most fundamental human rights which can be claimed to hold a status of a customary nature or of *jus cogens* (cf. above).

A State's obligations are generally restricted to cover its area of **jurisdiction** only. Yet this is normally not an issue; in situations of conflict, for example, a State's control of certain areas may be undermined or contested. In some situations, rebel groups may contain a region *de facto* and render the State Party's obligations impossible to fulfil in that area. Similarly, when a State or a non-State actor has actual control of a certain territory, it is expected to adhere to all its human rights obligations in that area.

When deciding the scope of a State's human rights obligations more specifically in a domestic context, the usual hierarchy relating to legal sources and rules would apply. Laws enacted by Parliament prevail over administrative regulations passed by political and administrative bodies. And within a tradition with a constitutional court, monitoring compliance with the national constitution, constitutional rules and constitutional court decisions would prevail over the ordinary parliamentary acts.

Many domestic **Constitutions** of the countries of the world have a Bill of Rights which lays down human rights principles and make them part of domestic law. Also, human rights provisions are formulated in relevant statute law; e.g. where a Criminal Procedure Code reflects and codifies the principles of fair trial. In this way the international and domestic standards mutually support and enforce one another. Thus a State's human rights obligations are meant to infuse the legal basis

and the working procedures of all relevant public bodies both at the national and municipal level.

In recent years, moreover, so-called **National Human Rights Institutions** (NHRI) have been established in many countries with the aim of promoting and protecting human rights in a domestic context. NHRIs are supposed to follow the Paris Principles, adopted in 1993 by the UN General Assembly; they are publicly funded yet independent institutions. Their mandates may vary, but often include monitoring and counselling tasks in relation to human rights implementation; some may also handle individual citizens' complaints over alleged violations of rights. NHRI status can be held by a Human Rights Commission, by an Ombudsman or a similar institution.

The national courts will often make human rights principles and provisions part of the legal sources on which they base their judgments. However, regardless of the methods of national implementation, not all human rights are suitable for specification and decisions in court. To be invoked in legal proceedings, a human right must be sufficiently specific to be pinpointed in legal decisions, often referred to as a **self-executing** right. Rights phrased as acknowledgement of principles and values are less useable in concrete judgments and decisions.

In cases relating to human rights, courts and other legal organs will also consider international/regional case law as a means of interpretation of the invoked human rights provisions. Furthermore, decisions from treaty bodies, and their interpretative instruments, the so-called **General Comments** within the UN human rights treaty machinery, as well as the **Explanatory Reports** from the Council of Europe, could also be consulted. And politically binding standards from OSCE as well as soft law instruments, such as declarations, guidelines, codes of conduct, and other instruments related to the specific case substance may also be consulted to see what has been recommended from relevant political bodies and assemblies. Court decisions are legally binding on the authorities and others under the specific court jurisdiction. Hence, decisions from domestic courts continuously contribute to the specification and practical interpretation of human rights in a domestic context.

2.4. International Law and Human Rights Law

Be they of global or regional origin, human rights documents form a special branch of international law. The two main sources traditionally guiding international law were customs and treaties without any formal hierarchy placing one above the other. In accordance with this tradition, the Statute of the International Court of Justice (ICJ)[12] lists the means for determining rules of international law as: international conventions establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by civilized nations.

Fundamental human rights principles, including the most basic of the non-derogable human rights: the right to life and freedom from slavery and from torture are today recognized by the vast majority of States and other international agents as forming part of **general** or **customary international law.** This means that they must be observed by all States regardless of whether they are bound by a treaty in this regard or not. As mentioned above, it may even be claimed that these, the most fundamental of human rights are peremptory norms of general international law from which no derogation is permitted, the ***jus cogens***.

As subsidiary means, the ICJ Statute mentions judicial decisions and the teachings of the most highly qualified publicists of the various nations. Obviously, these criteria are very broad and open to almost endless interpretation. One special characteristic of international law is that there is no stable organization of powers behind it in line with the judiciary, legislative, and executive powers in the domestic context.

However, by the end of the 1960s, the international community managed to adopt a treaty on the interpretation of international treaties, The Vienna Convention on the Law of Treaties (VCLT) of 1969. This document contains the main guidelines for interpretation of international law, including human rights law.

As opposed to international law in general, human rights law is not based exclusively on States as the legal agents or legal subjects. Human rights law recognizes both States Parties and individuals as legal subjects and they are endowed with rights at different levels of the system. The States have the capacity and right to engage in

[12] The ICJ is established by the Charter of the United Nations as the principal judicial organ of the United Nations. Cf. Article 38 of the Statute of the ICJ.

the development of norms and standards, and furthermore have the right to enter into binding conventions. The individual has the right to benefit from States Parties' protection of his or her human rights. Moreover, with regard to some provisions (the immediately applicable ones, cf. the section above: Categories of Rights), the individual has the right to an effective remedy if his or her rights are infringed upon. This last point is in many instances and situations the critical aspect, since the actual implementation of rights and freedoms to a large extent depends on the State's willingness and capacity to live up to its commitments. The international mechanisms to effectively ensure the individual's human rights are still lagging behind. Many human rights are not backed up by international or regional individual complaint procedures. This is particularly true of economic and cultural rights. Even where complaint mechanisms are available, States may opt not to accept them. International control of human rights is not a result of restricting the sovereignty of States. Rather it develops by mutually agreed limitations on the exercise of sovereignty.

Consequently, other means than the established legal procedures will very often have to supplement human rights law in order to secure effective realization of human rights: political dialogues within international and regional organizations; monitoring; advocacy and publicity activities by intergovernmental and civil society organizations; mediation or complaints handling by National Human Rights Institutions; and media involvement in and coverage of human rights issues—to mention some of the most important.

Individual Criminal Responsibility

In recent years, a marked development of individual responsibility for serious breaches of human rights law has evolved. The concept of **crimes against humanity** is historically closely linked to atrocities committed during war situations and, in particular, to the Nuremberg and Tokyo trials following World War II. Although still most frequently invoked in conflict situations, this notion has today come to mean the gravest human rights violations committed against civilians in times of war as well as in times of peace (see Box 2.4 below).

This development has built very much on the experience generated through the work of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, a similar *ad hoc* judicial institution set up following the genocide in Rwanda.

The International Criminal Court

From *ad hoc* institutions to a permanent International Criminal Court (ICC), the decisive step was taken with the adoption of the Rome Statute in 1998. This Statute establishes criminal accountability in cases of war crimes, crimes against humanity, and genocide.

Box 2.4. Crimes against Humanity

The Rome Statute (U.N.Doc. A/CONF.183/9*), Article 7 defines Crimes against Humanity as follows:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation or forcible transfer of population;
e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
i. Enforced disappearance of persons;
j. The crime of apartheid;
k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) further specifies each of the items (a)–(k)

The ICC is meant to have a complementary function, with national courts assuming primary responsibility for prosecuting alleged human rights offenders when found within their territory and jurisdiction.[13] This could include cases without the traditional jurisdictional links to the offence; such as if the offender or the victim(s) are not nationals of the country or the crime was committed in another territory. In many countries, after ratification of the Rome Statute, amendments to national criminal legislation have been enacted or are being considered

[13] Article 1.

in order to render such prosecution possible. The Rome Statute does not directly oblige States Parties to secure national prosecution of international crimes. Nevertheless, it follows indirectly from the text that such mechanisms should be installed; because only if a State is unwilling or unable to secure a fair persecution of gross human rights violations can the case be taken up by the ICC.[14] The States Parties should also ensure cooperation with the ICC, including through legislation.

Thus, the ICC can be seen as a step towards establishing **universal jurisdiction** in relation to the gravest human rights breaches. Universal jurisdiction means that persons accused of international crimes—in this case, (gross) violations of human rights—can be brought to justice by any State or other competent body, such as the ICC, regardless of the territory where the crimes were committed and of the nationality of the victim(s) as well as of the perpetrator. For the ICC to exercise its jurisdiction in the cases of crimes under the Rome Statute, it is nonetheless required that the State on whose territory the situation which is being investigated has taken place, or the State whose nationality is possessed by the person who is being investigated, must be a party to the Statute. Regrettably, bilateral immunity agreements (so-called Article 98 agreements) have been concluded between the USA and a number of countries in order to exempt citizens of the United States from the jurisdiction of the ICC. Other countries have rejected such agreements, and their legality under Article 98 of the Rome Statute is questioned by some experts.[15] In any circumstance, these bilateral agreements seriously weaken the movement towards universal jurisdiction in relation to gross violations of human rights.

In some areas, strong development towards universal jurisdiction is already well under way, in particular with regards to the crime of torture. The UN Convention against Torture[16] imposes an obligation for States Parties to secure that criminal persecution be undertaken against any person alleged to have been actively involved in perpetrating torture, irrespective of his/her national origin and the place for the crime.

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[14] Article 17(2).

[15] For more information and deliberations on this issue cf. http://www.iccnow.org/?mod=bia.

[16] Articles 5 and 7.

Humanitarian Law

Humanitarian law is the branch of international law that regulates the conduct of armed conflicts once they have begun (***jus in bello***). It does not cover all aspects of war; for instance, not diplomatic and treaty relations during wars, economic warfare, or other aspects where humanitarian considerations are not decisive. Nor does it regulate legal questions related to the commencement of armed conflicts (***jus ad bellum***).

As mentioned above, a State can choose under limited conditions to derogate from some of its human rights obligations during times of war or public emergency. In situations of armed conflict however, humanitarian law will apply. The main elements of humanitarian law are rules for treatment of the victims of armed conflicts and are set out in the four Geneva Conventions (1949) and the two Additional Protocols (1977).

States Parties to the Geneva Convention and the Additional Protocols are obliged to respect these regulations and to punish grave breaches of them irrespective of the nationality of the offender (universal jurisdiction). If offenders are non-nationals, States Parties can choose to extradite the persons to be tried and punished by another State Party.[17] Hence, there is individual criminal responsibility with regard to war crimes.

In humanitarian law, however, there is a distinction between international armed conflicts on the one hand and internal armed conflicts such as civil wars, armed rebellions, etc. on the other. The Geneva treaties of 1949 and the Additional Protocol I of 1977 mainly regulate international armed conflicts, while Additional Protocol II (1977) deals with protection during internal conflict. There is universal acceptance of the Geneva Conventions of 1949: yet fewer States have chosen to ratify the Protocols of 1977, and particularly Protocol II (cf. Box 2.5).

The demarcation line between situations where human rights law as opposed to humanitarian law is applied is not a sharp one. Certain human rights obligations continue to apply in situations of armed **international conflict.** Even in situations when the belligerents have expressly chosen to derogate from their human rights obligations, the non-derogable rights will still apply. Furthermore, if the belligerents are parties to the Geneva Protocol I, most aspects of the right to a fair trial

[17] This provision is common to all four Geneva Conventions (1949); cf. Convention I, Article 49; Conv. II, Article 50; Conv. III, Article 129; and Conv. IV, Article 149.

are also upheld during armed conflicts.[18] The application of Protocol I does not in itself exclude application of human rights instruments.[19]

Of the four Geneva Conventions from 1949, only the **common Article 3** is designed for situations of **internal armed conflicts** (**i.e. non-international conflicts**). This article states that all individuals, who do not actively take part in the hostilities, must be treated humanely without discrimination. Hence violent, humiliating, and degrading acts towards such persons are prohibited, and basic recognized judicial guaranties must be offered before passing any sentences. Moreover, the wounded and sick shall be collected and cared for. Obviously, such a broad and general provision does not afford a satisfactory level of protection, especially as about 80 per cent of the victims of armed conflicts since 1945 have been victims of non-international conflicts. Hence Additional Protocol II was adopted to extend the essential rules of the law of armed conflicts to internal wars. During an internal armed conflict, Protocol II may apply (if ratified by the State Party) concurrently with Geneva Conventions' common Article 3. Moreover, human rights conventions, such as the ICCPR and ECHR, are also valid if the State Party has not explicitly chosen to derogate from these obligations during the time of conflict. And, as mentioned above, derogations from human rights obligations are only allowed if they are strictly required by a state of emergency, and non-derogable human rights must be observed in all situations.

Box 2.5. Humanitarian Law Conventions and Protocols

Geneva Conventions (1949):

I. for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: 194 States Parties;*
II. for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: 194 States Parties;*
III. relative to the Treatment of Prisoners of War: 194 States Parties;*
IV. relative to the Protection of Civilian Persons in Time of War: 194 States Parties.*

Protocol I relating to the Protection of Victims of International Armed Conflicts (1977): 167 States Parties;*

Protocol II relating to the Protection of Victims of Non-International Armed Conflicts (1977): 163 States Parties.*

* The number of States Parties are of January 2008.

[18] Protocol I, Article 75(4), and Protocol II, Article 6.
[19] Additional Protocol I, Article 1(2).

2.5. References

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Thorough and scholarly descriptions of major concepts, institutions, and instruments in international law. With extensive cross-references and a bibliography under each entry.

Brownlie, Ian, *Principles of Public International Law*, 6th ed. (Oxford, New York: Oxford University Press, 2003).
The textbook covers most aspects and branches of international law (though not humanitarian law); including human rights law, international criminal justice, and humanitarian intervention.

Hanski, Raija and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd ed. (Finland: Åbo Akademi University, 2002).
The book includes articles on major UN human rights treaties and mechanisms; the European human rights system and the OSCE; regional systems in Africa and the Americas; the role of NGOs including a list of the largest civil organizations in human rights field; and implementation mechanisms.

Lawson, Edward, *Encyclopedia of Human Rights*, 2nd edition (USA and UK: Taylor&Francis, 1996).
Prepared on the occasion of the UN Decade for Human Rights Education (1994–2005), it is a handbook with a marked focus on United Nations organs, instruments, and activities. Its core of information is related to international mechanisms and organizations. Moreover, it includes thematic entries and brief country profiles with a human rights focus.

Maddex, Robert L., *Human Rights: Freedoms, Abuses, and Remedies* (Washington D.C.: CQ Press, 2000).
Brief entries on instruments, individual bibliographies, and human rights themes. Contact details on organizations and institutions. Brief examples of court decisions from national and international courts and treaty bodies to illustrate current interpretation of human rights issues.

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Ovey, Clare and White, Robin, *Jacobs and White, The European Convention on Human Rights*. 3rd edition (Oxford, New York: Oxford University Press, 2002).

A thorough, thematic description of the content of the European Human Rights Convention, including case decisions from the ECtHR.

Shelton, Dinah L. (ed.-in-chief), *Encyclopedia of Genocide and Crimes Against Humanity*, Vols. 1–3 (USA: Thomson Gale, 2005).

Symonides, Janusz (ed), *Human Rights: International Protection, Monitoring, Enforcement* (England, USA: UNESCO Publishing, 2003).
Articles covering UN human rights machinery, the ILO and UNESCO procedures related to human rights. Regional systems in Europe, the Americas, Africa and the Arab region are described, along with national implementation systems, the establishment of the ICC, human rights indicators for implementation, sanctions, and the role of NGOs.

Electronic Resources

Council of Europe

http://www.coe.int/T/E/Human_rights/
This website provides entries for all CoE human rights mechanisms.

http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/
The site for the Commissioner for Human Rights, which is not included in the site above.

http://conventions.CoE.int/
This site is the CoE official treaty website, and it is available in French, German, Italian, and Russian. It includes the full text of the respective convention/treaty; an updated chart of signatures and ratifications; a list of declarations, reservations and other communications; plus a summary and an explanatory report (including background of the Convention, core concepts, the structure of the Convention, and commentary on the provisions).

OSCE

http://www.osce.org/odihr/
The website for the Office for Democratic Institutions and Human Rights, which is working with the Human Dimension aspects within the OSCE. The site has entries concerning all major areas of the Human Dimension activities, including human rights. From here, there is also access to OSCE documents. Many publications from the OSCE are available online and can be downloaded via this site.

http://www.osce.org/hcnm/
The website of the OSCE's High Commissioner on National Minorities.

http://www.osce.org/fom/
The site of the Representative on Freedom of the Media.

The United Nations

http://www.ohchr.org
: This is the website of the Office of the UN High Commissioner for Human Rights. It offers a good overview of its content, which includes all the major UN Conventions and links to monitoring bodies under which one can find States Parties' reports and treaty bodies' comments and recommendations in relation to the reports. Furthermore, it includes General Comments (treaty bodies' interpretative statement in relation to the conventions), guidelines on reporting, and decisions on individual cases. Some parts of the website are available in French and Russian, and others of the UN official languages.

Other sites

www.bayefsky.com
: This website offers comprehensive information about the UN human rights treaties and their implementation. It also contains a web portal on academic institutions working with human rights research; and a portal with human rights NGOs, mostly international.

http://www.icc-cpi.int/
: This is the official website of the International Criminal Court. In addition to information on mandate and organization of the Court the site provides up-dates on pending investigations.

http://www.iccnow.org/
: A site established by a network of NGOs dealing with the International Criminal Court. The site offers comprehensive information on ICC's activities as well as NGO initiatives in relation to the ICC.

http://www.icrc.org/ihl.nsf/CONVPRES?OpenView
: The site of the International Committee of the Red Cross (ICRC) entails the Geneva Conventions and the Additional Protocols and extensive comment explaining the historical background, content, and current interpretation of each article.

http://www.nhri.net/
: This site provides information on National Human Rights Institutions throughout the world, including their individual mandates and functions, and other material (complaint forms and guidelines, information material, etc.) developed by the institutions themselves. Additionally, global and regional documents from network meetings between NHRIs as well as statements from UN organs pertaining to NHRIs can be found on the site.

CHAPTER 3 — PART A

THE RIGHT TO LIFE

The right to life is guaranteed in several international and regional human rights instruments. Constitutional protection against deprivation of life by the State "without due process of law" dates back at least to the US Bill of Rights of the late eighteenth century, and arguably to the English Magna Carta of 1215. While there are some variations in the way in which the right is formulated, this prohibition on arbitrary or unlawfully killing by the State is universally accepted.

3A.1. Definitions

The European Court of Human Rights (ECtHR) has stated that the right to life is "one of the most fundamental provisions in the Convention". The UN Human Rights Committee (HRC) describes it as 'the supreme right'. Nevertheless, many difficult issues surrounding, for instance, the justification of the use of force have meant that the right, in the view of some human rights commentators, is less protected in law and in practice than for example, the prohibition on torture.

The right to life encompasses positive obligations on the State to prevent killings, the obligation to conduct an effective investigation where a suspicious death has occurred with a view to identifying and prosecuting the alleged perpetrators, and the obligation to provide an effective remedy.

Beyond this the HRC considers that the right imposes an obligation on States to adopt positive measures, inter alia to reduce infant mortality and to increase life expectancy, especially by combating malnutrition and epidemics. The Human Rights Committee went further than this, considering that the right imposes on States a supreme duty to prevent war, acts of genocide and mass violence. The Committee has also said that there may be circumstances where failure 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 may amount to a violation of the right.[1]

The positive obligation derives from the statement that the right to life "shall be protected by law." This extends beyond simply making homicide a criminal offence and may also include an obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of other individuals (the horizontal effect, cf. chapter 2, para.2).

3a.2. Legally Binding Standards

Article 2 of the European Convention on Human Rights (ECHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) impose two obligations: to protect people's lives and not to deprive them of their lives—save in extremely limited circumstances.

Box 3.1. Basic Obligations of States in Relation to the Right to Life

According to well-established jurisprudence, Article 2 of the ECHR and Article 6 of the ICCPR place a clear obligation on States to:

1. prohibit arbitrary and unlawful killings,
2. conduct an effective investigation where a suspicious death has occurred, and
3. provide an effective remedy where a death has occurred at the hand of State officials.

The obligation of non-refoulement, contained in Article 33 of the United Nations Convention relating to the Status of Refugees prohibits the return of refugees to territories where their life or freedom is at risk (cf. chapter 12, section *The Principle of Non-Refoulement*).

Beyond this, the Geneva Conventions of 1949 and their Additional Protocols of 1977 outlaw unlawful killing in time of war. The Rome Statute of the International Criminal Court (cf. chapter 2, section *The International Criminal Court*), The UN Convention against Genocide and customary international law criminalize particularly serious cases of murder, i.e. where it constitutes a war crime, an act of genocide or a crime against humanity. These prohibitions, like national legislation outlawing unlawful killing, are reflections of the human right to life.

[1] See Human Rights Committee General Comment no. 31 on the nature of the general legal obligation imposed on States Parties.

3A.3. Permissible Limitations

Not all State killings amount to a violation of the right to life. State killings can be lawful when they fall into the accepted exceptions. These include:

i. the death penalty, provided it complies with certain safeguards;
ii. certain killings seen as necessary measures of law enforcement; and,
iii. certain killings committed in armed conflict.

It is important to observe that neither Article 2 of the ECHR, nor Article 6 of the ICCPR is subject to derogation in times of war or public emergency (cf. chapter 2, section *Derogation*). Provisions of international humanitarian law instruments confirm that the right to life continues to be protected in wartime. Only combatants may be the target of attempts to kill in wartime. Thus, persons considered "out of combat", such as civilians, wounded and prisoners of war must not be killed or harmed. To do so may constitute a war crime

3A.4. Current Interpretation—(Key Case Law)

The Use of Lethal Force

The first case in which the European Court of Human Rights found a violation of the right to life was *McCann v. UK*, where British soldiers shot dead three unarmed members of the Irish Republican Army (IRA). The Court accepted evidence from the soldiers involved that they genuinely, but wrongly, believed the three to be either armed or in possession of a remote device with which to detonate explosives, but concluded that the planning of the operation, and the shoot-to-kill tactics employed, had led to a violation of the right to life. The Court stated in this case that, "The authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers, whose use of firearms automatically involved shooting to kill."[2]

Thus, a killing by a law enforcement official is lawful where:

[2] McCann and Others v. United Kingdom ECtHR 1996.

– the force used was applied for a legitimate purpose,
– its use was strictly necessary; and,
– the degree of force used was proportionate under the circumstances.

In making a determination on these three criteria, reference can and should be made to more detailed relevant standards, including The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, or the European Code of Police Ethics. These are discussed below in the section on soft law instruments.

Deaths in Custody

Many of the issues relating to deaths in custody are similar or identical to those that arise in relation to the subject of mistreatment in custody (cf. chapter 4, section *Legally Binding Standards*). Thus, provisions applicable to one of these issues are equally applicable to the other.

The European Court of Human Rights has stated that, "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury."[3] The Human Rights Committee reached a similar conclusion, considering that, "a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations [of maltreatment]."[4]

International standards have also been developed, to protect people in detention against the excessive use of force by their captors.[5] These sets of principles are important safeguards to protect the right to life and freedom from torture. Force may only be used on people in custody

[3] *Ribitsch v. Austria*, ECtHR, Judgment of 4 December 1995; *Aksoy v. Turkey*, Judgment of 18 December 1996; *Assenov and Others v. Bulgaria*, 28 October 1998, *Kurt v. Turkey*, Judgment of 25.

[4] Application 907/2000. 1 November 2005.

[5] UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment; The Standard Minimum Rules on the Treatment of Prisoners; The Basic Principles for the Treatment of Prisoners; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

when it is strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened. In any event, force may be used only if non-violent means have proved ineffective.[6]

The UN Standard Minimum Rules for the Treatment of Prisoners state that detainees or prisoners needing special treatment must be transferred to specialized institutions or civil hospitals for that treatment.[7] The HRC found in a case against Russia, that failure to provide timely medical care that resulted in the death of a prisoner amounted to a violation of the right to life.[8]

In a well-known case from the Russian Federation, The UN Human Rights Committee found a violation of the right to life, where failure to provide adequate and timely medical care resulted in the death of a prisoner from tuberculosis.[9] The case should have important implications for prison management all over the world.

The Obligation to Investigate Suspicious Deaths

The right to life encompasses positive obligations to prevent killings, to conduct an effective investigation where a suspicious death has occurred with a view to identifying and prosecuting the alleged perpetrators, and to provide an effective remedy.

In a series of judgments, the European Court of Human Rights has found that the standard of investigations into the use of lethal force by the authorities in Northern Ireland and south east Turkey have often fallen short of these requirements.[10]

In *Ogur v. Turkey* the Court stated that, "serious doubts arise as to the ability of the administrative authorities to carry out an independent investigation as required by Article 2 of the Convention" because those carrying out the investigation were subject to the same chain

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[6] Rule 54.

[7] Rule 22(2) of the Standard Minimum Rules.

[8] Communication No. 763/1997, 15 April 2002.

[9] 763/1997, *Lantsova v. Russian Federation.*

[10] See, for example, *Cakici v. Turkey* App. No. 23657/94, *Timurtas v. Turkey* App. No. 23531/94, *Gulec v. Turkey* (1988) at para 78, *Ogur v. Turkey* App. No. 21594/93, *Kurt v. Turkey* App. No. 24276/94, *Aksoy v. Turkey* 100/1995/606/694, *McKerr v. UK* App. No. 28883/95, *Hugh Jordan v. UK* App. No. 24746/94, *Kelly and Others v. UK* App. No. 30054/96, *Shanaghan v. UK* App. No. 37715/97.

of command as those responsible for the killing.[11] Certain minimal investigatory standards are required when examining these deaths, such as a thorough and professional 'scene of the crime' analysis.[12] Investigations must also be conducted in such a manner that foresees the possibility of State or individual liability.[13]

In *Yasa v. Turkey* the Court extended the protection of Article 2 to potential victims of death squads and to acts of 'disappearance', where the killing was not acknowledged, by stating that the obligation to carry out an adequate and effective investigation was not confined to cases where "it has been established that the killing was caused by an agent of the State."[14]

The ECtHR has examined national systems to investigate suspicious deaths, sometimes finding them wanting. In cases relating to Northern Ireland the ECtHR has criticized the lack of independence of the police investigation, and a lack of public scrutiny and information to the victim's family. It was particularly critical of the inquest system in Northern Ireland, where findings were confined to a statement of who the deceased was, and how and when he or she died.[15] The Court found that this procedure "did not allow for any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed."[16] The Court also expressed its concern at other aspects of the inquest system, such as the fact that police and soldiers can refuse to appear and may submit written statements instead, which prevents them from being cross-examined. It also criticized the fact that inquests are often subject to considerable delays.

Relevant National Implementation Mechanisms

From the above, we can say that a national mechanism should ensure an investigation that is:

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[11] *Ogur v. Turkey*, para. 22.

[12] *Sevtap Veznedaroglu v. Turkey*, Judgment of 11 April 2000; *Kelly and Others v. UK*, Judgment of 4 May 2001.

[13] Ibid.

[14] *Yasa v. Turkey* 66/1997/850/1057.

[15] Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, rule 22, 23 and Third Schedule. Form 22 as amended.

[16] *McKerr v. UK* App. No. 28883/95, *Hugh Jordan v. UK* App. No. 24746/94, *Kelly and Others v. UK* App. No. 30054/96, *Shanaghan v. UK* App. No. 37715/97.

– independent of the body allegedly responsible for the suspicious death,
– transparent, offering the possibility of public scrutiny,
– accessible to the victim's family,
– carried out without undue delay,
– endowed with powers of compulsion of evidence (both witness and documentary).

The procedure and its findings or conclusions should moreover facilitate, rather than hinder any criminal prosecution against those who may be responsible. Such a prosecution (and any civil proceedings for compensation or other measures) are, however, the subject of different rights, including the right to a remedy.

National systems can satisfy these requirements in various ways, through a single mechanism or a combination of mechanisms, some of which may be judicial or quasi-judicial, while others may be administrative.

3a.5. OSCE Commitments

Participating States of the OSCE have committed themselves to uphold and respect international standards as laid down in international treaties. Thus participating States respect the provisions set out in the ECHR and the ICCPR with respect to the right to life. The OSCE documents repeat the commitment that the death penalty should only be for the most serious offences.[17]

3a.6. International Recommendations (i.e. soft law)

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that force may be used only if other means remain ineffective.[18] Care must be taken to minimize damage and injury and assistance and medical aid must be provided at the earliest possible moment.[19] Firearms may only be used by law enforcement officers in defence against an imminent threat of death or serious

[17] Document of the Vienna Meeting of 1989, Article 24.
[18] Principle 4.
[19] Principle 5.

injury, to prevent a crime involving grave threat to life, to arrest persons presenting such a danger or to prevent their escape, and only when less extreme means are insufficient. Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[20]

The European Code of Police Ethics, in similar terms, provides that the police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective.[21]

The UN Declaration on the Protection of all Persons from Enforced Disappearance lays down useful measures to combat disappearances, which can often lead to death. Persons alleged to have been involved in carrying out disappearances should be suspended from official duty pending investigations into the disappearance. This Declaration has now led to the conclusion of a recent UN Convention on the subject.[22]

The UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment state that everyone detained or imprisoned has the right to request improvements in their treatment or to complain about their treatment. The authorities must reply promptly, and if the request or complaint is refused, it may be brought to a judicial or other authority.[23]

The Standard Minimum Rules on the Treatment of Prisoners state that restraints, such as handcuffs, chains, irons and strait-jackets, should only be used on detained or imprisoned people for genuine security reasons, and not as a punishment.[24] When used, restraints must not be applied for longer than is strictly necessary, and the central prison administration is to decide on the pattern and manner of use of instruments of restraint.[25]

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions contain provisions on the prevention and investigation of extra-legal, arbitrary and summary executions, as well as on legal proceedings in respect of them.

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[20] Principle 9.

[21] Guideline 37. European Code of Police Ethics, Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001.

[22] International Convention for The Protection Of All Persons from Enforced Disappearance. Expected to be adopted at the 61st session of the United Nations General Assembly in 2006.

[23] Principle 33.

[24] Rule 33.

[25] Rule 34.

The United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (The Minnesota Protocol) is a detailed exposition of legal standards and a practical detailed guide on how to conduct examinations into such executions, including composition of teams, handling of evidence, and the conduct of autopsies and disinterments.

Like the UN Standard Minimum Rules on the Treatment of Prisoners, the European Prison Rules contain provisions on the provision of medical care to prisoners and correct procedure on the death or transfer of prisoners in case of illness or serious injury.

3A.7. Monitoring the Right: the Special Challenges

The field officer thus, when faced with an allegation of a violation of the right to life, should assess whether the deprivation of life is arbitrary or unlawful (that it does not fall within one of those lawful exceptions).

On the other hand, where a death has occurred at the hands of State officials, with a deliberate intent as to the outcome (the death), and that the killing did not fall within one of the lawful exceptions, then the State is directly responsible for a violation of the prohibition of arbitrary killing.

There is a substantial overlap between monitoring of other rights, particularly the rights of persons in custody, and the right to life.

3A.8. Monitoring Checklist on the Right to Life

Checklist – The Right to Life

1. Legislation and Regulation Check
   a. Legislation and Regulations relating to the Right to Life
      – Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification? (See list of instruments).
      – Has the state declared any state of emergency, security threat, or other condition indicating that there is a state of internal armed conflict in all or part of the territory?
   b. Legislation and Regulations relating to the Use of Force
      – Are there clear regulations governing the use of force by law enforcement officials?
      – Do these regulations limit the use of lethal force to situations involving an imminent threat of death or serious injury?
      – Do the regulations or laws require a prompt written report whenever firearms are used by law enforcement officials?
      – Does the criminal justice system offer guarantees of a full investigation and prosecution of the crime of murder?
   c. Legislation and Regulations relating to Deaths in Custody /Disappearance
      – Is there a requirement that a record be kept of any use of force against persons in custody?
      – Is there a regulation requiring that persons should be given or be entitled to a medical examination at the time they are taken into custody, at the time of transfer to a new place of detention and at regular intervals during the detention?
      – Do persons in detention have access to a procedure whereby they can complain about their treatment in custody?
      – Are there regulations explicitly forbidding the use of restraints on detainees as a means of punishment?
      – Are there regulations requiring the transfer of persons needing medical treatment to hospitals?

2. Monitoring the Right in Practice
   a. Protection in Custody
      – Do detainees have confidential access to lawyers and medical personnel? Do they have access to relatives?
      – Is there regular monitoring of all places of detention by an independent national body?
      – Are there private organizations that visit prisons and monitor the condition of detainees on a regular basis?
      – Are detainees and prisoners ensured medical care and treatment free of charge?

- Has the government allowed visits by bodies such as the European Committee for the Prevention of Torture? Have the ECPT reports been published? Have they been followed up?
- See monitoring checklist on prohibition of torture and on liberty and security of the person.

b. Use of Lethal Force
- Are law enforcement personnel trained in relation to restrictions on the use of force?
- Are law enforcement officials provided with adequate training in the use of policing techniques and methods that limit the use of force to a minimum?
- Are law enforcement officials provided with equipment that enables them to minimize the use of force?
- Is there a clear chain of command whereby the decision to authorize force and how it is exercised is clearly identifiable?
- In situations of internal armed conflict, are the Rules of Engagement available and subject to external monitoring?

c. Investigations into Suspicious Deaths
- Does the investigating body belong to the same authority as the body or institution allegedly responsible for the suspicious death?
- Are there guarantees to enable an effective investigation, including for example the suspension from active duty or transfer to other duties of persons allegedly responsible for the suspicious death or disappearance?
- Can the investigating body function independently of the executive, base its decisions on its own free opinion concerning facts and legal grounds?
- Can the investigating body express itself on all relevant issues concerning the cause of death and all surrounding circumstances?
- Can the investigating body compel the production of witness and documentary evidence?
- Can the finding or conclusion of the investigating body effectively lead to prosecution of those who might be responsible?
- Is the report of the investigating body available to lawyers, relatives, interested persons and/or the general public?

3A.9. Instruments on the Right to Life

Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements[26]
Article 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. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.	UN Human Rights Committee General Comment 6 The right to life General Comment 14 Nuclear weapons and the right to life

[26] The Human Rights Committee's conclusions and recommendations on country reports and decisions on individual cases give the best available picture of the thinking of the Human Rights Committee on the right to life and other rights protected under the ICCPR. Unlike the CoE HUDOC website, it is unfortunately not currently possible to carry out case searches according to articles of the Covenant. The cases of the HRC can however to some extent be researched by subject and key word on the website of the Netherlands Institute for Human Rights.

	5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.	

Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

Article 1	1. No one within the jurisdiction of a State Party to the present Protocol shall be executed. 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.	UN Human Rights Committee
Article 2	1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.	

Convention on the Rights of the Child, 1989

Article 37(a)	Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age…	Views of the Committee on the Rights of the Child, as seen in comments on country reports and in the general comments of the Committee.

International Convention for The Protection Of All Persons from Enforced Disappearance, opened for signature in 2005

Entirety	This new convention strengthens the legal protection against disappearances.	

Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations

Article 33	Prohibition of expulsion or return ("refoulement") 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

International Humanitarian Law Instruments

Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 68	In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.	See International Committee of the Red Cross commentaries on the Geneva Conventions and Travaux Préparatoires.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I, adopted in 1977)

Article 77(5)	The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.	See International Committee of the Red Cross commentaries on the Geneva Conventions and Travaux Préparatoires

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II, adopted in 1977)

Article 6(4)	The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence…	See International Committee of the Red Cross commentaries on the Geneva Conventions and Travaux Préparatoires

International Criminal Law Instruments

Rome Statute of the International Criminal Court

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Articles 6, 7, 8	The offences of genocide, crimes against humanity and war crimes all include unlawful killing as elements.	Work of the prosecutor of the court and the judgments of the court

International Criminal Tribunal for the former Yugoslavia

Articles 2, 3, 4	The offences of genocide, crimes against humanity and war crimes all include unlawful killing as elements.	Judgments of the tribunal

International Criminal Tribunal for Rwanda

Articles 2, 3, 4	The offences of genocide, crimes against humanity and war crimes all include unlawful killing as elements.	Judgments of the tribunal

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 2	1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.	Case law of the European Court of Human Rights

	2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.	Reports of the European Commissioner for Human Rights

ECHR Protocol No. 6, adopted in 1985

Entirety	Abolishes the death penalty in time of peace.

ECHR Protocol No. 13, which entered into force in 2003

Entirety	Abolishes the death penalty in all circumstances

CSCE/OSCE Instruments

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Paragraph 17	The participating States (…) 17(7)—will exchange information within the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration; 17(8)—will make available to the public information regarding the use of the death penalty.	

Document of the Vienna Meeting of 1989

Paragraph 24	With regard to the question of capital punishment, the participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime, and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating States will co-operate within relevant international organizations.

Other International Instruments

United Nations Instruments

Universal Declaration of Human Rights (UDHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 3	The strength of this Declaration of the UN General Assembly is that it is so universally accepted that many of its provisions are considered to have become customary international law. The weakness is that there is no implementation mechanism for enforcement.	

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Esp. Principle 4	This set of principles sets limits for the use of force and firearms in policing. It is of importance as an interpretive source in determining the legitimacy of the use of force. It may thus be of relevance in determining whether the force used was proportionate. Principle 4 states that force may be used only if other means remain ineffective.	

	Care must be taken to minimize damage and injury, and assistance and medical aid must be provided at the earliest possible moment.[27] Firearms may only be used by law enforcement officers in defence against an imminent threat of death or serious injury, to prevent a crime involving grave threat to life, to arrest persons presenting such a danger or to prevent their escape, and only when less extreme means are insufficient. Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

UN safeguards guaranteeing protection of the rights of those facing the death penalty

Entirety	1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. 2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. 3. Persons under 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane. 4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

[27] Principle 5.

	5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of, or charged with, a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. 6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory. 7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment. 8. Capital punishment shall not be carried out pending any appeal or other recourse procedure, or other proceeding relating to pardon or commutation of the sentence. 9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.	The UN Secretary-General is mandated to produce a report on capital punishment every five years. Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General, UN document E/2005/3

UN Standard Minimum Rules for the Treatment of Prisoners

Rule 44 Rules 22–25	(1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner. (2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone. (3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution. Rules on medical services for prisoners.	No single body is responsible for these standards, though they are regularly referred to by a wide range of UN human rights bodies and experts. See in particular the reports and recommendations of the UN Special Rapporteur on Torture

UN Body of Principles for the Treatment of all Persons under any form of Detention or Imprisonment

Principle 34 Principle 24	Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation. A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.	No single body is responsible for these standards, though they are regularly referred to by a wide range of UN human rights bodies and experts. See in particular the reports and recommendations of the UN Special Rapporteur on Torture

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Article 6 (b)	'The responsiveness of judicial and administrative process to the needs of the victims should be facilitated by … allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.' In addition the Declaration emphasizes that victims should be given information and assistance throughout the legal process, measures should be taken to minimize inconvenience, protect their safety and avoid unnecessary delay.	

UN 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

Entirety	As the name implies, these principles and guidelines are especially applicable to the question of remedies and reparations where gross violations are concerned. Adopted in 2005.	

Declaration on the Protection of all Persons from Enforced Disappearance General Assembly resolution 47/133 of 18 December 1992

Article 16	Suspension from duty of persons suspected of involvement in enforced disappearances pending completion of investigation.	Work and Reports of the Working Group on Enforced or Involuntary Disappearances

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Entirety	The Principles contain provisions on the prevention and investigation of extra-legal, arbitrary and summary executions, as well as on legal proceedings in respect of them.	Work and reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions

United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (The Minnesota Protocol)

Entirety	The Protocol is a detailed exposition of legal standards and a practical detailed guide on how to conduct examinations into such executions, including composition of teams, handling of evidence, and the conduct of autopsies and disinterments.	Work and reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions Work and Reports of the Working Group on Enforced or Involuntary Disappearances

Council of Europe Instruments

European Prison Rules

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Rule 49 Rules 26–32	1. Upon the death or serious illness of or serious injury to a prisoner, or removal to an institution for the treatment of mental illness or abnormalities, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner. 2. A prisoner shall be informed at once of the death or serious illness of any near relative. In these cases, and whenever circumstances allow, the prisoner should be authorized to visit this sick relative or to see the deceased either under escort or alone. 3. All prisoners shall have the right to inform at once their families of imprisonment or transfer to another institution. These rules contain provisions on medical care for prisoners	

Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers in July 2002

Guideline XII (2) XIII (2)	It is the duty of a State, which has received a request for asylum to ensure that the possible return ('refoulement') of the applicant to his or her country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion. The extradition of a person to a country, where he/she risks being sentenced to the death penalty, may not be granted. A requested State may, however, grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out.	

European Code of Police Ethics, Recommendation Rec (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001

37	The police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective.	

EU Instruments

Charter of Fundamental Rights of the European Union (2000)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 2	Though not yet a legally binding document, the Charter is significant because it explicitly forbids the death penalty and execution.	

CHAPTER 3 – PART B

THE DEATH PENALTY

3B.1. Legally Binding Standards

Article 2 of the ECHR, as mentioned above, protects the right to life, "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Accordingly, Article 2 of the ECHR does not prohibit the death penalty; moreover, extradition to another country where the death penalty can be imposed and carried out is not per se in violation of that provision.

Nonetheless, for the death penalty to be carried out there are certain safeguards to prevent arbitrary decisions. Firstly, the decision must have been passed by a body that complies with the procedural guarantees under Article 6 of the ECHR regarding fair trial. Secondly, the sentence must not be disproportionate to the crime. Thirdly, it must not be carried out under circumstances and at a location that would amount to inhuman and degrading treatment under ECHR, Article 3 concerning torture. Fourthly, the crime must have been punishable by death at the time of committing the offence in accordance with Article 7 of the ECHR (prohibits retroactive trials). Fifthly, no imposition of the death penalty can be permitted on discriminatory grounds as prohibited by Article 14 of the ECHR

Article 6 of the ICCPR provides that death sentences may only be imposed for the most serious of crimes. It provides for non-retroactivity of penalties and that any death sentence must be subject to the guarantees of the Covenant, including the fair trial provisions of Article 14. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. The inclusion of Article 14 standards under Article 6 is important because, while the former is derogable in time of public emergency, the latter is not. Thus, at least for death penalty cases, the full protection of Article 14 is applicable in all circumstances.

The Convention on the Rights of the Child provides in Article 37 (a) that "Neither capital punishment nor life imprisonment without

possibility of release shall be imposed for offences committed by persons below eighteen years of age…" Almost all States have accepted this rule. Even the United States of America, long subject to international criticism on this issue, saw an important change in 2005, when its Supreme Court ruled that the use of the death penalty against people under the age of 18 at the time of the offence contravenes the US Constitutional ban on 'cruel and unusual punishments'.[1]

3B.2. Current Interpretation—(Key Case Law) on the Death Penalty

A regional judicial body, the Inter-American Commission on Human Rights, has held that, "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime", and that this rule now constitutes a norm of jus cogens, or the peremptory norms of international law considered to be binding upon all States, irrespective of the ratification of international instruments. Support for this view is seen in the number of international instruments confirming the prohibition.[2]

The Human Rights Committee has found that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the ICCPR have not been respected constitutes a violation of Article 6 of the Covenant.[3]

According to the Committee's jurisprudence, the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6(1) of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances, or the circumstances of the particular offence.[4]

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[1] Judgement delivered on 1 March in the case of *Roper v. Simmons*.

[2] See the list of instruments attached to this chapter.

[3] See cases of *Conroy Levy v. Jamaica*, Communication No. 719/1996, Views adopted on 3 November 1998; *Clarence Marshall v. Jamaica*, Communication No. 730/1996, Views adopted on 3 November 1998; *Kurbanov v. Tajikistan*, Communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, Communication No. 964/2001, Views adopted on 8 July 2004.

[4] See the cases of *Thompson v. St. Vincent & The Grenadines*, Case No. 806/1998, Views of 18 October 2000; *Kennedy v. Trinidad & Tobago*, Case No. 845/1998, Views of 26 March 2002; *Carpo v. The Philippines*, Case No. 1077/2002, Views of 6 May 2002.

In a case against The Philippines, where the death penalty was imposed for rape, the Committee noted that rape under the law of the State Party is a broad notion and covers crimes of different degrees of seriousness. Thus the automatic imposition of the death penalty violated the defendant's rights under Article 6. In a case against Zambia, the Committee found that where a prisoner's transfer away from, and then back to death row had the effect of depriving him of the chance to benefit from an amnesty, the deprivation of access to this remedy amounted to a violation of Article 6(4).

In the well-known case of *Soering v. United Kingdom*, the European Court of Human Rights[5] decided that extradition to a country where an applicant would face long exposure to the so-called 'death row phenomenon', with prolonged anxiety as to whether and when the penalty would be carried out, constituted a breach of the prohibition on torture, or cruel inhuman and degrading treatment in Article 3 of the Convention.

Efforts at Abolition of the Death Penalty

The adoption of international instruments aiming at abolition reflects a growing consensus against the use of the death penalty. Protocol No. 6 to the ECHR, adopted in 1985, abolishes the death penalty in time of peace, and Protocol No. 13, which entered into force in 2003, abolishes the death penalty in all circumstances. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,[6] like Protocol 6 to the ECHR, provides a legal framework for the abolition of the death penalty. It does permit retention of the death penalty in extremely limited circumstances, in times of war, and only for the most serious of crimes of a military nature.

Most States Parties to the ECHR have now ratified Protocol No. 6 to the ECHR which, under Article 1, abolished the use of the death penalty in times of peace. This means that a death sentence may only be imposed and carried out in time of war or imminent threat of war. Article 2 of the Protocol specifically sets out the circumstances in which a death sentence may be handed down and carried out. Worldwide,

[5] Application number: 00014038/88 Judgement of July 7 1989.

[6] Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

86 States had abolished the death penalty for all crimes as of the end of 2005. A further 11 retain the death penalty only for extraordinary crimes, and a further 25 are abolitionist in practice. The total of 122 States being more or less abolitionist shows a clear majority of States supporting this tendency.

Protocol No. 13 to the European Convention, opened for signature in May 2002, goes further, outlawing the death penalty in all circumstances, including crimes committed in times of war and imminent threat of war. This provision entered into force on 1 July 2003.[7]

Many European States have adopted legislation preventing the extradition or return of persons to States where they would face the death penalty.

3B.3. OSCE Commitments Regarding the Death Penalty

While the commitments undertaken by the OSCE participating States do not require them to abolish the death penalty, there are a number of commitments regarding its use.[8] In particular, participating States have committed themselves to impose the death penalty only in a manner that is not contrary to their international commitments and to make information regarding the use of the death penalty available to the public.[9]

At the Vienna meeting of 1989 it was agreed that in participating States where capital punishment had not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime, and not contrary to their international commitments.

At the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, the participating States agreed to exchange information on the question of the abolition of the death

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[7] To date all member States except for Armenia, Azerbaijan, the Russian Federation and Turkey have signed the Protocol. Reservations have been lodged by Spain, Denmark and Georgia. However, 24 member States, which have signed the protocol, have not yet ratified it.

[8] In 2003 the death penalty is retained for crimes committed in peacetime and wartime, and executions are carried out in five of the OSCE participating States; these are Belarus, Kazakhstan, Tajikistan, the United States of America and Uzbekistan.

[9] Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE, para. 36.

penalty and keep that question under consideration, as well as to make available to the public information regarding the use of the death penalty.

3B.4. International Recommendations (i.e. soft law) on the Death Penalty

The UN has adopted a set of standards laying down safeguards where the death penalty remains in force.[10] These provide inter alia:

- that the death penalty only be applicable to the most serious crimes, meaning those involving intentional actions with lethal or "extremely grave" consequences,
- that persons sentenced to death always should enjoy the benefit of reductions in the applicability of the death penalty so that such reductions should be applied retroactively,
- that certain groups of persons, such as pregnant women, new mothers or persons who have become insane should not be subject to the death penalty,
- that the death penalty only be applicable where the evidence is clear and convincing, with the facts leaving no possibility of alternative interpretation,
- that the procedural guarantees are fully complied with, cf. the reference to ICCPR Article 14 above, and that the death penalty not be carried out pending applications for amnesty, pardon or commutation of sentence,
- that the death penalty be carried out in such a way as to minimize suffering.

[10] Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by Economic and Social Council resolution 1984/50 of 25 May 1984.

3B.5. Monitoring Checklist on the Death Penalty

Checklist – The Death Penalty

- Legislation and Regulation Check
  - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification? (See list of instruments).
  - Has the death penalty been abolished:
    a. in all circumstances,
    b. in peacetime?
  - If the death penalty has not been abolished:
  - Is the application of the death penalty limited to persons over 18 years of age at the time of the commission of the crime?
  - Are persons such as pregnant women, new mothers and insane persons protected from the application of the death penalty?
  - Is the death penalty limited only to the most serious crimes?
  - Are there protections against the carrying out of executions while applications for amnesty, pardon, commutation etc are pending?
  - Are there legal protections to ensure that all of the fair trial guarantees in Article 14 of the ICCPR are fully respected in cases where the death penalty might be applied?
  - Do all of the above guarantees and protections apply in all proceedings beyond all courts and tribunals of the country, including military courts and courts established to deal with terrorist or other very serious offences?
  - Are there legal provisions protecting against return of persons to countries where they might face the death penalty?
  - Are there legal provisions protecting against return of persons to countries where they might face prolonged detention on death row that might amount to cruel, inhuman or degrading treatment?
  - Are there legal or regulatory standards that ensure that the death penalty is carried out so as to minimize unnecessary suffering?

3B.6. References

Aolain, Fionnuala Ni, "The Evolving Jurisprudence of the European Convention Concerning the Right to Life". *Netherlands quarterly of human rights*, Vol. 19, No. 1 (The Hague: Kluwer Law International, 2001).
Article 2 of the European Convention protects the foremost of all rights—the right to life. Until recently it has received little judicial attention from the European Court and Commission. This article argues that before the *McCann v. United Kingdom* decision, the European Human Rights regime was hesitant and conservative in its approach to the appropriate level of protection for the right to life. McCann was a turning point. The Court widened protection for life by placing obligations on the State in its planning and execution of law enforcement operations. The article charts the progressively tighter standards being drawn by the Court since McCann. These include strict standards of review for investigative procedures after a death; a coalescence of European and United Nations investigative tools.

Crawshaw, Ralph. *International standards on the right to life and the use of force by police* (London: Frank Cass, 1999).
This article is concerned with the right to life as it is expressed in human rights treaties and interpreted and commented upon by treaty bodies in their deliberations on cases involving the use of force by police. The second part considers international instruments dealing with the use of force by police. The essential message is that the legal protection of the right to life is enhanced by the lawful and expert use of force by police, and it is undermined by unlawful and arbitrary police action.

OSCE, *The Death Penalty in the OSCE Area. Background Paper* (Poland: OSCE/ODIHR, 2006), http://www1.osce.org/publications/odihr/2005/09/16245_451_en.pdf
The background paper is an annual publication of the OSCE Office for Democratic Institutions and Human Rights. It examines the status of the death penalty in the OSCE region in the context of international standards (United Nations, Council of Europe, European Union) and on the basis of information received from completed questionnaires from participating States. The paper also facilitates participating States with the commitment to make information on the use of the death penalty.

United Nations, *Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General, UN document E/2005/3*. http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement.
The UN Secretary-General is mandated to produce a report on capital punishment every five years. The reports are a unique source of information, based on information supplied by governments, as well as NGOs and other experts. The Secretary-General's latest report, the seventh in the

series, was issued in March 2005.[11] Fifty-two governments responded to the Secretary-General's request for information, down from the 53 which supplied information for the previous report in 2000. Only eight countries, that retained and enforced the death penalty, replied to the survey.

United Nations, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*. http://www.ohchr.org/english/issues/executions/annual.htm
These reports, as well as reporting on instances of summary or arbitrary executions, contain useful recommendations on practical measures to eliminate the practice and punish perpetrators.

United Nations, *Reports of the Working Group on Enforced or Involuntary Disappearances*. http://www.ohchr.org/english/issues/disappear/index.htm
The working group has worked for more than 25 years on attempts to solve individual or mass cases of enforced disappearances. Its reports constitute an invaluable source on the handling of investigations.

Electronic Resources

http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/themissing?OpenDocument
International Committee of the Red Cross (ICRC), *Work of the International Committee of the Red Cross in relation to missing persons*. The ICRC has been in the forefront of international efforts to deal with the problem of missing persons in conflict situations and their aftermath for most of its existence. The website is a major resource on international law in relation to the problem, as well as a wealth of material regarding the ICRC's tracing service and other ways of assisting the families of missing persons.

[11] Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General, UN document E/2005/3.

CHAPTER 4

PROHIBITION OF TORTURE

The prohibition of torture is considered to carry a special status in general international law binding on all States, even if they have not ratified a particular treaty. It cannot be contradicted by treaty law or by other rules of international law.

4.1. Definitions

Torture

As defined for the purposes of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[1] torture consists of the following three elements:

- The infliction of severe mental or physical pain or suffering;
- By or with the consent or acquiescence of the State authorities; and
- For a specific purpose; namely, to obtain information or a confession, to punish, intimidate, or coerce, or for any reason based on discrimination of any kind.

Significantly, the definition does not limit the scope of torture to the infliction of physical pain, but also includes mental suffering. The UN Human Rights Commission has stated on several occasions that intimidation and coercion, as described in Article 1 of the UNCAT, can amount to cruel, inhuman or degrading treatment or to torture. Intimidation and coercion includes serious and credible threats, as well as death threats, to the physical integrity of the victim or a third person.[2]

It is sometimes difficult to assess whether or not a certain type of treatment amounts to torture. Insofar as one wishes to pursue legal

[1] UNCAT, Article 1.
[2] For example in resolution 38/2002, adopted on 22 April 2002, para. 6.

action, the alleged facts should constitute torture or ill-treatment in a legal sense. Torture can be distinguished from other forms of ill-treatment by the degree of suffering involved and by the requirement of a purposive element. In some cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other.

Pain and suffering arising from, inherent in, or incidental to a lawful sanction does not constitute torture.[3] However, in order to be lawful, it is not sufficient that a sanction be merely procedurally correct; that is, authorized and applied in accordance with the prevailing laws of a given country. It must also constitute a practice **widely accepted as legitimate** by the international community. Deprivation of liberty is clearly a lawful sanction, providing that it meets relevant international standards, such as those set out in the UN Standard Minimum Rules for the Treatment of Prisoners.[4] Corporal punishment, on the other hand, is considered to be inconsistent with Article 3 of the European Convention on Human Rights (ECHR).[5] The European Court of Human Rights (ECtHR) has held that corporal punishment is degrading treatment in breach of Article 3, not only when applied as a judicial sanction, but also as regards corporal punishment in the home.[6]

Cruel, Inhuman or Degrading Treatment or Punishment

In simple terms, cruel, inhuman or degrading treatment or punishment refers to instances of prohibited ill-treatment where one or more of the elements necessary for an act to be defined as torture are absent.

The essential elements of 'other cruel, inhuman or degrading treatment or punishment which do not amount to torture' are as follows:[7]

- Intentional infliction of significant mental or physical pain or suffering;
- By or with the consent or acquiescence of the State authorities.

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[3] UNCAT, Article 1(2).

[4] Report of the UN Special Rapporteur on Torture, E/CN.4/1997/7, 10 January 1997, para. 8.

[5] UN Human Rights Committee, General Comment 20 on the Implementation of Article 7 of the ICCPR, para. 5; Report of the UN Special Rapporteur on Torture, E/CN:4/1997/7, 10 January 1997, para. 6.

[6] *Tyrer v. UK* (5856/72), Court, 25 April 1978, para. 35; *A v. UK*, (25599/94), Court, 23 September 1998, para. 21.

[7] UNCAT, Article 16(1).

It is often difficult to identify the exact boundaries between torture and other ill-treatment, between different forms of ill-treatment, or between ill-treatment and lawful treatment, as this requires an assessment about the degree of suffering experienced that may depend on the particular circumstances of the case and on the personal characteristics of the victim. In reality, the different categories of prohibited ill-treatment are closely related to each other. The act of torture is itself an (extreme) form of prohibited ill-treatment. Assessment of allegations of torture or other prohibited ill-treatment must in any event be made on a case by case basis.

4.2. Legally Binding Standards

Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by all Council of Europe members and all OSCE participating States, provides:

"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."

By virtue of the prohibition, State officials are prohibited from inflicting, instigating or tolerating torture or other cruel, inhuman or degrading treatment or punishment of any person. As specifically provided for in the UNCAT, an order from a superior officer or a public authority may not be invoked as a justification for torture.[8] States are furthermore required to ensure that all acts of torture are offences under their criminal law, to establish criminal jurisdiction over such acts, to investigate all such acts and hold those responsible for committing them to account, and to provide an effective remedy for victims of acts of torture.[9]

Article 10 of the ICCPR, which is closely related to Article 7, provides as follows: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Torture and ill-treatment are also prohibited under Article 3 of the European Convention on Human Rights (ECHR), which states: "No

[8] UNCAT, Article 2.
[9] UNCAT, Articles 4, 5, 7, 12, 13, and 14.

one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The UNCAT is a specialized human rights treaty addressing the prohibition, prosecution and prevention of torture and other forms of ill-treatment. Some provisions, such as those referring to criminalization, prosecution and the provision of remedies for victims, apply only to torture. Others, such as those relating to the prevention and investigation of allegations and to the protection of alleged victims and witnesses, apply to both torture and ill-treatment.

States Parties to the UNCAT are obliged to ensure that torture, the attempt to commit torture, and complicity in torture are offences under their criminal law and to make these offences punishable in accordance with their grave nature. States must furthermore prescribe laws to punish torture committed on their territory, as well as by their nationals outside this territory. They must also detain any suspected torturers in their territory (regardless of the location of the offence) and either submit them to the prosecuting authorities or extradite them to another jurisdiction to face prosecution.

States Parties are also obliged to make efforts to prevent torture and other prohibited ill-treatment through dissemination of information about the prohibition of torture and through the training of law enforcement officials and other persons involved in the custody or treatment of persons in detention, and through the regular review of interrogation rules and arrangements for custody.

States are furthermore required to undertake prompt and impartial investigations where there are reasons to believe that torture or other prohibited treatment has taken place, to provide victims of acts of torture or other prohibited treatment with the right to make a complaint, to have it promptly and expeditiously handled, and, in this regard, to protect the complainant and witnesses against ill-treatment or intimidation, to provide redress to victims of torture, and to ensure that statements made as a result of torture are inadmissible as evidence against the person accused.

Article 3 of the UNCAT prohibits the expulsion of a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. A substantial ground means a factual one, going beyond a mere theory or suspicion.[10]

[10] *E.A v. Switzerland*, Communication No. 28/1995, CAT/C/19/D/28/1995.

While the general human rights situation in the State in question will be a relevant consideration, grounds must also exist to indicate that the person in question, or a member of the person's family, would be personally at risk.[11]

States Parties must ensure in their legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his or her dependants will be entitled to claim compensation.[12]

Prohibitions of, or references to the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment are also found in a number of other international conventions, including the Convention on the Rights of the Child[13] (CRC), the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[14] (ICRMW), the International Convention on the Elimination of All Forms of Racial Discrimination[15] (ICERD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[16]

The inclusion of obligations within the latter two Conventions underline the relationship that exists between the right not to be subjected to torture or other prohibited ill-treatment and the principles of non-discrimination in the enjoyment of rights and the obligation on States to respect and ensure to all persons equality before the law. States Parties to the ICERD have undertaken to guarantee the right of everyone, without distinction, to equality before the law in the enjoyment of, among others, 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.

The Committee on the Elimination of Discrimination against Women has stated that gender-based violence, which impairs or nullifies the enjoyment of women of human rights and fundamental freedoms, including the right not to be subjected to torture or to cruel, inhu-

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[11] UN Committee against Torture General Comment no. 1, 'Implementation of Article 3 of the Convention in the context of Article 22', adopted 21 November 1997, A/53/44, para. 258 and annex IX.

[12] UNCAT, Article 14.

[13] 1989, Article 37(a).

[14] 1990, Article 10.

[15] 1965, Article 5(b).

[16] 1979.

man or degrading treatment or punishment, constitutes discrimination within the meaning of Article 1 of the CEDAW. States Parties to the Convention may be responsible for private acts of gender-based violence if they fail to act with due diligence to prevent, to investigate, to punish or to provide compensation for acts of gender-based violence.[17]

The European Committee for the Prevention of Torture

The European Convention for the Prevention of Torture, ratification of which is mandatory for Council of Europe member States, establishes the European Committee for the Prevention of Torture (CPT), a visiting mechanism comprised of independent experts from each State Party to the Convention. The members of the CPT are elected by the Committee of Ministers on the basis of lists nominated by the State Party in question.

As the title of the Convention indicates, the mandate of the CPT is primarily preventative rather than reactive. The CPT undertakes visits to places of detention to examine the treatment of detainees with a view to strengthening, if necessary, the protection of those persons from torture or other unlawful treatment. The objective of the CPT's work is not to criticize or condemn States, but to identify areas of concern and to make recommendations where appropriate. While the CPT does not make interventions in individual cases, allegations or other relevant information supplied by individuals are taken into account in assessing conditions in places of detention and in formulating recommendations.

The CPT undertakes two types of visits: periodic, whereby each State Party is visited in rotation on a regular basis, and ad hoc, in response to particular concerns or reports of violations, as may be required in the circumstances. In addition, the CPT may carry out follow-up visits in relation to situations which have previously been investigated. In principle, access by the CPT to places of detention is not dependent on the consent of the State Party. The State Party in question shall provide the CPT with full information on places where persons deprived of their liberty are being held; unlimited access to any place of detention, including the right to move inside places of detention without restrictions, and any other information necessary for

[17] General Recommendation 19 on Violence against Women adopted by the Committee for the Elimination of All Forms of Discrimination against Women in 1992; para. 6–9.

the CPT to carry out its task. Further, the CPT is entitled to interview detainees in private and to communicate with any other person whom it believes can supply relevant information.

In its dialogue with States Parties, the CPT applies two principles: co-operation and confidentiality. Following each visit, the CPT prepares a report to the State Party in question containing its findings and conclusions, including any recommendations. This report is not made public unless the State Party concerned agrees to it being published. It has become common practice for States to agree to publication: almost all of the reports prepared by the CPT since its inception have now been made public. In the event that the State does not cooperate with the CPT, or refuses to act on its recommendations, the CPT can, as a last resort, make a public statement.

The CPT publishes an annual report on its activities, and has also, at various times, issued general recommendations,[18] drawn from individual reports on visits undertaken, on best practices in police custody and in other custodial settings.

Optional Protocol to the United Nations Convention against Torture

An Optional Protocol to the UNCAT (OPCAT)[19] provides for the establishment of a system of visits to places of detention carried out by independent international and national bodies, with a view to assisting States Parties to more fully implement their existing treaty obligations under the UNCAT to prevent acts of torture and other unlawful treatment.

The international body, which will function as a Sub-Committee to the UN Committee against Torture, will conduct regular visits to places of detention in all States Parties to the OPCAT. At national level, States Parties will be required, within one year of having ratified the Convention, to establish one or more specialist bodies to undertake visits or, alternatively, to nominate an existing institution or organization, such as the Office of the Ombudsman or Human Rights Commission, to carry out this function. States Parties must ensure that the national body functions without interference from State authorities.

The OPCAT entered into force in June 2006.

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[18] Council of Europe, The CPT Standards—Substantive Sections of the CPT's General Reports, CPT/Inf/E(2002)1-Rev.2004 (Strasbourg, 2002).http://www.cpt.coe.int.

[19] Adopted by the UN General Assembly on 18 December 2002.

4.3. Permissible Limitations

The prohibition of torture and ill-treatment is absolute and non-derogable.

There are no circumstances in which States can set aside or restrict their obligations to respect and to ensure respect for the prohibition. The prohibition applies even in times of war or other public emergency, which may justify the temporary limitation or suspension of some other rights and freedoms.

This is clear from the prohibition in Article 7 of the ICCPR, which is formulated in absolute terms, and from Article 4(2), which explicitly states that no derogation is permitted from Article 7. Similarly, Article 3 of the ECHR makes no provision for exceptions, and Article 15(2) states that there can be no derogation from Article 3, even in the event of a public emergency threatening the life of the nation.

The United Nations Human Rights Committee (HRC) has stated that Article 10 of the ICCPR, demanding that all persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person, expresses a norm of general international law not subject to derogation. This is the case even though Article 10 is not mentioned among the list of non-derogable rights in Article 4(2) of the Convention. The Committee finds support for this interpretation in the reference to the inherent dignity of the human person in the preamble to the Covenant and in the close connection that exists between Articles 7 and 10.[20]

Article 2(2) of the Convention against Torture, which has been ratified by all member States of the Council of Europe and almost all OSCE Participating States, also provides that, "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."

Common Article 3 to the four Geneva Conventions of 1949, which applies in the case of armed conflict of an internal character, provides that acts of violence to life and person, in particular murder of all kinds, mutilations, cruel treatment and torture with respect to persons taking no active part in the hostilities "are and shall be prohibited at any time and in any place whatsoever."

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[20] UN Human Rights Committee General Comment No. 29 on States of Emergency; adopted on 24 July 2001; CCPR/C/21/Rev,1/Add.11, para. 13(a).

In a case[21] involving the mistreatment of a person suspected of being involved in a terrorist attack, the ECtHR stated that, "the requirements of the investigation of crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals." In another case, the Court emphasized that the conduct of the victim of the violation is irrelevant to the State's obligation to ensure respect for the prohibition of torture and inhuman or degrading treatment or punishment in Article 3 of the ECHR.

States are also restricted from making derogations which may put individuals at risk of torture or ill-treatment—for example, by allowing excessive periods of incommunicado detention or denying a detainee prompt access to a court.[22] This prohibition operates irrespective of circumstances or attributes, such as the status of the victim or, if he or she is a criminal suspect, upon the crimes that the victim is suspected of having committed.[23]

4.4. Current Legal Interpretation (Key Case Law)

Distinction between Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The words **cruel, inhuman or degrading treatment or punishment** are only partially defined in the case law of the ECtHR. While it is not necessary that the act be inflicted for a specific purpose, there does have to be an **intention** to expose individuals to the conditions which amount to or result in the ill-treatment. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Degrading treatment or punishment may involve pain or suffering less severe than does torture or cruel or inhuman treatment and will usually involve humiliation and debasement of the victim.

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[21] *Tomasi v. France*, ECtHR, 1992, (Series A), No.241, para. 115.

[22] Human Rights Committee General Comment No. 29 on States of Emergency, 2001; para. 16; *Aksoy v. Turkey*, ECtHR judgment 18 December 1996; *Brannigan and MacBride v. UK*, ECtHR judgment 26 May 1993; *Brogan v. UK*, ECtHR judgment 29 November 1988.

[23] UNCAT, Article 2. See also *Ireland v. UK*, ECtHR Series A 25, (1978); *Chahal v. UK*,

In the case of *Ireland v. The United Kingdom*,[24] the ECtHR made a distinction between torture and cruel, inhuman or degrading treatment or punishment for the purposes of Article 3 of the Convention. The distinction is based on the level of severity of the treatment in question:

torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."

The distinction between 'inhuman' and 'degrading' treatment was considered in the case of *B. v. France*,[25] where the ECtHR stated:

"The Court in one case considered the treatment both "inhuman", because it had been applied with premeditation and for hours at a stretch, and had caused "if not actual bodily injury, at least intense physical and mental suffering", and "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."

In the case of *Soering v. The United Kingdom*,[26] which involved a West German national facing extradition to the United States on charges which could carry the death penalty on conviction, it was claimed that the exposure of the applicant to the so-called 'death row' phenomenon (lengthy delays in the review and appeal process following a death sentence, and the likely tension and psychological trauma that this would entail) would amount to a violation of Article 3 of the Convention. In judgment, the ECtHR stated that the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by a condemned person within the scope of Article 3. Present-day attitudes to capital punishment within the States Parties to the ECHR should be taken into consideration in determining whether the treatment experienced by the condemned person constituted a violation of the Convention.

ECtHR, Judgment of 15 November 1996; *Tomasi v France*, ECtHR, Series A, No. 241-A (1993); *Selmouni v France*, ECtHR Judgment of 28 July 1999.

[24] *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, p. 66, para. 167.

[25] *B. v. France*, ECtHR, Judgment of 25 March 1992, Series A no. 232-C, p. 87, para. 83. See also *Ireland v. the United Kingdom*, Judgment, Series A no.25, p. 66, para. 167, and *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A no. 161, p. 39, para. 100.

[26] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 39, para. 104.

Rape as a Means of Torture

The crime of rape will also amount to the crime of torture if the elements of torture as defined are found to be present. In the case of *Aydin v. Turkey*,[27] the ECtHR held that the rape and other physical and mental violence inflicted on a young girl detained by the security forces constituted torture. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has on several occasions convicted defendants of torture as a war crime for the rape of women who were under interrogation.[28] As the ICTY has noted, there is "a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law."[29]

Other Violations of the Prohibition against Torture

In a case[30] involving the disappearance of a Turkish man of Kurdish ethnicity, the ECtHR found a violation of Article 3 in relation to the man's mother, the litigant, who had witnessed her son being taken away but who had afterwards been denied any official information on his fate. In this regard, Article 1 of the UN Declaration on the Protection of All Persons from Enforced Disappearance[31] provides that "any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of (…) the right not to be subjected to torture and to other cruel, inhuman or degrading treatment or punishment."

In the case of *Campbell and Cosans v. the United Kingdom*,[32] which involved the threatened use of corporal punishment (not carried out) on two schoolboys, the ECtHR stated that, "provided it is sufficiently

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[27] *Aydin v. Turkey*, (23178/94), 25 September 1997, para. 86.

[28] *Prosecutor v. Delalic and others*, (IT-96–21), 16 November 1998, para. 943, 965; *Prosecutor v. Furundzija*, ICTY, (IT-95–17/1), 10 December 1998 (Trial Chamber), para. 269.

[29] *Prosecutor v. Furundzija*, para. 163.

[30] *Kurt v. Turkey*, ECtHR, 25 May 1998, para. 134.

[31] Adopted by the UN General Assembly by Resolution 47/133 of 18 December 1992.

[32] *Campbell and Cosans v. the United Kingdom*, 25 February 1982, Series A no. 48, p. 13–14, para. 26.

real and immediate a mere threat of conduct prohibited by Article 3 may itself be in conflict with the provision."

The failure to effectively monitor a suicidal patient or to include informed psychiatric input in his assessment and treatment was said by the ECtHR to be evidence of a significant defect in the quality of medical care in the detaining institution, amounting to a violation of Article 3 of the Convention.[33]

Where an accused person is held **incommunicado** (that is, without contact to the outside world) for a prolonged period of time, without being informed of the reason for the detention, and without family members being advised of the arrest and of the place in which the person is being detained, this will constitute prohibited ill-treatment.[34] Incommunicado detention is furthermore considered to be the custodial setting in which torture is most frequently practiced.[35]

Duty to Investigate and Prosecute

The ECtHR has also held that States are obliged to investigate all 'arguable claims' of torture and that this is implicit both in the notion of the right to an effective remedy and the right to be protected from acts of torture.[36] It has stated that, "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury."[37] Where an individual raises an arguable claim that he has been seriously ill-treated by agents of the State the authorities are obliged to carry out an effective and independent official investigation—including the taking of witness

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[33] *Keenan v. United Kingdom*, 27229/95, 3 April 2001, para. 109–116.

[34] Article 1 of the UN Declaration on the Protection of All Persons from Enforced Disappearances provides, "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutions a violation of the rules of international law guaranteeing, inter alia (…) the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment."

[35] Report of the Special Rapporteur on Torture, E/CN.4/2003/68, 17 December 2002, para. 26(g).

[36] *Assenov and others v. Bulgaria*, ECtHR Judgment of 28 October 1998; *Aksoy v. Turkey*, Judgment of 18 December 1996.

[37] *Ribitsch v. Austria*, ECtHR Judgment of 4 December 1995; *Aksoy v. Turkey*, Judgment of 18 December 1996; *Assenov and others v. Bulgaria*, 28 October 1998, *Kurt v. Turkey*, Judgment of 25 May 1998, *Çakici v. Turkey*, Judgment of 8 July 1999, *Akdeniz and others v. Turkey*, Judgment of 31 May 2001.

statements and the gathering of forensic evidence—capable of leading to the identification and punishment of those responsible.[38] Without such a duty to investigate the Court noted that, "the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."[39]

When examining complaints of torture or other unlawful treatment, one must remember that where an individual is taken into police custody in good health but is found to be injured at the time of release, the State bears the burden to provide a plausible explanation as to the cause of the injuries, failing which a clear issue arises under Article 3 of the ECHR.[40]

States Parties to the UNCAT are obliged to prosecute a suspected torturer present within their jurisdiction, unless the person in question is to be extradited to another State which intends to prosecute the person in question itself. Where State officials are responsible for torture or other prohibited ill-treatment, the State is also responsible for providing remedies to the victims.

The CPT has stressed that a prisoner against whom means of force has been used should have the right to be immediately examined and, if necessary, treated by a doctor. In those rare cases where resort to instruments of physical restraint is required, the prisoner should be kept under constant and adequate supervision. Instruments of restraint should be removed at the earliest opportunity and they should never be applied or their application prolonged as a punishment. A record should be kept of every instance of the use of force against prisoners.[41]

The United Nations Committee against Torture (CAT) has recommended that States abolish the use of electro-shock stun belts and restraint chairs as a method of restraining those in custody, as their use 'almost invariably' results in practices that amount to cruel, inhuman or degrading treatment or punishment.[42]

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[38] Ibid; see also *Sevtap Veznedaroglu v. Turkey*, Judgment of 11 April 2000; *Kelly and Others v. UK*, Judgment of 4 May 2001.

[39] Ibid; see also *Selmouni v. France*, Judgment of 28 July 1999.

[40] *Ribitsch b v. Austria*, ECtHR Judgment of 4 December 1995, Series A No. 336, para. 108–111.

[41] CPT/Inf/E (2002) 1, p. 19, para. 53(2).

[42] Conclusions and Recommendations of the Committee against Torture: United States of America, 15 May 2000, UN Doc. A/55/44, para. 180 (c).

The CPT has stressed that **solitary confinement** can have very harmful consequences for the person concerned and that, in certain circumstances, solitary confinement can amount to inhuman and degrading treatment and should therefore only be applied for as short a period as possible.[43] In this regard, the UN Basic Principles for the Treatment of Prisoners[44] also provide that efforts addressed to the abolition of solitary confinement, or to the restriction of its use, should be undertaken and encouraged.

As regards examining complaints of ill-treatment, there is particular onus on the authorities to ensure that any medical examination/treatment is conducted independently of the authority detaining the individual. In this respect, it is questionable whether a prison doctor, employed by the authorities, can be considered independent for the purposes of confirming or discounting whether a detainee has been ill-treated. The CPT has stated that whatever the formal position under which a prison doctor carries on his activity, his clinical decisions should be governed solely by medical criteria. The quality and effectiveness of medical work should be assessed by a qualified medical authority.[45] Additionally, the importance of investigating prisoners' complaints and visits by an independent body to assess complaints of prisoners and take action upon them indicates the need to have in place a complaints investigation mechanism, which should be operationally and functionally independent from the detaining authority and/or any persons under investigation.[46]

4.5. Relevant National Implementation Mechanisms

Prohibiting Torture in National Law

An important step in ensuring that the prohibition of torture is implemented at national level is the incorporation of the ICCPR, the UNCAT and other relevant international and regional instruments into domestic law. The UN Committee against Torture has on numerous occasions called on States Parties to the UNCAT to ensure that the

[43] CPT/Inf/E (2002) 1, p. 20 para. 56(2).
[44] General Assembly Resolution 45/111 of 14 December 1990; Principle 7.
[45] Extract from the Committee for Prevention of Torture, 3rd Report.
[46] Committee for Prevention of Torture, General Report. para. 53.

crime of torture is a specific offence within the domestic penal code, and that the punishment for persons convicted of torture is consonant with the gravity of the offence.

Education, Dissemination of Information, and Periodic Review of Law Enforcement Procedures

Proactive, sustained efforts should also be taken by national authorities to ensure that the existence of the prohibition is well-known and understood by law enforcement personnel and any others who are responsible for the care of persons deprived of their liberty. As provided for in the UNCAT, States Parties are obliged to provide education for law enforcement and other relevant officials and to regularly review rules for detention and for the conducting of interrogations of criminal suspects under regular review. States Parties are furthermore obliged to take positive measures with a view to preventing acts of torture and other cruel, inhuman or degrading treatment or punishment from taking place.

Punishing Torture Offenders

A person alleging torture or other unlawful treatment or his or her representative can seek to initiate criminal proceedings before a domestic court through a complaint to the police or the public prosecutor. The primary objective of criminal proceedings is the punishment of the offender, not the compensation of the victim.

In some countries, the police service, the military and/or other security forces have established independent mechanisms to investigate complaints of misconduct. Such mechanisms may have powers to direct or to recommend disciplinary action against a police officer found to be responsible for an act of torture or other unlawful treatment.

Seeking Compensation

Through civil proceedings an individual can seek compensation, usually financial, from the person responsible. In some jurisdictions, it may be possible to pursue a compensation claim irrespective of whether criminal proceedings have taken place. In other cases, the ability to pursue compensation is dependant on a criminal conviction having first been obtained.

Civil proceedings have some potential procedural and practical advantages for claimants: he or she can have more direct control of the proceedings when initiated and what the contents of the statement of claim should be, the burden of proof is less onerous than for a criminal trial, and the proceedings are likely to be less traumatic for the victim than criminal proceedings, where he or she may be required to recount the facts of the case several times, including in court in the presence of the alleged offender, and to be subjected to cross-examination. On the other hand, the claimant will generally be required to pay an application fee, and will also pay the costs of his or her legal representative and risk having to pay the other side's costs if the application is unsuccessful. In some countries, litigation funds or pro bono schemes have been established to assist victims of torture and other human rights violations in bringing their case to court.

4.6. OSCE Commitments

The OSCE commitment to the eradication of torture and ill-treatment dates back to the Vienna Meeting (1989). It was reaffirmed and refined at the Copenhagen (1990) and Moscow Meetings (1991), the Budapest Summit (1994), and, most recently in the Charter for European Security adopted at the Istanbul Summit (1999).

Participating States have pledged to take effective legislative, administrative, judicial and other measures to prevent and punish torture and ill-treatment and to consider acceding "as a matter of urgency" to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. They have committed themselves to recognizing the competence of the Convention's monitoring committee to receive individual and State communications and to inquire into allegations of systematic torture.[47]

Participating States have also committed themselves to ensure that education and information are included in the training of law enforcement personnel and any other persons who may be involved in the custody, interrogation or treatment of persons deprived of their liberty and to keep under systematic review rules, instructions, methods and practices, as well as arrangements for the custody and treatment or those persons. At the Moscow Meeting, particular attention was paid to

[47] Concluding Document from the Copenhagen Meeting (1990), Article 16(2).

the rights of persons deprived of their liberty, including the right of a detainee or his or her counsel to make a request or complaint regarding his or her treatment, and the guarantee that no complainant would suffer prejudice for making such a request.[48]

The Charter for European Security, adopted in Istanbul in 1999, restates the commitment by participating States to the eradication of torture and cruel, inhumane or degrading treatment or punishment throughout the OSCE area. To this end, participating States will promote procedural and substantive safeguards and remedies to combat such practices, to assist victims and co-operate with relevant international and non-governmental organizations, as appropriate.[49]

4.7. Other International Instruments

There are a large number of additional instruments adopted by the United Nations and by the Council of Europe, which shed light on or are otherwise related to the prohibitions of torture contained in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Protection of Persons in Detention

Most violations of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment occur in prisons or other places of detention. Therefore, it is important to safeguard the physical integrity and welfare of persons deprived of their liberty. Standards in this area generally address the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment in conjunction with the closely related rights of liberty and security of the person[50] and the right to be treated with humanity and respect for the inherent dignity of the person.[51]

When the State deprives a person of liberty, it assumes a duty of care for the wellbeing of that person. As discussed in the section

[48] Document from the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), Article 23(1).
[49] Charter for European Security, Istanbul, 1999, Article 21.
[50] ECHR, Article 5.
[51] ICCPR, Article 10.

on monitoring, below, a basic principle for protecting detainees from torture or other forms of ill-treatment is openness: prisons and other places of detention should be open to external, independent scrutiny and detainees should have access to the outside world.

Persons who have been taken into custody by State officials are vulnerable to the risk of abuse of powers invested in law enforcement officers. A number of international and regional instruments set out safeguards for persons in custodial care, with a view to reducing the isolation of prisoners from the outside world and of ensuring that the activities of State agents are subject to regular monitoring and control. The implementation of custody safeguards can facilitate the taking of timely action to prevent acts of torture or other prohibited ill-treatment from taking place and, where torture is alleged to have taken place, the preservation of evidence pending the undertaking of an inquiry. Maintaining proper records in places of custody is also in the interests of law enforcement officials themselves, since it assists them in carrying out their duties in accordance with relevant national and international standards, and can protect them from possible unfounded allegations of misconduct.

The CPT has developed three fundamental safeguards[52] against ill-treatment of persons detained by the police, which should apply from the very outset of custody (that is, from the moment the person in question is obliged to remain with the police):

- The right of detainees to have the fact of their detention notified to a close relative or third party of their choice;
- The right of access to a lawyer; and
- The right to a medical examination by a doctor of their choice, in addition to any medical examination carried out by a doctor called by the police authorities.

Furthermore, it is equally fundamental that a person detained should be informed of his/her rights, including those referred to above, without delay; that is, the information should be conveyed, and the enjoyment of the rights in question should take effect, as soon as possible after a person has been detained.

The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (BPD)[53] provides detailed guid-

[52] CPT 2nd General Report, [CPT/Inf(92)3], para. 36 and 37.
[53] General Assembly Resolution 43/173 of 9 December 1988.

ance on safeguards for the protection of persons under any form of detention or imprisonment from torture or cruel, inhuman or degrading treatment or punishment.

The Standard Minimum Rules for the Protection of Prisoners[54] (SMR) and the European Prison Rules (EPR),[55] adopted in 1955 and 2006 respectively, address a wide range of issues related to the prison administration and practice. Both the SMR and the EPR describe **minimum standards** for prison administration; that is, they set standards below which conditions in prisons and other places of detention may not fall.

The SMR include provisions prohibiting, among other things, corporal punishment and punishment by placing in a dark cell. Punishment not amounting to torture or ill-treatment but which may be prejudicial to the prisoner's physical or mental health may never be inflicted unless a medical officer has first examined the prisoner and certified that he or she is fit to sustain it.[56]

Principle 37 of the EPR similarly provides that collective punishments, corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading treatment or punishment shall be completely prohibited as punishment for disciplinary offences.

The SMR and the EPR also address issues such as registration, separation of categories of prisoners, accommodation, provision of food and water, medical services, the use of instruments of restraint, information to be provided to prisoners about prison rules and the right of prisoners to make requests or complaints.

Rules for Detention of Vulnerable Groups

The relative vulnerability and special needs of certain groups of detainees, for example women, children and the mentally ill, necessitate the taking of special steps by the detaining authorities. As regards children, the UN Rules for the Protection of Juveniles Deprived of their

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[54] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of 1957 and 2076(LXII) of 13 May 1977.

[55] Recommendation No.R (2006)2, adopted by the Committee of Ministers on 11 January 2006.

[56] UN Standard Minimum Rules for the Protection of Prisoners (1955, 1977); Rules 31 and 32.

Liberty[57] and the Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules')[58] provide detailed guidance on the protection of children in custodial care.

Article 1(3) of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care[59] provides that, "all persons with a mental illness, or who are being treated as such persons, have the right to protection from (…) physical or other abuse and degrading treatment."

Investigation of Complaints

The UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment state that everyone detained or imprisoned has the right to request improvements in their treatment or to complain about their treatment. If the request or complaint is refused by the detaining authorities, there must exist a right of appeal to a judicial or other authority.[60]

The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principles on Investigation of Torture),[61] derived from the Istanbul Protocol,[62] constitute the first international instrument to address the investigation and documentation of allegations of torture and other cruel, inhuman or degrading treatment or punishment. As stated in Principle 1, the purposes of effective investigation and documentation of torture or other prohibited ill-treatment include the following:

- Clarification of the facts and acknowledgement of individual and State responsibility for victims and their families;
- Identification of measures needed to prevent occurrence; and
- Facilitation of prosecution and/or disciplinary sanctions against those being responsible and demonstration of the need for full

[57] UN General Assembly Resolution 45/113 of 14 December 1990.
[58] UN General Assembly resolution 40/33 of 29 November 1985.
[59] UN General Assembly resolution 46/119 of 17 December 1991.
[60] Principle 33.
[61] Recommended by UN General Assembly Resolution 55/89 of 4 December 2000.
[62] Istanbul Protocol—Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN Professional Training Series No. 8, United Nations, New York and Geneva, 2001).

reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

Remedies for Victims of Violations

A person whose rights or freedoms, amongst them the right to freedom from torture or other prohibited ill-treatment, has been violated, "shall have an effective remedy (…) notwithstanding that the violation has been committed by persons acting in an official capacity."[63] As referred to above, Article 14 of the UNCAT restates and elaborates on this right as it relates to victims of torture.

According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims Declaration),[64] victims of crime and abuse of power should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected. The Victims Declaration encourages the establishment, strengthening and expansion of national funds for compensation to victims, together with the expeditious development of appropriate rights and remedies.

The Basic Principles and Guidelines on the Right to a Remedy[65] consider existing norms of international human rights and humanitarian law from a victim-oriented perspective. Victims of torture and other gross violations of international human rights law, including victims of torture, should be treated with respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.[66] Remedies for victims shall include the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.[67]

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[63] Article 2(3)(a), ICCPR; Article 13, European Convention on Human Rights.

[64] Adopted by General Assembly Resolution 40/34 of 29 November 1985.

[65] UN General Assembly Resolution adopted on 10 November, 2005. The full title of the instrument is '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'.

[66] Principle 10.

[67] Principle 11.

The obligation to provide reparation is derived from customary international law and from State Party treaty obligations. With respect to the right to freedom from torture and other prohibited ill-treatment, these obligations are, as discussed above, found in the ICCPR, the ECHR and, specifically as regards torture, in the UNCAT. Reparation may take a number of forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[68]

The act of **restitution** refers to the re-establishment as far as possible of the situation before the wrongful act occurred, to the extent that any changes that have occurred in that situation may be traced to that act.

Compensation is understood to include any economically assessable damage, both material and non-material, resulting from the crime, including, "physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services."

Rehabilitation includes medical and psychological care as well as legal and social services, and the UN Special Rapporteur on Torture has regularly encouraged States Parties to support rehabilitation centres to ensure that victims of torture are provided with the means for as full rehabilitation as possible.

Satisfaction should, where applicable, include any or all of the following individual or collective measures: cessation of continuing violations, revelation of the truth, public acknowledgment of the facts and acceptance of responsibility, search for the disappeared and identification of remains, judicial and administrative sanctions against persons liable for the violations, the restoration of the dignity of victims through a public declaration or official apology, commemorations and tributes and other activities aimed at remembrance.

Finally, **guarantees of non-repetition** should, where applicable, include any or all of the following measures, which may also contribute to prevention: ensuring effective civilian control of military and civilian forces, ensuring that civil and military proceedings are in accordance with relevant international standards, strengthening the inde-

[68] Principles 18, 19–23.

pendence of the judiciary, protecting personnel in relevant professional fields and occupations, providing ongoing human rights and international humanitarian law education to all sectors of society, and in particular to law enforcement officials and military and security forces, promoting observance of relevant codes of conduct and ethical norms, promoting mechanisms for preventing and monitoring social conflicts and their resolution, and reviewing and reforming laws contributing to or allowing gross violations of international human rights law.

Professional Codes of Conduct

A number of codes of conduct have been developed by the United Nations, the Council of Europe and other regional organizations, addressing the proper role of professional groups responsible for, or with important functions to perform in relation to persons in detention or within the criminal justice system.

The Code of Conduct for Law Enforcement Officials[69] provides that in the performance of their duty, law enforcement officials shall maintain and uphold the human rights of all persons. Moreover, no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment.

The Parliamentary Assembly of the Council of Europe has adopted a Declaration on the Police[70] which sets out rules concerning professional ethics of the police which take into account human rights principles. Paragraph 3 of the Declaration provides that, "summary executions, torture and other forms of inhuman or degrading treatment or punishment remain prohibited in all circumstances. A police officer is under an obligation to disobey or disregard any order or instruction involving such measures."

Principle 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[71] provides as follows:

"It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which con-

[69] Adopted by UN General Assembly Resolution 34/169 of 17 December 1979.
[70] Resolution 690(1979), adopted on 8 May 1979.
[71] UN General Assembly Resolution 371/194 of 18 December 1982.

stitute participation in, complicity in, incitement to, or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."

The relevant United Nations professional codes of conduct for judges, prosecutors and lawyers contain provisions requiring persons fulfilling these functions to ensure that judicial proceedings are conducted fairly, the rights of the parties are respected, and that human rights and fundamental freedoms recognized by national and international law are upheld.[72] The UN Guidelines on the Role of Prosecutors[73] provide that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they must refuse to use such evidence against anyone other than those who used such methods and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.[74]

Instruments Adopted by the European Union

The Charter of Fundamental Rights of the European Union, proclaimed in December 2000, includes a prohibition of torture and inhuman or degrading treatment or punishment.[75]

The European Union has also adopted guidelines on policy towards non-Member States on torture and other cruel, inhuman or degrading treatment or punishment,[76] which are intended to provide the EU with an operational tool to be used in contacts with third countries at all levels as well as in multilateral human rights fora with a view to

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[72] 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, Milan, 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Article 6; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, Article 14.

[73] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

[74] Article 16.

[75] Article 4.

[76] Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Affairs Council, April 2001.

supporting efforts to prevent and eradicate torture in all parts of the world. The guidelines identify a variety of ways and means in which the EU and its agencies will work towards the prevention of torture and ill-treatment within the Common Foreign and Security Policy.

4.8. Monitoring the Right: the Special Challenges

Particular challenges arise in monitoring of the right to freedom from torture and other forms of unlawful treatment, since such acts, when they occur, usually take place in custodial settings shielded from public view. Violations of the right are rarely acknowledged by law enforcement agencies, and information and other relevant material is difficult to obtain. For these reasons, visits to places of detention are an invaluable means by which to assess compliance with the right and to improve the quality of its implementation by law enforcement and custodial agencies and authorities.

Principle 29(1) of the Body of Principles on Detention (BPD) states:

"In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment."

The phrase 'places of detention' includes police custody, detention on remand, prisons, security service or military facilities where persons are deprived of their liberty, administrative detention areas, juvenile detention centres and internment units of medical and psychiatric institutions.

The Special Rapporteur on Torture has stated that regular inspection of places of detention "constitutes one of the most effective preventive measures against torture."[77]

Monitoring visits can uncover evidence of acts of ill-treatment or torture that may have taken place. They can also draw attention to incidents, practices or situations that have the potential to lead to acts of mistreatment or torture taking place, and to make recommendations to the detaining authorities accordingly.

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[77] General recommendations of the UN Special Rapporteur on Torture, UN Document E/CN.4/2003/68, para. 26(f).

The Special Rapporteur has recommended that official bodies be set up to carry out inspections, comprised of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Suitably experienced qualified representatives of non-governmental organizations should also be permitted to carry out visits to places of detention.

Members of inspection teams should have the opportunity to speak privately with detainees and with any one, in the place of detention or outside, who can provide them with relevant information. They should be able to make recommendations to the authorities where appropriate and should also report publicly on their findings.[78]

Inspection teams should always show respect for persons deprived of their liberty, for prison staff and for the rules governing the institution. Special care should be taken to respect the confidentiality of information supplied in private interviews, and not to take any action or measure which could put the informant or any other person in danger.[79]

[78] E/CN.4/2003/68, para. 26 (f).

[79] A full list of 18 basic principles of monitoring is provided in Chapter V of the United Nations Training Manual on Human Rights Monitoring, Professional Training Series No. 7, Office of the High Commissioner for Human Rights, United Nations, p. 87–93.

4.9. Monitoring Checklist on the Prohibition of Torture

Checklist – The Prohibition of Torture

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification?
   - Has the country declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment?
   - Which domestic laws and regulations address the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, and are they in accordance with the relevant international standards?
   - Is the crime of torture a specific offence in the relevant domestic penal code or codes, and, if so, is the relevant provision consistent with the definition in Article 1 of the UNCAT?
   - What are the rules with regard to the recognition of official places of detention and the registration of persons deprived of their liberty?
   - Does the law allow for unauthorized or secret detention?
   - What are the legally guaranteed rights of persons taken into detention? E.g. do detained persons have the right of access to defence lawyers from the commencement of the custodial period? Does this include the right to meet with the defence lawyer in private? Do detained persons have the right of access to independent medical examination on request?
   - What are the rules with regard to the use of solitary confinement? For example, for what reasons can it be imposed, for how long, and under what conditions?
   - Is incommunicado detention permitted under domestic law, and if so, for how long? What legal means are available for persons so detained to challenge the detention or to lodge a complaint? What legal or procedural safeguards exist to protect detainees in this situation?
   - Is there an institution or organization officially mandated to undertake visits to places where persons deprived of their liberty are kept? If so, what is the composition of this body, and what is the legal framework governing its activities? Does it operate independently of the executive branch of government and how are its reports or recommendations dealt with by the authorities?
   - Is there an official legal mechanism or mechanisms for the investigation of allegations of torture or other prohibited ill-treatment? What is the composition of this body and the legal framework governing its activities? Does it operate independently of the executive branch of government?
   - What legal or structural mechanisms are in place to protect complainants or witnesses from harassment or further harm, and,

in the event that an allegation of torture proves to be well-founded, to ensure that the person or persons responsible are held to account? Are there any legal provisions addressing the right of victims of torture and other prohibited ill-treatment to an effective remedy?

2. Monitoring the Right in Practice
   - How and when are persons taken into detention informed of their legal rights, and how is full and equitable compliance by law enforcement officers with these rights ensured and monitored in practice?
   - Is it possible for independent institutions, including suitably qualified and experienced representatives from civil society organizations, to visit pre-trial custody centres, prisons and other places of detention?
   - Are there credible reports indicating that acts of torture or other prohibited ill-treatment take place in the jurisdiction in question? If so, what has been the official reaction from the political leadership to such reports?
   - Does the State ensure that law enforcement personnel and others responsible for the care of persons deprived of their liberty receive training on the prohibition of torture and related ill-treatment and on its practical implications for the performance of their duties?
   - Are the rules governing places where persons deprived of their liberty are kept, together with the rules governing the conduct of police investigations and interrogations, regularly reviewed by the relevant authorities?
   - Does the State promote or provide support, financial or otherwise, for the activities of organizations providing legal or socio-medical services for victims of torture? Is the operation of domestic law such that it facilitates or promotes the effective rehabilitation and reintegration of victims of torture into the active life of the community?

4.10. Instruments on the Right to Freedom from Torture

Relevant Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 7	"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."	Human Rights Committee General Comment no. 20.
Article 10(1)	"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."	Human Rights Committee General Comment no. 21 on Article 10; General Comment no. 29 on States of Emergency (Article 4).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT)

Entirety	This is the leading international instrument. Articles 1–16, the Convention's substantive provisions, primarily address the criminal enforcement of the prohibition of torture found in the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights. Article 1 provides a definition of torture for the purposes of the Convention. States Parties are obliged to ensure that torture, the attempt to commit torture, and complicity in torture are offences under their criminal law and to make these offences punishable by appropriate penalties which take into account their grave nature (Article 4). States must furthermore prescribe laws to punish *acts of torture committed on their territory*, as well as *acts committed by nationals of that State* abroad, and even, if the State thinks it appropriate, acts committed *against* their nationals abroad (Article 5). States must also	The Committee against Torture has issued one General Comment, on Article 3 in the context of Article 22. The Committee has also developed substantial case law through its consideration of individual complaints made pursuant to Article 22.

	detain any alleged torturers in their territory (regardless of the location of the offence) and either submit them to the prosecuting authorities or extradite them (Article 7).
	States are obliged to make efforts to prevent torture and other prohibited treatment through dissemination of information about the prohibition of torture, through the training of law enforcement officials and other persons involved in the custody or treatment of persons in detention (Article 10) and through the regular review of interrogation rules and arrangements for custody (Article 11). States shall undertake prompt and impartial investigations where there are reasons to believe that torture or other prohibited treatment has taken place (Article 12), shall provide victims of acts of torture or of other prohibited treatment with the right to make a complaint, to have it promptly and expeditiously handled, and, in this regard, shall protect the complainant and witnesses against ill treatment or intimidation (Article 13). Finally, States are obliged to provide redress to victims of torture (Article 14), and to ensure that statements made as a result of torture are inadmissible as evidence against the person accused (Article 15). Articles 17–24 address the establishment, functioning and competence of the Committee against Torture.
	Articles 25–33 are technical in nature, containing provisions on signature and ratification of the Convention and procedures for making amendments or reservations to certain provisions.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002 (OPCAT)

Entirety	The Optional Protocol provides for the establishment of complimentary national and international visiting mechanisms to further the prevention of acts of torture and other cruel, inhuman or degrading treatment or punishment. The Protocol is open to accession or ratification by States Parties to the UNCAT.

Convention on the Rights of the Child, 1989 (CRC)

Article 37(a)	"No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons less than eighteen years of age."	

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

Article 10	"No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."	

International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD)

Article 5(b)	States Parties to the Convention undertake to guarantee the right of everyone, without distinction, to equality before the law in the enjoyment of, among others, 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.	

Convention on the Elimination of All Forms of Discrimination against Women, 1965 (CEDAW)

Article 1	This provision defines the term 'discrimination against women' for the purposes of the Convention. The Committee on the Elimination of Discrimination against Women, in its General Recommendation no. 19, identifies gender-based violence which impairs or nullifies the enjoyment of fundamental rights and human freedoms, among others the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, as discrimination within the meaning of Article 1 of the Convention.	General Recommendation 14 on female circumcision. General Recommendation 19 on violence against women.

International Convention for the Financing and Suppression of Terrorism, 1999

Article 17	"Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which the person is present and applicable provisions of international law, including international human rights law."	See also, among others, the International Convention for the Suppression of Terrorist Bombings, 1997, Article 14.

International Humanitarian Law

Geneva Conventions

Section	Critical Substantive Points
Common Article 3 to the four Geneva Conventions of 1949	"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat (…) shall in all circumstances be treated humanely, without any adverse distinction (…) To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (…) (c) outrages upon personal dignity, in particular, humiliating and degrading treatment."

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 3	"No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Ratification of the Convention is mandatory for member States of the Council of Europe. The decisions of the European Court of Human Rights, interpreting the provisions of the Convention, are binding on member States.	Case law as developed through the European Court of Human Rights.

Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1984 (ECPT)

Entirety	The Convention provides for the establishment of the Committee for the Prevention of Torture, mandated in Article 1, to undertake visits to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. Ratification of the Convention is mandatory for member States of the Council of Europe. The recommendations of the Committee are not legally binding on States Parties, but have strong persuasive value.	General recommendations developed by the Committee for the Prevention of Torture.

CSCE/OSCE Instruments

OSCE Commitments

Concluding Document from Copenhagen Meeting (1990)

Critical Substantive Points

Paragraph 16: "The participating States:

16(1)—reaffirm their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, to take effective legislative, administrative, judicial and other measures to prevent and punish such practices, to protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and to take effective measures to prevent and punish such practices;

16(2)—intend, as a matter of urgency, to consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so, and recognizing the competencies of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

16(3)—stress that 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;

16(4)—will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

16(5)—will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

16(6)—will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

16(7)—will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and, therefore, the consideration of any cases of torture and other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE."

Concluding Document of Budapest Meeting (1994)

"Chapter VIII, Paragraph 20. The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. They recognize the importance in this respect of international norms as laid down in international treaties on human rights, in particular the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

They also recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view to eradicating torture. They consider that an exchange of information on this problem is an essential prerequisite. The participating States should have the possibility to obtain such information."

Charter for European Security, Istanbul, 1999

"Article 21. We are committed to eradicating torture and cruel, inhumane or degrading treatment or punishment throughout the OSCE area. To this end, we will promote legislation to provide procedural and substantive safeguards and remedies to combat these practices. We will assist victims and co-operate with relevant international organizations and non-governmental organizations, as appropriate."

Other International Instruments

Universal Declaration of Human Rights (UDHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 5	"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." There is widespread acceptance that this UN General Assembly Declaration has become part of customary international law.	

Vienna Declaration and Programme of Action, 1993

Paragraph 54–61	Adopted by the World Conference on Human Rights (Vienna), 1993, this instrument reaffirms that under human rights and international humanitarian law, freedom is a right which must be protected in all circumstances. The Plan of Action also stresses the importance of further action to provide assistance for victims of torture, and reaffirms that efforts to eradicate torture should, first and foremost, be concentrated on prevention.	

Basic Principles for the Treatment of Prisoners, 1990

Entirety	These principles affirm that except for these limitations demonstrably necessitated by the fact of incarceration, all prisoners retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, as well as in the ICCPR and other human rights covenants (Principle 5). Principle 7 provides that efforts addressed to the abolition of solitary confinement, or to the restriction of its use, should be undertaken and encouraged.	

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Entirety	These principles, which elaborate on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and related rights contained in, among other instruments, the ICCPR, provide guidance on safeguards and other protective measures for all persons subject to detention or to imprisonment. Issues addressed include the separation of particular safeguards applying to different categories of detainees; the requirement that ordering of or the effective control of persons in detention be vested in a judicial or other authority; the right of habeas corpus, the maintaining of comprehensive records for all persons detained or arrested; the provision of information to arrestees and of the right of detainees to communicate with the outside world, and to have the assistance of a legal counsel; the carrying out of medical examinations and access to medical records; access to education, cultural and informational material; visits by, and contact with independent detention monitoring authorities; the right of the detainee to challenge the legality of the detention; the right to make a request or a complaint concerning treatment; the obligation on the State to undertake an inquiry into cases of death or disappearance; and the obligation to provide compensation for damage incurred by acts or omissions of a public official contrary to rights contained in the Principles.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990

Critical Substantive Points
This set of principles sets limits for the use of force and firearms by law enforcement officials.

Standard Minimum Rules for the Treatment of Prisoners, 1955, 1977

In particular Articles 31 and 32	Adopted by the first UN Crime Congress (Geneva), 1955, and approved by the UN Economic and Social Council in 1955 and 1977, these Rules set out elements of good principle and practice in the treatment of prisoners, and include provisions prohibiting corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment. Punishment not amounting to torture or ill treatment but which may be prejudicial to the prisoner's physical or mental health may never be inflicted unless a medical officer has first examined the prisoner and certified that he is fit to sustain it. The Rules also address issues such as registration, separation of categories of prisoners, accommodation, provision of food and water, medical services, the use of instruments of restraint, information to be provided to prisoners about prison rules and the right of prisoners to make requests or complaints.

Rules for the Protection of Juveniles Deprived of Their Liberty, 1990

In particular Rules 1–3, 12, 14 and 17	The Rules establish minimum standards for the protection of juveniles deprived of their liberty, consistent with human rights and fundamental freedoms (Rule 3). Deprivation of the liberty of a juvenile should be a disposition of last resort and be for the minimum necessary period (Rule 2). Where deprivation of liberty does occur, it should be under conditions and circumstances which ensure respect for the human rights of juveniles. Where juveniles are detained, activities and programmes should be ensured that serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society (Rule 12).

Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules)

In particular Rules 10(3), 17(3), 19(1) and 26(2)	The Rules provide detailed guidance on the implementation of human rights standards in the administration of juvenile justice. Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him—Rule 10(3). In line with Article 7 of the ICCPR, the UNCAT and the CRC, juveniles shall not be subject to corporal punishment—Rule 17(3). The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period—Rule 19(1). Juveniles in institutions shall receive care, protection and all necessary assistance—social, educational, vocational, psychological, medical and physical—that they may require because of their age, sex, and personality and in the interest of their wholesome development—Rule 26(2).	The Rules are accompanied by a commentary providing clarification of specific provisions.

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991

Principle 1(3)	"All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment."

Declaration on the Protection of All Persons from Enforced Disappearance, 1992

Article 1	"Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutions a violation of (…) the right not to be subjected to torture and to other cruel, inhuman or degrading treatment or punishment."

Code of Conduct for Law Enforcement Officials, 1989

This Code provides that in the performance of their duty, law enforcement officials shall maintain and uphold the human rights of all persons. Moreover, no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment.

Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982

Principle 2	"It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to, or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principles on the Investigation of Torture)

Entirety	Adopted by the UN General Assembly in 2000, the Principles are the leading international guidelines for the investigation of allegations of torture and other cruel, inhuman or degrading treatment or punishment. The Principles were originally included as an Annex I to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1999) (commonly referred to as 'the Istanbul Protocol'), which provides detailed guidance on, among other subjects, the legal investigation of torture, considerations for conducting interviews, and on physical and psychological evidence of torture. The Istanbul Protocol has now been published as UN Professional Training Series no. 8 (United Nations, New York and Geneva, 2001).

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

Entirety	This Declaration provides that victims of crime and abuse of power should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and encourages the establishment, strengthening and expansion of national funds for compensation to victims, together with the expeditious development of appropriate rights and remedies.

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, 2005

Entirety	Adopted by the UN General Assembly in 2005, the Basic Principles and Guidelines consider existing norms of international human rights and humanitarian law from a victim-oriented perspective. Victims of torture and other gross violations of international human rights law, including victims of torture, should be treated with respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. Remedies for victims shall include the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Charter of the Fundamental Rights of the European Union (2000)

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

Guidelines to EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2001)

Adopted by the General Affairs Council in April 2001, the Guidelines identify ways and means in which the EU and the member States can effectively work towards the prevention of torture and ill treatment within the framework of the Common Foreign and Security Policy (CFSP).

Declaration on the Police, 1979 (Council of Europe)

In particular paragraph 3	The Declaration sets out rules concerning professional ethics of the police which take into account human rights principles. Paragraph 3 provides that, "Summary executions, torture and other forms of inhuman or degrading treatment or punishment remain prohibited in all circumstances. A police officer is under an obligation to disobey or disregard any order or instruction involving such measures."

European Prison Rules 2006 (Council of Europe)

In particular	These rules establish minimum standards for all aspects of prison administration.
principle 60(3)	Principle 60(3) provides that, "Collective punishments and corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman or degrading punishment shall be prohibited."

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CHAPTER 5

RIGHT TO LIBERTY AND SECURITY OF THE PERSON

5.1. Definitions

Everyone has the right to liberty and security of the person. Liberty of the person, as the phrase has been interpreted by, among others, the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR), relates to freedom from any form of coerced or compelled detention, be it in prison, at a police station, a psychiatric hospital, a holding centre for illegal immigrants, or even in a person's own home.

The International Court of Justice has stated[1] that wrongful deprivation of freedom and physical constraint in conditions of hardship are incompatible with both the UN Charter and the Universal Declaration of Human Rights, the latter of which is considered to be declaratory of customary international law.

The right to liberty and security of the person may nevertheless be subject to derogation by the State in some circumstances. This is clear from the wording of the relevant provisions in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), which provide that, "no one shall be subject to arbitrary arrest or detention" and that, "no one shall be deprived of their liberty except on such grounds and in accordance with procedures established by law". States may, for example, detain or arrest a person on a reasonable suspicion that they have committed a criminal offence. Whatever the reason for detention, and whatever term may be used for it in the law or practice, the international standards require that certain fundamental rights be guaranteed to all persons deprived of their liberty. If any of these rights are not enjoyed in practice, then the detention will be unlawful, irrespective of whether it complies with the formal requirements of domestic law.

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[1] Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), ICJ Reports 1980, p. 42, para. 91.

A broad cross-section of rights intersect in the context of deprivation of liberty; among them the right not to be subject to unlawful or arbitrary detention, the right to security of the person, the right to be treated with humanity and with respect for the inherent dignity of the person, and the right to freedom from torture or other unlawful treatment. These rights are also protected under the ICCPR and the ECHR and have been incorporated into the large majority of national legal systems around the world.

The enjoyment of other rights, such as the right to health, the right to education, the right to privacy, or the right to freedom of religion, may also be placed in jeopardy when a person is detained, and the State has a positive obligation to ensure that, except for those limitations necessitated by the fact of imprisonment, all persons deprived of their liberty continue to be able to enjoy other rights contained in the ICCPR, the ECHR and other human rights covenants.

Security of the Person

In the jurisprudence of the ECtHR, security of the person is understood as being interlinked with the right to personal liberty: the phrase 'liberty and security of the person' in Article 5(1) of the ECHR is always to be read as a whole.

The United Nations HRC, on the other hand, has interpreted 'security of the person' as a distinct right, encompassing not only physical restraint but also the physical and mental integrity of the person. The Committee on several occasions has found violations of the right outside the context of formal deprivation of liberty, extending its application to threats of violence made by State, or non-State actors, and to forced disappearances where the State has denied having knowledge of the whereabouts of the person in question.

In a case[2] where a Colombian man had received death threats, been assaulted on one occasion, and had a colleague murdered, the HRC found that Article 9(1) had been violated, since the Colombian Government had either not taken, or been unable to take, appropriate measures to ensure his right to security of the person. In the Committee's view, "it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just

[2] *W. Delgado Paez v. Colombia*, HRC, 12 July 1990; UN doc. A/45/40 (vol. II), p. 47, para. 5(6).

because he or she is not arrested or otherwise detained. States Parties are under an obligation to take reasonable and appropriate measures to protect them." In another case,[3] the Committee found that the right to security of the person had been violated in a case where the claimant, a member of parliament, had been publicly accused by the then Sri Lankan President of being involved with the Liberation Tigers of Tamil Elam. The claimant had subsequently received death threats which he asked the police to investigate without any action being taken.

In the context of detention, security of the person serves to underline the requirement that the deprivation of liberty must not be arbitrary, and must be in strict compliance with the law. The ECtHR has emphasized[4] that the guarantees in Article 5 are intended to safeguard "both the protection of the physical liberty of persons as well as their personal security in a context which, in the absence of safeguards, could result in the subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection."

5.2. Legally Binding Standards

Article 9 of the ICCPR,[5] which has been ratified by all Council of Europe members and all OSCE participating States, states:

> (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

[3] *Jayawardena v. Sri Lanka* (916/2000 HRC No. 916/2000, para. 7(2) and 7(3)). A further case regarding security of the person is *Leehong v. Jamaica*, HRC No. 613/1995, 13 July 1999; UN doc. A/54/40 (vol. II), p. 60, para. 9(3), where the HRC found a violation of the right, where an unarmed man had been shot from behind by the police before being arrested.

[4] *Kurt v. Turkey*, ECtHR, 25 May 1998.

[5] The equivalent provision in the ECHR is Article 5, which is cited in full in the instruments box.

> shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> (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.

The corresponding provision in the ECHR, Article 5, includes an exhaustive list of situations where persons may be lawfully deprived of their liberty. This provision is cited in full in the list of instruments.

Articles 10 and 11 of the ICCPR are both closely related to the right to liberty and security of the person. They provide as follows:

> (10) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; and
>
> (11) No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Guarantees of, or references to the right to liberty and security of the person are also found in a number of other international conventions, including the Convention on the Rights of the Child (CRC),[6] the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),[7] the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[8] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[9]

States Parties to the CERD have undertaken to guarantee the right of everyone, without distinction, to equality before the law in the enjoyment of, among other rights, 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.[10]

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[6] 1989, Article 37(b) and (d).

[7] 1990, Articles 16 and 20.

[8] 1965, Article 5(b).

[9] 1979, Article 1, 2(d), 2(e) (with reference to General Recommendation No. 19 of the Committee for the Elimination of Discrimination against Women).

[10] Article 5(b).

The Committee on the Elimination of Elimination of Discrimination against Women has stated[11] that gender-based violence, which impairs or nullifies the enjoyment of women of human rights and fundamental freedoms, including the right to liberty and security of the person, constitutes discrimination within the meaning of Article 1 of the CEDAW. According to the Committee, States Parties to the Convention may, at international law, be responsible for private acts of gender-based violence if they fail to act with due diligence to prevent such violations of rights.[12]

The right to liberty and security of the person is also protected in the Geneva Conventions. Article 75(3) of the first additional protocol of 1977, which states fundamental guarantees of persons who are in the power of a Party to the conflict, provides as follows:

> Any person arrested, detained or interned for actions related to the armed conflict shall be informed properly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

Similar guarantees are included in the second additional protocol relating to the protection of victims of non-international armed conflicts, and in substantive and process protections included in the third and fourth Conventions of 1949.

The international conventions against terrorism contain provisions guaranteeing fair treatment to persons in respect of whom proceedings are brought, including enjoyment of applicable rights under national and international law. For example, Article 17 of the International Convention for the Financing and Suppression of Terrorism[13] provides:

> Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which the person is present and applicable provisions of international law, including international human rights law.

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[11] General Recommendation 19 on violence against women, adopted by the Committee for the Elimination of All Forms of Discrimination against Women in 1992; para. 6–9.

[12] Para. 9.

[13] 1999.

Lawful Arrest and Detention

A number of issues need to be addressed when assessing the legality of a decision to arrest, to detain or to prolong the period of detention. In European countries there is a recognized presumption in favour of bail, and any departure from this presumption requires careful consideration of the reasons put forward for detention. The ICCPR, the ECHR and other regional human rights treaties elaborate a number of specific standards in relation to detention that must be upheld by the detaining authorities.

The first matter for consideration is whether applicable domestic legal and procedural rules have been followed by the detaining authorities. If the requirements of domestic law have not been strictly adhered to, the individual's detention will be unlawful for the purposes of the ICCPR and the ECHR. Furthermore, even where detention is in compliance with all relevant domestic legal or procedural rules, it may still be an offence to the purposes of the international standards if it is arbitrary in nature.[14]

The second matter to be addressed is the purpose of the detention. Article 5(1) of the ECHR contains an exhaustive list of grounds of detention for the purposes of the Convention. Article 9 of the ICCPR does not specify grounds of detention, but like the ECHR it stipulates substantive and procedural guarantees that must be fulfilled in all cases. Furthermore, both the ECHR and the ICCPR prohibit imprisonment merely on the ground of inability to fulfil a contractual obligation,[15] that is, imprisonment for debt.

In order to comply with international standards, sentence must have been imposed by a court which functions independently and impartially, and the trial must have been conducted in accordance with international fair trial principles.

Judicial Supervision of Detention

Article 9(3) of the ICCPR and Article 5(3) of the ECHR provide that anyone arrested on a criminal charge shall be brought promptly before a judge or other officer authorized to exercise judicial power. The word

[14] *Kemmache v. France* (No.3), ECtHR, Judgment of 24 November 1994, Series A296-C, para. 36–37.

[15] Article 11, ICCPR; Article 1, Protocol No. 4 to the ECHR.

'promptly' is not defined in the two Conventions and one must first determine whether the requirements of domestic law have been met. The criminal codes of most legal systems contain provisions stipulating the maximum allowable period of custody before a person is presented to an examining magistrate for the first time.

The judge before whom the accused is brought must be independent from the executive and the parties, and is obliged to hear the views of the detainee and of the investigating authorities in person. The Court must review the circumstances militating for or against detention and determine, by reference to legal criteria, whether there are grounds justifying a continuation of detention. The criteria to be taken into consideration include the following:

1. The risk that the accused may fail to appear for trial;
2. The likelihood that the accused may interfere with the further investigation of the case;
3. Whether ongoing detention is necessary to prevent the commission of further offences;
4. Whether ongoing detention is necessary in order to preserve public order; and
5. Whether ongoing detention can be justified in the circumstances of the case, in view of the general presumption of innocence until a person has been found guilty by a court of law.

Unless there are compelling grounds justifying continuation of detention, the detainee must be released. It should not be the general rule that persons awaiting trial are held in custody, but release may be subject to guarantees to appear for trial or for any other stage of the proceedings.[16]

The lawfulness of the detention must be continuously considered by the court at regular intervals, so long as the person remains in custody, including in situations where a conviction has been overturned on appeal and a retrial ordered. Maintenance of custody pending the rehearing of the case will only be justified where a court is satisfied that relevant and sufficient grounds, based on legal criteria, exist for so doing.

[16] Article 9(3), ICCPR.

Arbitrary Detention

The concept of arbitrariness goes beyond the consideration of the formal legality of the decision to detain. Arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, justice, lack of predictability and due process of law. Remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances.[17]

The application of the principle of non-arbitrariness requires that the court examine the facts and circumstances of the individual case. In a case involving the prolonged detention without charge of a Cameroonian man,[18] the HRC held that even if the arrest and detention was in accordance with the rules of criminal procedure, it was neither reasonable nor necessary in the circumstances of the case.

Trial within a Reasonable Time or Release

A person in pre-trial custody is entitled to trial within a reasonable time or to release.[19] The period for consideration is the entire period the person is detained, from the moment of arrest to the handing down of the judgment by the Court.

The existence of a reasonable suspicion that the person arrested has committed an offence is a precondition for the validity of continued detention, but after a certain period of time has elapsed it will no longer be sufficient in itself. Consideration must be given by the court to the submissions made by the investigating or prosecuting authorities, and an assessment made as to whether the grounds put forward are relevant and sufficient to justify the continuing deprivation of liberty.

Where the reasonableness of the length of pre-trial detention falls for determination, the Court should consider whether the criminal procedure agencies have displayed special diligence in the conduct of the proceedings, whether the subject matter for consideration is particularly complex in nature, thus justifying a longer period of pre-trial custody, and/or whether the actions of the accused or his or her legal representative may have contributed to delays in the proceedings.

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[17] *Albert Womah Mukong v. Cameroon*, Human Rights Committee, No. 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991; see also *Hugo van Alphen v. The Netherlands*, HRC No. 305/1988, para. 5(8).

[18] *Albert Womah Mukong v. Cameroon*, HRC, No. 458/1991, para. 9(8).

[19] Article 9(3), ICCPR; Article 5(3), ECHR.

Challenging the Lawfulness of Detention

Arguably the most important of the international guarantees is the right to **habeas corpus**, the right to seek judicial review of the lawfulness of the detention. Article 9 of the ICCPR provides that anyone deprived of his liberty shall be entitled to take proceedings before a court, which shall decide without delay[20] on the lawfulness of the detention and order the person's release if the detention is not lawful. The right applies to all forms of detention. It is to be considered independently of any application for release on bail, the purpose being solely to assess the lawfulness of the detention itself. Where the right to habeas corpus is not effectively available, the State Party in question will be in breach of its obligations under the ICCPR and/or the ECHR.

Any adopted procedure for the determination of habeas corpus applications must be in accordance with domestic law, consistent with the ECHR and other international obligations[21] and must comply with international fair trial standards. (cf. chapter 6).

The Human Rights Committee has stated that the court must have the power to order the release of the detained person if it determines that the detention is incompatible with domestic law, with the requirements of Article 9, or with any other provisions of the ICCPR. The court's power to review the lawfulness of detention must be real and not merely formal. In a case concerning a Cambodian man held in immigration detention in Australia, the Committee found that Article 9(4) had been violated, since the court's powers in the case were limited to a formal assessment of 'the self-evident fact' that he was a 'designated person' within the meaning of the law under which he was being detained.[22]

Whether or not an application has been decided 'without delay' or 'speedily' must be assessed on a case by case basis.[23] Any delay which occurs in determining the application must not be unreasonable in nature. Heavy judicial work loads or temporary administrative prob-

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[20] Article 9(4), ICCPR; Article 5(4) of the ECHR uses the formulation 'speedily'.

[21] *Van Droogenbroeck v. Belgium*, ECtHR, Judgment of 24 June 1982, Series A50, para 48.

[22] *A. v. Australia*, HRC, Communication No. 560/1993, 3 April 1997, in UN Doc. A/52/40 (vol. II), p. 143, para 9(5).

[23] *M.I. Torres v. Finland*, HRC, 2 April 1990, UN doc. A/45/40 (vol. II), p. 100, para. 7(3).

lems in the court are not considered to be acceptable excuses for a delay.[24]

Incommunicado Detention

International standards do not expressly prohibit incommunicado detention, detention in circumstances where the person affected has no contact with the outside world. However, international standards provide, and expert bodies have maintained, that restrictions and delays in granting detainees access to a doctor and lawyer and to having someone notified about their detention are permitted only in very exceptional circumstances for very short periods of time. It is difficult to envisage how the right to habeas corpus can be meaningfully exercised when a person is being held incommunicado. The Human Rights Committee has furthermore stated that provision should also be made against incommunicado detention as a safeguard against torture and ill treatment.[25]

Access to and Assistance of a Lawyer

Given that the right to challenge the legality of detention will involve presentation of legal issues, it is a natural corollary of this right that the detainee should be able to have the benefit of legal assistance in presenting the claim. Such assistance must be provided and paid for by the State in the event that the claimants cannot afford to engage a lawyer themselves.

The right to legal assistance encompasses both preparation of the claim and representation in the proceedings. The lawyer or his or her representative must be aware of submissions made by the authorities to justify detention, have access to relevant documents, and be given adequate opportunity to respond to them in adversarial proceedings.[26] Equality of arms between the parties, the prosecutor and the detained person must be ensured.[27]

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[24] *Bezicheri v. Italy*, EctHR, 25 October 1989, Series A, No. 164, p. 10, para. 20; *E v. Norway*, EctHR 29 August 1990, Series A, No. 181, p. 28, para. 66.

[25] Human Rights Committee General Comment 20, para.11.

[26] *Ilijkov v. Bulgaria*, ECtHR, 26 July 2001.

[27] *Niedbala v. Poland*, ECtHR, 4 July 2000.

Compensation for Unlawful Deprivation of Liberty

Anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation.[28] The right to compensation will arise where national law, any of the provisions of Article 9 of the ICCPR and/or, depending on the context, Article 5 of the ECHR have been contravened.

Awards of compensation must be made by a legally binding decision of a court. It will not suffice that a remedy has been awarded by a Government agency or by an independent institution, such as a Human Rights Commission or Office of the Ombudsman.

Article 5(5) of the ECHR does not prohibit contracting States from making the award of compensation dependent on the ability of the claimant to show damage has been suffered. The fact that a violation of Article 5 has occurred is not sufficient in itself; the victims must also show that they have suffered financial or non-financial loss.[29]

Safeguards for Special Categories of Detainees

Every person deprived of his/her liberty has the right to equal treatment without discrimination on the grounds of race, colour, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular allowances should, however, be made for the rights and needs of special categories of detainees, such as women, juveniles, elderly people, foreigners, ethnic minorities, people with different sexual orientation, people who are sick, people with mental health problems or learning disabilities, and other groups or individuals who may be particularly vulnerable during detention. Some groups may be targeted for discriminatory abuse by the staff of the institution where they are detained. They may also be vulnerable to abuse from other detainees.

Detainees should be categorized on the basis of the reason for their detention. In this respect, it is appropriate that persons held on remand be segregated from those serving sentences following conviction. Furthermore, it is desirable that detainees at different stages of their sentence be segregated, so as to facilitate their eventual return to the community.

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[28] Article 9(5), ICCPR; Article 5(5), ECHR.

[29] *Wassink v. the Netherlands*, EctHR, 27 September 1990, Series A, No. 185-A, p. 14, para. 38.

5.3. Permissible Limitations

The right to liberty and security of the person is not absolute. This is apparent from the words of Article 9(1) of the ICCPR, which allows for the possibility of denial of the right to liberty "on such grounds and in accordance with such processes established by law." Article 9 is not included among those provisions of the ICCPR[30] from which no derogation may be made. Nevertheless, the HRC has said that States Parties may under no circumstances take measures derogating from their obligations under the ICCPR that are inconsistent with humanitarian law or pre-emptory norms of international law.

Important procedural guarantees, such as the right to habeas corpus—Article 9(4), must never be restricted in ways that circumvent the protection of non-derogable rights.[31] While the habeas corpus procedure is designed mainly to protect the derogable right to liberty, it is also an essential safeguard for the protection of a detainee's non-derogable rights to life and to freedom from torture. For this reason, the HRC has emphasized that the right to habeas corpus must not be diminished by the State Party's decision to derogate from one or more provisions of the Covenant.[32]

The obligation of States Parties to provide an effective remedy for any violation of the Convention is also considered by the Human Rights Committee to be non-derogable in nature. In the Committee's view, the right to an effective remedy constitutes a treaty obligation inherent in the Convention as a whole. As such, it must always be ensured by States Parties.[33] Similarly, the prohibition against unacknowledged detention (derived from, among other sources, Article 9(1)), and the right of detainees to be treated with humanity and with respect for the inherent dignity of the person (Article 10), have been said by the Human Rights Committee to "express norm(s) of international law not subject to derogation".[34]

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[30] Article 4(2), ICCPR.

[31] Human Rights Committee General Comment No. 29, para. 15.

[32] Human Rights Committee General Comment No. 29, para. 16. See also the decision of the ECtHR in *Aksoy v. Turkey*, ECtHR, 1996, App. No. 21987/93.

[33] Human Rights Committee General Comment No. 29, para. 14.

[34] Human Rights Committee General Comment No.29, para. 13(a).

5.4. Current Interpretation (Key Case Law)

Lawfulness of Detention

The European Court of Human Rights has stated that every person arrested should "be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness."[35] As to the sufficiency of information given to the accused at the time of arrest, the ECtHR has established that the information given need not be a full outline of the prosecution case, but must be more than a mere naming of the provision or provisions relied upon. If the arrest relates to a specific offence, the accused must be furnished with details of the offence, including its statutory definition and be asked whether or not he or she admits it.[36]

The ECtHR has held that continued pre-trial detention can only be justified "if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweigh the rule of respect for individual liberty."[37]

The ECtHR has held that the review of the lawfulness of the detention must examine, whether the detention is in compliance with both substantive and procedural rules of national legislation,[38] and furthermore that it is not arbitrary or unlawful for the purposes of the international standards.[39]

The requirement that lawfulness of detention be decided "by a court" implies that procedural guarantees established in the ECtHR's jurisprudence on Articles 5 and 6 of the Convention, such as the independence, impartiality and power of the court to make a legally binding decision apply equally to applications challenging the legality of the detention. Likewise, the principle of equality of arms and the requirement that the proceedings be adversarial in nature must be observed.[40] The detained person must be given an opportunity to challenge the

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[35] Fox, Campbell and Hartley, ECtHR, Case no. 18/1989/178/234–236, Judgment of 30 August 1990, para. 40.

[36] Fox, Campbell and Hartley para. 40–41.

[37] *Van der Tang v. Spain*, (26/1994/473/554), 13 July 1993, para. 55.

[38] *Navarra v. France*, ECtHR, Judgment of 23 November 1993, para. 26.

[39] Ibid.

[40] *Toth v. Austria*, ECtHR Judgment of 12 December 1991, para. 84.

submissions of the prosecution[41] and be given an adequate opportunity to prepare an application for release.[42]

The ECtHR has stated that a procedure that "did not entitle either the applicant himself or his lawyer to attend the court session" was not consonant with the principle of equality of arms and, as such, not 'truly adversarial', as required for the determination of habeas corpus proceedings.[43] Furthermore, domestic legal provisions, that did not require that the prosecutor's submissions in support of ongoing detention be communicated to either the accused or his lawyer, have been determined by the ECtHR to be incompatible with the right.[44]

In like manner, any provisions in domestic law providing for compulsory pre-trial detention for categories of offences where the proposed sentence exceeds a certain period are incompatible with the judicial supervision requirement in Article 5(3) of the ECHR.[45]

There is no fixed period beyond which the requirement of 'trial within a reasonable time' will have been contravened. Instead, one must consider the specific facts of the case at hand and apply the following criteria established in the jurisprudence of the ECtHR:

- A consideration of the reasons put forward by the domestic authorities:
- A consideration of the complexity of the case. The more complex a case, the longer the time required to adequately prepare and hold a trial. In this regard, it may also be appropriate to consider the conduct of the accused. Whilst he or she is under no obligation to assist the prosecuting authorities in expediting the case and is perfectly entitled to take legitimate points by way of appeal, any unnecessary prolongation of the proceedings must be taken into account by the Court.
- A consideration of whether the domestic authorities have exercised "special diligence" in expediting the case of an individual held in detention. In this respect it is important to note that the

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[41] *Lamy v. Belgium*, ECtHR Judgment of 30 March 1989, para. 29.

[42] *Farmakopoulos v. Belgium*, EComHR, application no. 11683/85, decision of 4 December 1990.

[43] *Niedbala v. Poland*, ECtHR, Judgment of 4 July 2000, para. 66–67.

[44] Ibid.

[45] *De Jong, Baljet & Van Den Brink v. Netherlands*, ECtHR, Judgment of 14 May 1984, Series A77.

organizing and administrative running of a judicial system is the responsibility of the State and delays caused as a result will be directly attributable to it.

5.5. Safeguards in Detention

The European Committee for the Prevention of Torture (CPT) has developed three fundamental safeguards[46] for the protection of persons deprived of their liberty, which should apply from the very outset of custody:

- The right of detainees to have the fact of their detention notified to a close relative or third party of their choice;
- The right of access to a lawyer; and
- The right to a medical examination by a doctor of their choice (in addition to any medical examination carried out by a doctor called by the police authorities).

Information about these rights should be conveyed, and the rights should take effect, as soon as possible after a person has been detained.

The Human Rights Committee has stated that in order "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."[47] The ECtHR has held that the unacknowledged detention of an individual is a 'complete negation' of the guarantees contained in the ECHR against arbitrary deprivations of the right to liberty and security of the person.[48]

The HRC has stated that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide

[46] CPT 2nd General Report, [CPT/Inf(92)3], para. 36 and 37.

[47] Human Rights Committee—General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1. at 30 (1994), para. 11.

[48] *Çakici v. Turkey*, ECtHR, Judgment of 8 July 1999, para. 104.

all detainees and prisoners with services that will satisfy their essential needs.[49]

The CPT has recommended that, "a single, complete record of custody be maintained for each detainee for the duration of his or her detention, which should record all aspects of custody and action taken regarding them (when the person was deprived of their liberty and for what reason; when they were informed of their rights; any signs of injuries, mental illness, etc; when the person's next of kin, lawyer, and, where appropriate, consulate were informed and when the detainee received visits from them; when the detainee was offered food, underwent periods of interrogation, was transferred or released). The detainee's lawyer should be entitled to obtain access to the custody record on request."[50]

National authorities are under a positive obligation, where an allegation of ill treatment or abuse has been raised, to conduct a proper investigation and to provide appropriate medical treatment. The failure to do so may amount to a violation both of the prohibition against torture and other ill treatment and of the duty of care to protect the health of persons deprived of their liberty.[51]

The deprivation of liberty by the State always entails a duty of care which calls for the provision of effective health care. An inadequate level of health care can rapidly lead to situations which could amount to inhuman and degrading treatment.[52]

Deprivation of Liberty of Mentally Ill Persons

The ECtHR has[53] identified five criteria to be fulfilled in cases of detainment of persons of unsound mind—Article 5(1)(e)—in order to satisfy the non-arbitrariness requirement:

1. The mental disorder must be established by objective medical expertise;
2. The nature or degree of the disorder must be sufficiently extreme to justify the detention;

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[49] *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; *Párkányi v. Hungary* (410/1990), 27 July 1992, Report of the Human Rights Committee, (A/47/40), 1992.

[50] CPT/Inf/E (2002) 1, p. 7, para. 40.

[51] *Hurtado v. Switzerland*, Comm. Report 8 July 1993.

[52] CPT visit to Georgia, 2001: Para. 91 (CPT reports).

[53] *Winterwhip v. the Netherlands*, ECtHR, 24 October 1979.

3. Detention should only last as long as the medical disorder and its required severity persist;
4. Periodic reviews should be undertaken by an authority which has the power to discharge the person; and
5. Detention must take place in a hospital or other institution authorized to detain such persons.

The detained person is also entitled to take proceedings at reasonable intervals to challenge the lawfulness of the detention. Such proceedings should allow the court to examine whether the patient's disorder persists and whether it is severe enough to justify continued detention.[54]

Enjoyment of Civil and Political Rights during Detention or Imprisonment

With the exception of those limitations demonstrably necessitated by the fact of detention or incarceration, all detainees and prisoners retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, the ICCPR and other human rights covenants.[55]

Article 10 of the ICCPR guarantees to all persons deprived of their liberty the right to humane treatment and to respect for the inherent dignity of the human person. The article also stipulates certain minimum conditions of pre-trial detention and imprisonment. The HRC has described Article 10(1) as a fundamental and universally applicable rule, imposing a positive obligation on States Parties towards detainees. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State Party.[56]

By its very nature, imprisonment has a profound impact on the prisoner's private and family life. The right to respect for privacy and family life[57] is addressed in numerous provisions in, among others, the UN Standard Minimum Rules on the Treatment of Prisoners and the European Prison Rules, which provide guidelines on, among others, visits from family members, the sending and receipt of correspondence and the use of the telephone. Where prison rules or practices restrict the contact of a person with the outside world, to an extent which is not

[54] *X. v. the United Kingdom*, ECtHR, 5 November 1981, Series A, No. 46, para. 52, p. 23.
[55] UN Basic Principles for the Treatment of Prisoners, 1990, Principle 5.
[56] Human Rights Committee—General Comment No. 21, Article 10, para. 3 and 4.
[57] Article 8, ECHR; Article 17, ICCPR.

necessarily in the interests of public safety, for the prevention of crime or any other reason provided for under Article 8(2) of the ECHR, they may be deemed to be incompatible with the Convention. It is not only an element of the right to privacy and family life but an important element in the rehabilitation of prisoners, that they should be allowed regular contact with family members and friends during incarceration, so as to facilitate successful reintegration into society on release from prison.

A further requirement, guaranteed under Article 18 of the ICCPR and Article 9 of the ECHR, is the right to freedom of religion. Prisoners and persons in other forms of detention retain the right to actively practice their religion, so long as the forms that such practice take do not constitute a criminal offence and are not obstructing the maintenance of security in the prison. Any restriction on the right to freely manifest one's religion must be shown to be strictly necessary in the circumstances of the case.

5.6. Relevant National Implementation Mechanisms

Almost all legal systems contain provisions incorporating the principles contained in Article 9 of the ICCPR and Article 5 of the ECHR. Where violations of the right to liberty and security of the person occur, or where the power to detain is exercised in an unlawful or arbitrary manner, it may be because the law is not being implemented in practice, or that it is not being adequately enforced by public officials.

In both Article 9 of the ICCPR and Article 5 of the ECHR, judicial mechanisms are the means by which the substantive and procedural rights contained in the two provisions are to be facilitated and safeguarded. Persons deprived of their liberty must be brought promptly before a judge or other officer authorized by law to exercise judicial power. Challenges to the lawfulness of detention are to be decided by a court. Awards of compensation for unlawful deprivation of liberty must be made by a legally binding decision of a court. If a determination on any of these matters is made by a non-judicial body, such as an Office of the Ombudsman or an agency within the executive branch of government, a breach of the ICCPR and/or the ECHR will have occurred.

Nevertheless, other domestic mechanisms at national level, in particular Ombudsman's Offices and Human Rights Commissions, may

have mandates which extend to the consideration of complaints, the conducting of inquiries or investigations, or the undertaking of reviews into domestic law and practice related to the right to liberty and security of the person.

5.7. OSCE Commitments

The commitment of OSCE participating States to ensure the right to liberty and security of the person dates back to the Vienna Meeting (1989). It was reaffirmed and further elaborated upon at the Copenhagen (1990) and Moscow Meetings (1991).

Participating States have made commitments to ensure that no one is subjected to arbitrary arrest, detention or exile, and that all individuals in detention or incarceration are treated with humanity and with respect for the inherent dignity of the human person.[58]

Participating States have also affirmed the right of any person arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized by law, so that the lawfulness of the arrest or detention can be decided.[59]

At the Moscow Meeting, participating States reaffirmed and further elaborated on their commitment to the right to personal liberty and security of the person and to fundamental procedural and substantive guarantees related to the deprivation of liberty, as provided for in the ICCPR and at international law.[60]

Participating States have also agreed to "endeavour to take measures, as necessary, to improve the conditions of individuals in detention or imprisonment", and to "pay particular attention to the question of alternatives to imprisonment".[61]

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[58] Concluding Document of Vienna—the Third Follow-Up Meeting, 1989, para. 23(1) and 23(2).

[59] Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, 1990; para. 5(15).

[60] Document of the Moscow Meeting of the Conference of the Human Dimension of the CSCE, 1981; para. 23(1).

[61] Document of the Moscow Meeting; para. 23(2).

5.8. Other International Instruments

The United Nations Standard Minimum Rules on the Treatment of Prisoners[62] state that restraints, such as handcuffs, chains, irons and strait-jackets, should only be used on detained or imprisoned people for genuine security reasons, and not as punishment.[63] Restraints must not be applied for any longer than strictly necessary and must be in accordance with guidelines on their use established by the central prison administration.[64]

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[65] state that everyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, their family or friends.[66] The information provided must include the fact of the arrest or detention and the place where the person is being kept in custody. If the person is transferred to another place of custody, his or her family or friends must be informed again. Communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for longer than a few days.[67] Foreign nationals are entitled to have their consulate or other diplomatic representative notified of the fact of detention.[68] Refugees or persons under the protection of an intergovernmental organization have the right to communicate with and receive visits from representatives of the competent international organization.[69]

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[62] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV), 1957, and 2076 (LXII), 1977.

[63] Rule 33.

[64] Rule 34.

[65] Adopted by General Assembly Resolution 43/173 of 9 December 1988.

[66] Principle 16.

[67] Principle 15, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[68] Principle 16(2), UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. See also LaGrand, (*Germany v. United States*) International Court of Justice Judgment 27 June 2000, http://www.icj-cij.org.

[69] Principle 16(2), UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

Professional Codes of Conduct

A number of professional codes of conduct developed by the United Nations and the Council of Europe address respect for and implementation of the right to liberty and security of the person.

The Declaration on the Police, adopted by the Parliamentary Assembly of the Council of Europe,[70] states that police officers "shall not co-operate in the tracing, arresting, guarding or conveying of persons who, while not being suspected of having committed an illegal act, are searched for, detained or prosecuted because of their race, religion or political belief."[71] Furthermore, as regards the right to security of the person, a police officer shall carry out his duties to "protect his fellow citizens and the community against violent, predatory and other harmful acts, as defined by law".[72]

The UN Basic Principles on the Role of Lawyers provide that Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence, and all persons arrested or detained have prompt access to a lawyer, in any cases no later than 48 hours from the time of arrest or detention. All arrestees, detainees or prisoners shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship, and in full confidentiality. In the practice of their profession, lawyers should ensure that human rights and fundamental freedoms recognized by national and international law are upheld.[73]

The UN Basic Principles on the Independence of the Judiciary state that: "the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected".[74]

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[70] Resolution 690(1979), adopted on 8 May 1979.

[71] Ibid; para. 8.

[72] Loc. cit.; para. 8.

[73] Articles 5–8, 14; UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

[74] Article 6, 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, Milan, 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provide that "effective protection, through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats."[75]

The Bangalore Principles on the Domestic Implementation of Human Rights Norms, adopted by participants at a judicial colloquium on the domestic implementation of international human rights norms in 1998, contain very precise statements on the role and responsibility of judges in ensuring respect for substantive and procedural rights in the administration of justice, including the right to freedom from unlawful or arbitrary arrest:

> Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realized in the daily life of the people (…) Judicial review and effective access to the courts are indispensable not only in normal times but also during periods of public emergency. It is at such times that basic human rights are most at risk and when courts must be especially vigilant in their protection.[76]

Instruments Adopted by the European Union

The Charter of Fundamental Rights of the European Union, proclaimed in December 2000, guarantees the right of everyone to liberty and security of the person.[77] It also contains provisions obliging member States to respect and protect the human dignity, as well as the physical and mental integrity of the person.[78]

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[75] Principle 4, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by the Economic and Social Council resolution 1989/65 of 24 May 1989.

[76] Principles 4 and 9, Bangalore Principles on the Domestic Implementation of International Human Rights Norms, December 1998.

[77] Article 4.

[78] Articles 1 and 3.

5.9. Monitoring the Right: the Special Challenges

Persons deprived of their liberty are to a large extent dependent on the detaining authorities for protection, wellbeing, and means of sustenance. They have only limited possibilities to make decisions concerning their personal welfare. Events which take place in places of detention are almost entirely shielded from public view. Detainees are by definition vulnerable and at risk of mistreatment or even torture.

As discussed above, lawyers and judges have particularly important roles to play in monitoring, drawing attention to and remedying instances of unlawful or arbitrary detention.

Another effective means for monitoring the exercise of the power to detain is through the undertaking of regular, independent visits to prisons and other places of detention.

Ideally, monitoring should take place at various levels and by a variety of different agencies and organizations, including non-governmental organizations. Prison authorities should carry out their own internal inspections and reviews.

In many countries judges or prosecutors have a legislative mandate to monitor the functioning of prisons, police holding cells and other places of detention. In some countries, official monitoring bodies have also been established, or existing institutions with functional and operational independence from the States, such as an Office of the Ombudsman or Human Rights Commission, have been invested with such powers.

Whatever the nature of the monitoring body, it is important that its members have the necessary skills and experience in order to carry out their functions effectively. Prisons are challenging working environments, and communicating with detainees, detaining authorities and personnel requires sensitivity and tact.

Members of inspection teams should have the opportunity to speak privately with detainees and with any one else who can provide them with relevant information. They should be able to make recommendations to the authorities where appropriate for improvements in the treatment of detainees and in conditions of detention.

Monitoring teams should always demonstrate respect for persons deprived of their liberty, for the authorities and staff, and for the internal rules governing the operation of the institution. They should also respect the confidentiality of the information supplied to them in

private interviews, and not take any action or measure which could endanger an individual or a group.[79]

[79] A full list of 18 basic principles of monitoring is provided in Chapter V of the United Nations Training Manual on Human Rights Monitoring, Professional Training Series No. 7, Office of the High Commissioner for Human Rights, United Nations, p. 87–93.

5.10. Monitoring Checklist on the Right to Liberty and Security of the Person[80]

Checklist – The Right to Liberty and Security of the Person

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the state ratified, and what reservations were made upon ratification?
   - Has the state declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to liberty and security of the person?
   - Are any such restrictions or limitations legally established?
   - Which domestic laws and regulations address the right to liberty and security of the person, and are they in accordance with the relevant international standards?
   - On On what legal basis can persons be detained on remand? What alternatives to pre-trial custody exist, and how is eligibility for release pending trial determined in individual cases?
   - Does the law allow for 'preventive detention'; that is, the deprivation of liberty in cases where the person is assessed as being a risk to the community, but where there is no evidence to link the person with a crime or planned crime?
   - In what ways can persons be deprived of their liberty outside the context of the criminal justice system? Is there a concept of administrative detention, and if so, what is the applicable legal and regulatory framework?
   - For how long can persons be deprived of their liberty before they must be brought before a judge?
   - Is there a right to challenge the legality of detention in court established at law? Does the court have the power to order the release of the person if it determines that detention is unlawful?
   - Are there any other relevant legal provisions that protect persons from arbitrary or unlawful arrest or detention?
   - Is there an institution or organisation officially mandated to undertake visits to places where persons deprived of their liberty are kept? If so, what is the composition of this body, and what is the legal framework governing its activities? Does it operate independently of the executive branch of government, and how are its reports or recommendations dealt with by the authorities?
   - Is Is there a legally enforceable right to compensation for violations of the right to liberty and security of the person?

[80] The items to be monitored under this checklist should be taken in conjunction with those under the fair trial checklist and the checklist for the right to freedom from torture and cruel, inhuman and degrading treatment or punishment.

2. Monitoring the Right in Practice
   - Is it possible for independent institutions, including suitably qualified and experienced representatives from civil society organisations, to visit pre-trial custody centres, prisons and other places of detention?
   - Are there credible reports indicating that unjustified restrictions on the right to liberty and security of the person are taking place in the jurisdiction in question? If so, what has been the official reaction from the political leadership to such reports?
   - Are their reports indicating that conditions in places of detention fall short of the minimum standards described in Article 10 of the ICCPR and other instruments? If so, what has been the official reaction from the relevant authorities?
   - Does the state ensure that law enforcement personnel and others responsible for the care of persons in custodial settings receive training on the rights of persons deprived of their liberty, and in particular on the procedural safeguards set out in Article 9 of the ICCPR and in relevant domestic law and regulations?

   a. Monitoring in Relation to Arbitrary Arrest
      - Was the arrest legal according to national law? In this respect, the following two questions may be useful. (While these are not international standards as such, they are common requirements of national law in relation to the legality of arrests, and thus may be useful as indicators concerning arbitrariness.)
      - Was there a warrant or judicial order for the arrest? (Often a requirement of national law.)
      - If not, was the person (a) observed while apparently committing a crime, attempting to commit or (b) fleeing a crime scene or (c) a fugitive from justice?
      - Was the person arrested or detained for validly exercising his or her human rights under the UDHR, the ICCPR, the ECHR or other relevant instruments?
      - Was the person informed at the time of the arrest of the reasons for the arrest?
      - Was the person informed without undue delay of any charges against him or her?
      - Was force used to carry out the arrest? If so, was the force used more than was necessary to achieve a legitimate objective (typically to restrain or subdue the suspect)? Was there an attempt to minimize damage or injury? Were assistance and medical care made available to the suspect/arrestee at the earliest possible moment?
      - Was the suspect/arrestee informed of the consequences of speaking or remaining silent at the time of arrest? (Such warnings—like the so-called *Miranda* warning in the USA—are not in themselves a requirement under international law, but some form of them is required by national legislation in many countries. They are also of importance in relation to the right against self-incrimination.)

b. Bringing before a Judge
   – Was the person arrested brought promptly before a judge? (The question of what is "prompt" varies. Find out what period the national law prescribes.) Was there any undue delay in bringing the person before a judge?
   – If the detainee was brought before someone other than a judge, did this person have legal authority to exercise the power to review the legality of detention and to order release?
   – Was the judge or person exercising this power independent of the investigation?
   – Was there a review of all circumstances concerning detention or release?
   – Is such a review repeated periodically? How often? (There is no precise international standard, but more than thirty days at a time may mean a risk that international standards are not being met.)
   – Does the detainee have the possibility to apply to a court for a decision on the legality of the detention?
c. Monitoring Justification of Continued Detention
   – What grounds have been invoked to justify the detention? Is it one or more of the following:
   – A danger that the detainee would otherwise jeopardize the investigation by interfering with witnesses or with other evidence;
   – A danger that the detainee would otherwise flee.
   – Have the investigating and/or prosecuting authority showed diligence in pursuing the investigation? (I.e. what progress can they show since the last prolongation of detention?)
   – Is the continued detention justified by the complexity of the case?
   – Is the detention unjustified in the light of the cooperative attitude of the detainee?
   – Are there other factors tending to show that detention is or is not necessary for the purposes of the investigation?
   – Is bail or another form of conditional release usually granted in similar cases?
   – Is the amount of the bail or the guarantees demanded in proportion to what is usually demanded in similar cases?
   – Are the fundamental principles regarding deprivation of liberty: timely judicial supervision of the power to detain, trial within a reasonable time or release, being observed in practice? If not, what is the probable cause or causes, and what measures should be taken to address the situation? Does the problem lie with one or more agencies within the criminal justice sector? Is it due, in part, to a lack of personnel or resources, and if so, what should be done to ensure that adequate resources are provided to ensure that the authorities comply with the international and domestic standards?
d. Conditions of Detention
   – Does the detainee have access to a lawyer? Does the detainee have the possibility to confer with his or her lawyer in confidence?

– Are conditions in pre-trial detention centres, prisons and other places of detention in accordance with the minimum standards set out in the UN Standard Minimum Rules and other relevant instruments? Are steps being taken to ensure vulnerable groups, or those with special needs; women, children, the mentally ill, HIV-positive detainees and others, are housed in such a way and receive treatment appropriate to their status?

5.11. Instruments on the Right to Liberty and Security of Person

Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Articles 9, 10, 11, 12, 17 and 18	Article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Article 10. "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."	Human Rights Committee -General Comments no. 8 on Liberty and Security of the Person; no. 29 on States of Emergency.

	Article 11. "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."
	This is the leading international instrument. The right to liberty is not an absolute right, but any deprivation of liberty must be carried out in accordance with the law and, furthermore, must not be arbitrary in nature.
	Several other articles of the ICCPR are closely related to the right to liberty and security of the person, in particular Articles 12 (the right to liberty of movement), 17 (the prohibition against arbitrary or unlawful interference with privacy, family, home or correspondence), and 18 (the right to freedom of thought, conscience and religion).

Convention on the Rights of the Child, 1989 (CRC)

Article 37(b) and 37(d)	Article 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
	(…)
	(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."

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (CMW)

Articles 16, 20, 36 and 39	Article 16 is the principal provision in the Convention addressing the right of migrant workers to liberty and security of the person:
	(1) Migrant workers and members of their families shall have the right to liberty and security of the 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.

(3) Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.

(4) Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

(8) Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

(9) Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

Article 20(1) provides that, "No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation."

Migrant workers and members of their families, who are documented or in a regular situation in the State of employment, are guaranteed a number of additional rights under the Convention, including the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there (Articles 36, 39(1)).

Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD)

Article 5(b)	States Parties to the Convention undertake to guarantee the right of everyone, without distinction, to equality before the law in the enjoyment of, among others, the right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.	

Convention on the Elimination of All Forms of Discrimination against Women, 1965 (CEDAW)

Article 1, 2(d) and 2(e)	Article 1 defines the term **discrimination against women** for the purposes of the Convention. The Committee on the Elimination of Discrimination against Women, in its General Recommendation no. 19, identifies gender-based violence which impairs or nullifies the enjoyment of fundamental rights and human freedoms, among others the right to liberty and security of the person, as discrimination within the meaning of Article 1 of the Convention. Article 2(d) of the Convention provides that States Parties shall refrain from engaging in any act or practice of discrimination against women and ensure that public authorities and institutions act in conformity with this obligation. Article 2(e) obliges States to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.	General Recommendation 19 on violence against women includes comments on, among other things, the right to reproductive security (see in particular paragraphs 20,22, 24(m)).

International Convention for the Financing and Suppression of Terrorism, 1999

Article 17	"Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which the person is present and applicable provisions of international law, including international human rights law."	See also comparable provisions in other antiterrorism conventions; for example, the International Convention for the Suppression of Terrorist Bombings, 1997, Article 14.

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11; 1950 / 1998 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 5	Article 5: Right to liberty and security (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 unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. (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.	Case law as developed through the European Court of Human Rights.

(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 authorized 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.

Protocol no. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Securing Certain Rights and Freedoms other than those already included in the Convention and in the first Protocol thereto, 1963

Article 1	Prohibition of imprisonment for debt. No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.	Case law as developed through the European Court of Human Rights.

International Humanitarian Law

Geneva Conventions III relative to the Treatment of Prisoners of War, and IV, relative to the Protection of Civilians in Time of War, 1949

Section	Critical Substantive Points
Common Article 3; in particular Articles 13, 14, 17–25, 82–84, 118, GC III; Articles 35, 37, 42, 43, 46, 49, 68, 71, 76, 78–135–141, GC IV	Common Article 3 to the Geneva Conventions, which applies to armed conflicts not of an international character, obliges the Parties to the conflict to treat persons taking no active part in the hostilities humanely in all circumstances, without adverse distinction of any kind. Acts of violence to life and person, or outrages upon personal dignity, are and shall remain prohibited at all times. Geneva Conventions III and IV on the Treatment of Prisoners of War and the Protection of Civilians in Time of War, respectively, contain further substantive and process protections related to the right to liberty and security of the person. The absolute character of the guarantees in the Geneva Conventions and of those contained in the first additional protocol (see below) is apparent from Common Article 1, by which the High Contracting Parties undertake to "respect and ensure respect for this Convention in all circumstances".

Additional Protocol Number 1 relating to the Protection of Victims of International Armed Conflicts, 1977

Article 75(3)	Article 75(3) states: "Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why such measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

Additional Protocol 2, relating to the Protection of Victims of Non-International Armed Conflicts, 1977

Articles 4–6	Articles 4–6 elaborate fundamental guarantees applicable to all persons who do not take a direct part or who ceased to take part in hostilities, minimum standards with respect to the treatment of persons deprived of their liberty, and standards with respect to the prosecution and punishment of persons suspected of having committed criminal offences related to the armed conflict.

CSCE/OSCE Instruments

OSCE Commitments

Concluding Document of Vienna—the Third Follow-up Meeting, 1989

Section	Critical Substantive Points
Paragraph 23	The participating States will: 23(1)—ensure that no one will be subjected to arbitrary arrest, detention or exile; 23(2)—ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person; 23(3)—observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials."

Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, 1990

Paragraph 5	"5(15)—Any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function."

Document of the Moscow meeting of the Conference of the Human Dimension of the CSCE, 1981

Paragraph 23	"23—The participating States will treat all persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person and will respect the internationally recognized standards that relate to the administration of justice and the human rights of detainees. 23(1) The participating States will ensure that (i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law; (ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him; (iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law; (iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful; (…) (vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards; (vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;…

(ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, 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 power;

(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

(xi) anyone, who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

(23.2) The participating States will:

(i) endeavour to take measures, as necessary, to improve the conditions of individuals in detention or imprisonment;

(ii) pay particular attention to the question of alternatives to imprisonment."

Other International Instruments

Universal Declaration of Human Rights, 1948 (UDHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Articles 3 and 9	Article 3: "Everyone has the right to life, liberty and security of the person." Article 9: "No one shall be subject to arbitrary arrest, detention or exile." There is widespread acceptance that this UN General Assembly Declaration has become a part of customary international law and that as such, all States are bound by the obligations contained in it.	

Basic Principles for the Treatment of Prisoners, 1990

In particular principles 5 and 11	Principle 5 affirms that except for these limitations demonstrably necessitated by the fact of incarceration, all prisoners retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, as well as in the ICCPR and other human rights covenants. Principle 11(1) provides that a detained person "shall have the right to defend himself or to be assisted by counsel as prescribed by law."

Standard Minimum Rules on the Treatment of Prisoners, 1955, 1977

Rules 57–60, 82, 84, 85, 92	The Standard Minimum Rules contain specific, detailed provisions elaborating on the guarantees in the UDHR, the ICCPR, the UNCAT and other international instruments, as they apply to different categories of detainees: convicted prisoners, insane and mentally abnormal prisoners, and persons under arrest or awaiting trial.

Body of Principles for the Protection of All Persons under Any Form of Detention, 1988

In particular principles 1, 2, 4, 11, 12, 13, 35 and 37	These Principles, which elaborate on guarantees contained in, among other instruments, the ICCPR, provide guidance on safeguards and other protective measures for all persons subject to detention or to imprisonment.

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991

Principles 1(5), 5, 8, 9, 11, 12(1), 15 and 16	These Principles provide guidance on the undertaking of medical examinations of persons with mental illnesses, obtaining consent for and provisions governing the administering of treatment, providing the person concerned with a notice of his or her rights, and general principles governing the admissions, including involuntary admissions.

Declaration on the Protection of all Persons from Enforced Disappearance, 1992

In particular Article 2	Article 2: "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, (…) the right to liberty and security of the person."

The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989

In particular principles 2, 4, 6 and 7	Principles 4, 6 and 7 describe certain fundamental procedural safeguards for the prevention of extra-legal, arbitrary and summary executions: "4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats. 6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence. 7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records."

Basic Principles on the Role of Lawyers, 1990

Principles 1 and 5–8	Principle 1 provides that, "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence (Principle 5). Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer assigned to them, without payment by them if they lack sufficient means to pay (Principle 6). Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention (Principle 7). All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality (Principle 8).

European Prison Rules, 2006 (Council of Europe)

In particular principles 1–4	These rules establish minimum standards for all aspects of prison administration. Principles 1and 2 state: 1. All persons deprived of their liberty shall be treated with respect for their human rights. 2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.

Declaration on the Police, 1979 (Council of Europe)

In particular Part A: Ethics, paragraph 1, 8, 11, 12 and 14	The Declaration sets out rules concerning professional ethics of the police which take into account human rights principles. Part A, paragraph 1 provides that, "A police officer shall fulfil the duties the law imposed upon him by protecting his fellow citizens and the community against violent, predatory and other harmful acts, as defined by law." Paragraph 8 provides as follows: "A police officer shall not co-operate in the tracing, arresting, guarding or conveying of persons who, while not being suspected of having committed an illegal act, are searched for, detained or prosecuted because of their race, religion or political belief."

Charter of the Fundamental Rights of the European Union, 2000

Article 1, 3 and 6	Article 6 reaffirms the universal right to liberty and security of person. Article 1 obliges member States to respect and protect human dignity. Article 3, on the right to the integrity of the person, states: (1) Everyone has the right to respect for his or her physical and mental integrity. (2) In the fields of medicine and biology, the following must be respected in particular: —the free and informed consent of the person concerned, according to the procedures laid down by law, —the prohibition of eugenic practices, in particular those aiming at the selection of persons, —the prohibition on making the human body and its parts as such a source of financial gain, —the prohibition of the reproductive cloning of human beings.

Bangalore Principles on the Domestic Implementation of International Human Rights Norms, 1998

Principles 4 and 9	Principle 4 provides as follows: "Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realized in the daily life of the people." Principle 9 provides: "Judicial review and effective access to the courts are indispensable not only in normal times but also during periods of public emergency. It is at such times that basic human rights are most at risk and when courts must be especially vigilant in their protection."	These Principles were adopted by participants at a judicial colloquium on the domestic implementation of international human rights norms held in Bangalore in December 1998

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CHAPTER 6 – PART A

THE RIGHT TO A FAIR TRIAL

The right to fair trial is a core element in the concept of the rule of law, as well as for the protection of most human rights. The mere existence of laws that protect human rights means little without their effective enforcement. The right to a fair trial thus protects against violation of other basic rights.

Under the OSCE commitments and Council of Europe (CoE) standards, everyone is entitled to a fair trial in both civil and criminal proceedings. The right imposes both institutional and procedural obligations on States. States have a positive obligation to establish and maintain an independent and impartial judiciary with full competence to review and take final decisions on civil claims and in criminal cases. If separate military courts are in operation, they are bound by the same international standards as the ordinary domestic courts. Similarly, the same standards are binding on administrative bodies that fulfil judicial functions, so that States cannot avoid their obligations by confiding judicial tasks to such bodies.

There are few or perhaps no areas in which the State has greater means and powers of coercion over individuals than in the field of criminal justice. Thus, regulation of these powers is a vital concern of human rights law. The central importance of this right is illustrated by a look at statistics concerning the European Convention of Human Rights (ECHR): more than half of all of the cases decided by the European Court of Human Rights (ECtHR) for example, concern the right to a fair trial.

6A.1. DEFINITION

The right to a fair trial is a compound right, composed of many separate but related parts, such as the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defence, the right to defend oneself in person or through counsel, the right to call and examine witnesses and the right to protection

from retroactive criminal laws. A simple definition of the right as a whole is therefore elusive. Each of the component parts is subject to some limitations of interpretation and balance against compelling State, public or other private interests. Deficits in one of the component parts can to some extent be compensated for by rigorous respect for others. The concept of fairness is judged by reference to the ensemble of these requirements. These and other fair trial rights are 'minimum' guarantees. The observance of each of these guarantees does not necessarily ensure that a hearing has been fair.[1]

The right is based on several key principles, including:

1. the principle of **legality,** whereby State institutions and every step taken by them must have a sound and demonstrable basis in law. There must be clarity as to what procedure and law applies in what court and in regard to what subject matter (i.e. the procedural rules applied to criminal cases often differ from those applied in civil or administrative matters). Moreover, procedures must not be overly complex. They must be clear and transparent;
2. the principle of **equality of arms**;
3. the **presumption of innocence**;
4. principles of the **independence and impartiality of the court**.

The rights attached to a fair trial apply throughout all aspects of the procedure, not just the actual hearing before the court. Individuals may thus raise claims of human rights violations with regard to the arrest, detention and conduct of the investigations through the final appeal at the domestic level. There is thus a close link between the right to a fair trial and the right to liberty and security of the person. Moreover, the right to a fair trial is closely related to other rights, including the prohibition against torture, the right to liberty and security of the person, the right to equality before the law, the right to a remedy and the right to life.

The various components of the right are defined and treated separately in the text below.

[1] Human Rights Committee General Comment 13, para. 5.

6A.2. The Right to a Fair and Public Hearing

The Principle of the Equality of Arms

One essential criterion of a fair hearing is the principle of 'equality of arms' between the parties in a case. Equality of arms means that both parties, defence and prosecution, are treated in a manner ensuring that they have a procedurally equal position during the entire course of the criminal proceedings, and are in an equal position to make their case.[2] It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage *vis à vis* the opposing party.

In criminal trials, where the prosecution has all the machinery of the State behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. Its requirements include other specific component parts of the right to a fair trial, such as the applicant's right to summon witnesses on the same basis as the prosecution, adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information.[3] However, the principle is broader than that. If the circumstances of the particular trial, from arrest to final appeal, show that the accused was placed at a procedural disadvantage, the principle would be violated. Examples could be if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present. A court appointed expert and the powers conferred on him may limit his neutrality to the extent that he is to be considered a witness for the prosecution and if the applicant has not been permitted to call expert opinion of his own, this will violate the principle of equality of arms.

The principle of equality of arms will also apply to the defence's right to oppose arguments forwarded by the prosecution. Thus, one of the elements of a fair hearing is the right to adversarial proceedings. Each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations

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[2] See European Court Judgments in the cases of *Ofrer*, and *Hopfinger*, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, p. 680 and 696.

[3] Case of *Foucher*, European Court, 25 EH RR 234, p. 247.

filed with a view to influencing the court's decision. **Ex parte** proceedings (where one party to the case is heard by the court in the absence of the other party) are thus inherently suspect.

The Requirement of a Public Hearing

It is in keeping with the idea of justice as a public function of government that it be carried out in public view. Except in narrowly defined circumstances, court hearings and judgments must be public. The right to a public hearing means that the parties in the case, as well as the general public, have the right to be present. Courts must make information about the time and venue of oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of interested members of the public.[4]

The purpose of this provision is to protect individuals from the administration of justice in secret. In addition to the public's right to information concerning the justice system, public scrutiny is a mechanism to protect against arbitrariness and injustice. The same may be said of the requirement that judgment must be proclaimed publicly. This does not mean that the entire judgment must be read out in open court (however desirable this may be), merely that steps are taken so that the parties and the general public have unfettered access to the judgment.

The ECtHR and the former European Commission on Human Rights have stated that at least one court must deal with the merits of a case in public, unless the case falls within one of the permissible exceptions. The Court concluded that where there have been oral hearings on the merits of the case in lower courts, proceedings in appeal courts did not necessarily have to be conducted orally or in public. However, there may be a right to an oral hearing when an appeal is capable of raising issues of both fact and the law to be applied to those facts.[5]

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[4] *Van Meurs v. the Netherlands* (215/1986), 13 July 1990, Report of the HRC, (A/45/40), 1990, at 60.

[5] *Fredin v. Sweden (No. 2)*, (20/1993/415/494), 23 February 1994, at 6–7.

Permissible Limitations

The right is nevertheless not unlimited. The public's access to hearings may be restricted in certain narrowly defined circumstances. According to the ECHR and ICCPR, these are:

- morals (for example, some hearings involving sexual offences);
- public order (*ordre public*), which relates primarily to order within the courtroom;
- national security in a democratic society;
- when the interests of juveniles or the private lives of the parties so require;
- to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice.[6]

All of these exceptions are narrowly construed.

6A.3. A Competent, Independent and Impartial Tribunal

Everyone facing a criminal trial or a suit at law has the right to trial by a competent, independent and impartial tribunal established by law.[7] The requirement that the tribunal be established by law seeks to ensure that trials are conducted by regularly constituted judicial bodies and according to established rules, rather than ad hoc bodies set up to decide a particular case.

First, one must consider the meaning of a court or "tribunal". A "tribunal" determines matters within its competence on the basis of the rule of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements—independence, in particular of the executive power (the government or administration); impartiality; duration of its members' terms of office (judges appointed temporarily could easily be tempted to judge in a manner likely to please the powers that appoint them); guarantees afforded by its procedure, especially as regards the equality of arms.[8] Thus, there

[6] Article 14(1) of the ICCPR, Article 6(1) of the European Convention.

[7] Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention.

[8] Eur. Court HR, *Belilos v. Switzerland*, Judgment 29 April 1988, Series A132, p. 29, para. 64.

is a certain overlap given to the legal meanings of key terms—the requirements of independence and impartiality are also implicit in the notion of a tribunal. Human rights law as such does not make a distinction between a court and a tribunal. In international practice, the word tribunal has come to be used for temporary bodies, such as the International Criminal Tribunals for Rwanda and the former Yugoslavia, while the word court is used for permanent judicial bodies, such as the International Criminal Court.

The word "competent" is present in Article 14 of the ICCPR, but not in the ECHR. "Competence" requires that the court or tribunal have jurisdiction in the particular case, as regards subject-matter, territory and time. The European Court has, however, deemed the competence requirement also to be inherent in the notion of a tribunal under the convention.[9] This right is so basic that the Human Rights Committee has stated that it "is an absolute right that may suffer no exception."[10]

Independence

The independence of the tribunal means that decision-makers in a given case are free to decide matters before them impartially, solely on the basis of the facts and in accordance with the law. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise.

Factors which influence the independence of the judiciary include the separation of powers, which protects the judiciary from undue external influence or interference, and practical safeguards of independence such as technical competence and security of tenure. Independence must be institutional as well as functional. Appointment of the members of a court by the executive is in itself not incompatible with the ECHR. Neither are guidelines of a general nature given to a court by the executive, as long as such guidelines do not amount to instructions in a particular case or group of cases.

The independence of the judiciary requires it to have exclusive jurisdiction over all issues of a judicial nature. This means that judicial

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[9] *Sramek* Case, 22 October 1984, 84 Ser. A 17, para. 36; *Le Compte, Van Leuven and De Meyere* Case, 23 June 1981, 43 Ser. A 24, para. 55.

[10] *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20.

court decisions may not be changed by a non-judicial authority to the detriment of one of the parties, except for issues relating to mitigation or commutation of sentences and pardons.[11] The independence of the judiciary also requires that the officials responsible for the administration of justice are completely autonomous from those responsible for prosecutions.[12]

Impartiality

The right to an impartial tribunal requires that judges and jurors have no interest or stake in a particular case and do not have preformed opinions about it. The judiciary is required to ensure that proceedings are conducted fairly, and that the rights of all of the parties are respected.[13]

The concept of impartiality may in many cases overlap with independence. A judge might enjoy the required independence, but nevertheless be personally prejudiced in favour of the State authorities in a particular case or in general. The principle of impartiality, which applies to each individual case, demands that each of the decision-makers, whether they be professional or lay judges or juries, be unbiased.[14] A test that is both subjective and objective must be applied in this regard.[15]

The subjective approach endeavours to ascertain the personal conviction of a given judge in a given case, while the objective approach attempts to determine whether the court offers guarantees sufficient to exclude any legitimate doubt in this respect.

For a lack of subjective impartiality to be made out, actual proof of bias needs to be established. Thus, the personal impartiality of the judge is presumed unless there is proof to the contrary.

For a lack of objective impartiality to be made out the test is less strict and is fashioned on the maxim *justice must not only be done: it*

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[11] Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary.

[12] Guideline 10 of the Guidelines on the Role of Prosecutors.

[13] Principle 6 of the Basic Principles of the Independence of the Judiciary.

[14] See, *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120, relating to lay judges; and *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236, para. 8(4), requiring jurors to be impartial. See also Article 67(1) of the ICC Statute guaranteeing a fair hearing conducted impartially.

[15] Eur. Court HR, *Saraiva de Carvalho v. Portugal*, Judgment of 22 April 1994, Series A286–B, p. 38, para. 33.

must be seen to be done. Thus, if a claim is made to this effect, this standard requires the court to determine whether, apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. If there are legitimate reasons to doubt the impartiality, then the judge must withdraw from the case. Legal systems using jury trials should allow for the possibility for potential jurors to be excluded if there is reason to fear bias on their part.

The procedure for determining impartiality is highly important. If a defendant raises the issue during the proceedings it must be investigated unless it is clearly unfounded. However, where the court has investigated the complaint to a reasonable degree and found no evidence of bias, there is unlikely to be a violation.

Doubts as to impartiality can arise in respect of a judge, who performs more than one function in criminal proceedings. For example if a trial judge had previously taken decisions during the pre-trial stage (for example in bail, legal representation or disclosure hearings) and then presided over the main trial. As a general rule, as long as such involvement concerns only case supervision no violation will arise. However, any decision taken that involves consideration of the case on the merits may be vulnerable to challenge.[16]

Box 6A.1. Other Instruments Relating to Tribunal

United Nations Basic Principles on the Independence of the Judiciary.[17]

The principles are a useful guideline in interpreting the independence and impartiality requirements of Article 14 of the ICCPR. The problems that arise in relation to these issues can be seen in for example the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers.

Council of Europe Recommendation No. R (94) 12, On the Independence, Efficiency and Role of Judges.[18]

The European standards contained in this recommendation are more detailed than the UN ones. An accompanying explanatory memorandum goes into even greater depth on the requirements of the recommendation.

The Bangalore Principles of Judicial Conduct, 2002.

This set of principles is, again, more detailed than the European ones. It goes into areas not covered by the other two instruments, such as a judge's duty to ensure equality before the law.

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[16] *Hauschild v. Denmark*, Judgment of 24 May 1989, Series A no. 154, p. 21, §48.

[17] Endorsed by the United Nations General Assembly in November 1985.

[18] Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

6a.4. Time Requirement

Criminal proceedings must be started and completed, from pre-trial stages to final appeal and the issuing of judgments, within a reasonable time.[19] The right to a trial within a reasonable time is a free standing, independent right and a violation may be found even without it being shown that the delay caused the proceedings to be unfair in other respects.[20]

For anyone charged with a criminal offence and held in pre-trial detention, the obligation on the State to expedite trials is even more pressing, so that less delay is considered reasonable. International standards require that a person charged with a criminal offence be released from detention pending trial, if the time deemed reasonable in the circumstances is exceeded.

The purposes of the reasonable time requirement are:

- to guarantee that accused persons do not lie under a charge for too long and that the charge is determined,
- to protect a defendant against excessive procedural delays and prevent him remaining too long in a state of uncertainty about his fate,
- to avoid delays which might jeopardize the effectiveness and credibility of the administration of justice,
- ensuring that a person's defence is not undermined by the passage of inordinate amounts of time.

The first question to ask in this regard is, naturally, how much time has passed? For this purpose, time is calculated from the moment a person is **charged,** meaning the moment an accused is officially notified by the competent authority of an allegation that he has committed a criminal offence. It ends when there is a final judgement, after all avenues of appeal have been exhausted.

Unless that period is fairly long, thus giving grounds for real concern, it is almost certainly unnecessary to go further. If an accused is at large, the period prior to apprehension must be deducted from the overall period.

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[19] Article 14(3)(c) of the ICCPR, Article 6(1) of the European Convention, Article 21(4)(c) of the Yugoslavia Statute, Article 20(4)(c) of the Rwanda Statute, Article 67(1)(c) of the ICC Statute.

[20] ECtHR, *Eckle v. Federal Republic of Germany*, Judgment of 22 April 1994, Series A286–B, p. 38, para. 33.

As with the reasonableness of the length of detention (cf. chapter 5, section *Judicial Supervision of Detention*), once the time period has been calculated, the reasonableness of the length of the trial must be assessed taking into consideration the complexity of the case, the conduct of the accused, the conduct of the relevant authorities, and what is at stake for the accused. The assessment of complexity is the same as with the reasonable length of detention, but it will additionally require examination of the number of co-accused.

The second matter to which the ECtHR has routinely paid regard, is the conduct of the accused. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting him-/herself, exploiting procedural technicalities, and so on. An accused cannot properly complain of delay of which he is the author. Finally, one must consider the manner in which the case has been dealt with by the administrative and judicial authorities. A State cannot blame unacceptable delays on a general shortage of prosecutors or judges or courthouses or on chronic under-funding of the legal system. Systematic and institutionalized problems must be addressed so as to organize the legal system in such a way that ensures that the reasonable time requirement is honoured.

6A.5. The Presumption of Innocence

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet the prescribed requirements of fairness. The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal. This requires that judges and juries refrain from prejudging any case. It also applies to all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.[21] It also means that the authorities have

[21] Human Rights Committee General Comment 13, para 7.

a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

However, this principle is subject to two limitations:

1. Where the defendant is seeking to establish a **specific defence** (as for example when the defence of insanity or self-defence is raised in relation to a charge of murder) the burden of proving this specific requirement may be transferred to the defendant; and
2. within certain limits, where a rule under a presumption of fact or law operates (see below);

Issues surrounding the presumption of innocence tend to arise in two common situations. Firstly, comment must not be made by a public official during criminal proceedings concerning the guilt of the accused. Any comment by a public official made before a finding of guilt in the proceedings that amounts to a formal declaration may violate the presumption. If for instance a judge dealing with pre-trial detention assesses the need to detain an accused based upon a finding that the accused is guilty, and publicly states so in his reasoning for refusal of bail, the principle is violated.

It is not necessary that the statement be made by a judge or court, as statements made by other public authorities will violate the presumption, i.e., police officers, government officials. Information to the public from the authorities concerning a criminal investigation and naming a suspect or stating that a suspect has been arrested or has confessed does not violate the presumption of innocence, so long as there is no declaration that the person is guilty.[22]

Secondly, violation may arise concerning a judicial decision that reflects an opinion that an individual is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. An example could be if an acquitted accused is ordered to pay half the costs of the proceedings and compensation to the victims. The basis for this is the court's finding that, had a statute of limitations (prescription) period not run out, the charge would very probably have led to a conviction.[23] The problem is that the accused is presented to the

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[22] Eur. Court HR, *Krause v. Switzerland*, 13 DR 73, 3 October 1978; see also *Worm v. Austria*, 83/1996/702/894, Eur. Court HR, 29 August 1997.

[23] Eur. Court HR, *Minelli v. Switzerland*, Judgment of 25 March 1983, Series A308, p. 18, para. 37.

public as being guilty without having had the benefit of a trial on the substance.

The problem can also arise where a claim for reimbursement of costs and compensation for detention on remand after an acquittal or discontinuance of criminal proceedings is rejected. Where the reasoning of the decision rejecting the claim amounts in substance to a determination of the guilt of the accused without his having previously been proved guilty according to law and, in particular without his having had an opportunity to exercize the rights of the defence.[24] A violation was also found where government imposed punitive fines on the heirs of individuals who had been guilty of tax evasion.[25]

Security measures taken during the trial may present issues relating to the presumption of innocence. Measures such as holding the accused in a cell within the courtroom, requiring the accused to wear handcuffs, or shackles in the courtroom would have to be shown to be necessary on security grounds, and a court would have to take steps to ensure that no prejudicial effect resulted from such measures, for example by instructing jury members as to the presumption of innocence. While the question does not appear to have arisen in the work of the UN Human Rights Committee, it is well established in the jurisprudence of, for example, the United States Supreme Court that compelling an accused to wear prison uniform in the courtroom would amount to a violation of the presumption.[26] There can be very little doubt that the Human Rights Committee would reach the same conclusion, as it has been included in standards on imprisonment at both the regional and universal levels. The same would apply to other attributes of guilt such as taking the accused to trial with a shaven head in countries where convicted prisoners have their heads shaved. In an attempt to avoid such prejudicial indications, if an accused has no suitable clothing of his or her own, he or she should be provided with civilian clothing in good condition in which to appear in court.[27] Issues like this will be of particular importance in jury trials, where the risk of a prejudicial effect of such outward signs may be greater.

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[24] Eur. Court HR, *Englert v. Germany*, Judgment of 25 August 1987, Series A123, p. 34–35, para. 36–37.

[25] *A.P., M.P. and T.P. v. Switzerland* (Application No. 19958/92).

[26] *Estelle v. Williams*, 425 U.S. 501 (1976).

[27] Rule 95(3) of the European Prison Rules; see also Rule 17(3) of the Standard Minimum Rules.

If a person is acquitted of a criminal offence by final judgment of a court, the judgment is binding on all State authorities. Therefore, the public authorities, particularly prosecutors and the police, should refrain from implying that the person may have been guilty, so as not to undermine the presumption of innocence, respect for the judgments of a court and the rule of law.[28]

The Burden of Proof

In accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial. In some countries, the law applies **statutory presumptions**, requiring the accused (rather than the prosecution) to explain elements of certain offences. For example, the accused may be required to explain their presence at a given location (at or near the place where a crime occurred), or their possession of certain things (such as stolen property or contraband). The ECtHR has found that statutory presumptions do not necessarily violate the presumption of innocence, but they must be defined by law and reasonably limited. They must also preserve the right of the accused to a defence—in other words they must be capable of rebuttal by the accused.[29]

Many States in common law systems separate criminal from non-criminal (civil) jurisdiction. In such States, being acquitted of a criminal offence does not prohibit courts exercising non-criminal jurisdiction from establishing civil liability based on the same set of facts, but using a different (lower) standard of proof.[30]

The Standard of Proof

Although the standard of proof is not expressly specified in most international standards, the UN Human Rights Committee has stated "[b]y reason of the presumption of innocence, the burden of proof of

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[28] *Sekanina v. Austria*, 25 August 1993, 266-A Ser. A; *I. and C. v. Switzerland*, (10107/82), 4 December 1985, 48 DR 35.

[29] See *Pham Hoang v. France*, (66/1991/318/390), 25 September 1992, finding that a French customs law which created rebutable assumptions did not violate the presumption of innocence.

[30] *X. v. Austria*, (9295/81), 6 October 1982, 30 DR 227.

the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."[31]

6A.6. Providing Information to the Accused/Disclosure

The accused is granted the right to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him.

The requirement is that such information be given to the accused "promptly", that is to say with the shortest possible delay. The question of promptness is to be assessed in each individual case on the basis of its specific circumstances.

The information must contain not only the nature of the charge, but also the legal and factual grounds on which it is based. However, it is not a requirement at this stage (i.e. of the accusation or charge) that any evidence is furnished to the accused.

The purpose of the right is to enable the accused to prepare his defence. Therefore the prosecutor will have to inform him as soon as it has been decided to institute criminal proceedings, and if necessary, provide other rights to the accused such as translation of documentation and/or a free interpreter.

6A.7. Time and Facilities for the Defence

In straightforward terms, the right means that an accused must be given time to prepare a defence and adequate facilities in which to do so. The question of adequate time of preparing a defence must be decided afterwards according to the circumstances in which both the accused and his counsel found themselves and on the basis and nature of the case.

If an accused wishes a particular counsel and this causes delay he will not be permitted to consequently complain of a delay. However, if an accused changes counsel then the new counsel will have to be given the same adequate time to prepare. This applies equally to appeal

[31] Human Rights Committee General Comment 13, para. 7.

proceedings. The right to have adequate time and facilities for the preparation of a defence is violated where a court provides inadequate reasons for its decision and a very short time for filing an appeal.

Box 6A.2. A Case on the Right to Appeal

In a case where a Jamaican appeals court failed to issue a reasoned written judgment, the Human Rights Committee found that the rights of the accused had been violated because the failure was likely to prevent the accused from successfully arguing for special leave to appeal to a higher tribunal, and thus from availing himself of a further remedy.[32]

If there is a time period for submitting a notice of appeal on points of law, this must be reasonable and permit adequate time for counsel to examine the written judgment.

Disclosure

The accused must be provided with full data in the possession of the police and prosecution available at that moment, but this will also be a continuing duty within the rules of disclosure. The meaning of "in detail" does not mean that the furnished material need be in "minute detail", but sufficiently detailed to permit the preparation of a defence. For example, the prosecution may not withhold a witness statement that undermines the credibility of their case or underpins the defence of the accused. The subjective view of the prosecutor that it is not relevant is insufficient; it must be disclosed in order for the principle to be respected.

The meaning of "in a language which he understands" simply means that the accused has to be able to clearly understand the cause of the accusation against him, and if he does not understand the language of the country in which he is accused he must be provided with a written translation, as oral translation has held to be insufficient. (However, this requirement does not apply to all of the material in the prosecution's possession—see below).

The accused thus must have at his disposal all relevant elements that can be collected by the authorities for the purposes of exonerating himself or of obtaining a reduction of his sentence. In this respect inspection of files must be considered an important element of facilities for the defence. This does not mean that defence counsel may not be restricted access to certain documents; this may involve issues

[32] *Hamilton v. Jamaica*, (333/1988), 23 March 1994, UN Doc. CCPR/C/50/D/333/1988, 1994 at 5–6.

of national security, as long as there are no insuperable obstacles to preparing and presenting a defence that amount to withholding evidence. However, if an accused is legally represented, and if the State shows a compelling public interest (such as the protection of witnesses), it is permissible to deny the accused access to the case file as long as his legal representative is given access. However, this will have to be done in a way that causes least prejudice to the rights of the defence.

6A.8. Right to Presence at Trial and Choice of Defence

Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and challenge the prosecution case and present a defence.[33] The right to be present at trial is an integral part of the right to defend oneself. Although the right to be present at trial is not expressly mentioned in the ECHR, the ECtHR has stated that the object and the purpose of Article 6 means that a person charged with a criminal offence is entitled to take part in the trial hearing.[34]

The right to be present at trial imposes duties on the authorities to notify the accused (and defence counsel) in sufficient time of the date and location of the proceedings, to request the presence of the accused and not to improperly exclude the accused from the trial.[35] According to the HRC there may be limits on the efforts the authorities can be expected to make in contacting the accused. However, the Committee found a violation of the right to be present at trial in a case where the authorities of the former Zaire issued summonses only three days before the trial, and did not attempt to send them to the accused who was living abroad, even though his address was known.[36]

The right of an accused to be present at trial may be temporarily restricted if the accused disrupts the court proceedings to such an extent that the court deems it impractical for the trial to continue in his or her presence. The HRC has stated that the right may also be relinquished if the accused fails to appear in court for trial after having been duly notified of the proceedings. The accused may waive his or her right

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[33] Article 14(3)(d) of the ICCPR.
[34] *Colozza and Rubinat*, 12 February 1985, 89 Ser. A. 14, para. 27.
[35] *Mbenge v. Zaire*, (16/1977), 25 March 1983, 2 Sel. December 76, at 78.
[36] Ibid.

to be present at hearings, but such a waiver must be established in an unequivocal manner, preferably in writing.[37]

The right to be present during appeals proceedings depends on the nature of those proceedings. If the court of appeal has jurisdiction to decide on both issues of law and fact, a fair trial generally requires the presence of the accused. The ECtHR found a violation of the rights of the accused in a case before the Supreme Court in Norway. The Supreme Court convicted and sentenced an accused, overturning an acquittal by a lower court and considering both issues of law and fact, without summoning the accused to appear, in the absence of any special feature to justify this step. The European Court held that the overturning of the acquittal in this case could not have been properly done without having assessed the evidence of the accused in person.[38]

Defence of One's Own Choosing

Everyone charged with a criminal offence has the right to defend him- or herself in person.[39] In common with some other fair trial rights, this right cannot be said to imply an absolute right to reject the assistance of counsel, if there are compelling reasons why the accused should not solely represent him-/herself. This was recognized in 2004 by the ICTY in the trial of Slobodan Milosevic. Although the trial court had previously stringently protected Mr Milosevic's right to reject counsel and to defend himself, his continuing illness and the delays to his trial led the appeal chamber to accept that counsel could, in these circumstances, be imposed even over his objections.[40]

Everyone accused of a criminal offence has the right to legal assistance.[41] The accused may decide to be assisted by defence counsel, and the court is required to inform the accused of the right to counsel. This right applies to all stages of the criminal proceedings, including during the preliminary investigation and before trial. The right of

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[37] See *Colozza and Rubinat*, 12 February 1985, 89 Ser. A 14, para. 28; *Poitrimol v. France*, (39/1992/384/462), 23 November 1993, at 13.

[38] See *Botten v. Norway*, (50/1994/497/579), 19 February 1996, at 22; see also, *Kremzow v. Austria*, (29/1992/374/448), 21 September 1993, at 16.

[39] Article 14(3)(d) of the ICCPR, Article 6(3)(c) of the European Convention.

[40] Case no. IT-02–54-AR73.7. Decision of the Appeals Chamber, 1 November 2004.

[41] Article 14(3)(d) of the ICCPR, Principle 1 of the Basic Principles on the Role of Lawyers, Article 6(3)(c) of the European Convention.

access to a lawyer should be prompt and the accused should not be questioned before the arrival of his or her lawyer. To do so may render any statement made during this period inadmissible at trial. This complements the right against self incrimination. Should an accused incriminate himself or herself during police questioning, the presence or otherwise of a lawyer will be an important consideration in deciding whether the statement should be admitted into evidence (in systems using stringent evidentiary rules), or the weight to be given to it (in systems applying liberal rules on the admission of evidence).

Because of the importance of trust and confidence between the accused and his or her lawyer, the accused may generally choose which lawyer will represent them. Where a military court limited the accused to a choice between two appointed attorneys, the HRC found that the right to defence by counsel of choice had been violated.[42] Similarly, the Committee found a violation when the accused was given only a list of military lawyers from which to choose, and when an accused was forced to accept appointed military counsel, although a civilian attorney was willing to represent him.[43] Nevertheless, the right to choose a particular lawyer is not absolute and may be restricted in certain circumstances. For example, a lawyer questioned by the prosecuting authorities during an investigation could in many countries not subsequently represent an accused during the main trial. Such rules usually exist to ensure that the accused is defended zealously and without the intrusion or the appearance of intrusion of other interests.

An accused does not have an unrestricted right to choose assigned counsel, particularly if the State is paying the costs. However, in death penalty cases the HRC has stated that the court should give preference to appointing counsel chosen by the accused, including for the appeal, even if it requires adjournment of the hearing.[44] If a person does not have a lawyer of his choice to represent him, he may have counsel assigned.[45]

The State is required to provide counsel free of charge to the accused if the interests of justice require it and the accused does not have

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[42] *Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. December 93, at 95.

[43] *Burgos v. Uruguay*, (R.12/52), 29 July 1981, Report of the HRC, (A/36/40), 1981, at 176; *Acosta v. Uruguay*, (110/1981), 29 March 1984, 2 Sel. December 148.

[44] See *Pinto v. Trinidad and Tobago*, (232/1987), 20 July 1990, Report of the HRC, (A/45/40), Vol. II, 1990, at 73.

[45] Article 14(3)(d) of the ICCPR, Article 6(3)(c) of the European Convention.

sufficient funds to pay for a lawyer.[46] Criteria used in assessing "the interests of justice" in this connection include the seriousness of the consequences for the accused, the complexity of the law and facts and the particular situation of the accused. In Europe and the USA, the general rule is that counsel is required where a deprivation of liberty may result. The ECtHR held that there was a violation of Article 6(3)(c) of the ECHR when a man was denied free legal assistance during a judicial investigation and trial on drug charges. The offence with which he was charged was punishable by up to three years' imprisonment, and because the accused had allegedly committed the crime while on probation for another offence, the issues before the court and the range of measures available to it were complex.[47]

Communications between the accused and their counsel are confidential. The authorities must ensure that such communications remain so. The HRC has explained that Article 14(3)(b) of the ICCPR, which guarantees the right to communicate with counsel, requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications."[48] For people in custody, the authorities must provide adequate time and facilities for the accused to meet and have confidential communications with their lawyers, whether face to face, on the telephone, or in writing. Such meetings or telephone calls may take place within sight, but not within hearing, of others.[49] The HRC has stated that where excessive bureaucracy renders access to counsel difficult, the conditions required by Article 14 of the ICCPR are not met.[50] Communications between detained or imprisoned persons and their lawyers are inadmissible as evidence, unless they are connected with a continuing or contemplated crime.[51]

Defence lawyers must act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must advise their clients of their legal rights and obligations, and about the legal system. They must aid their clients in every

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[46] Article 14(3)(d) of the ICCPR, Principle 6 of the Basic Principles on the Role of Lawyers, Article 6(3)(c) of the European Convention.

[47] *Quaranta v. Switzerland*, 24 May 1991, 205 Ser. A 17.

[48] Human Rights Committee—General Comment 13, para. 9.

[49] Principle 8 of the Basic Principles on the Role of Lawyers; Principle 18 of the Body of Principles, Rule 93 of the Standard Minimum Rules.

[50] Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75, para. 18, 5 May 1997.

[51] Principle 18(5) of the Body of Principles.

appropriate way, taking such action as is necessary to protect their clients' rights and interests, and assist their clients before the courts.[52] In protecting the rights of their clients and in promoting the cause of justice, lawyers must seek to uphold human rights and fundamental freedoms recognized by national and international law.[53]

When an accused is represented by assigned counsel, the authorities must ensure that the lawyer assigned has the experience and competence commensurate with the nature of the offence of which their client is accused.[54] The mere nomination of a lawyer is not sufficient. The authorities have a special duty to take measures to ensure that the accused is effectively represented.[55] However, the stage at which the authorities must intervene when an applicant is unhappy about his legal representative is not entirely clear from the case law. The ECtHR found a violation where an accused complained that his legal aid appointed lawyer failed to turn up at the indictment hearing, made infrequent pre-trial visits and generally failed to acquaint himself with the prosecution evidence. Here, the authorities should have ensured that the defence was effective by demanding that counsel performed their duties or were replaced.[56]

Failure of legal counsel to ask many questions, to challenge evidence and generally to present an effective defence, is unlikely to amount to a violation unless it can be said that he was manifestly ineffective, and that it should have been obvious to the court. It follows from the independence of the legal profession that the conduct of the defence is primarily an issue between defendant and counsel, whether legal aid was appointed or private.

The HRC noted concern about "the lack of effective measures [in the USA] to ensure that indigent defendants in serious criminal proceedings, particularly in State courts, are represented by competent counsel."[57] It has also held that when an accused was offered only a limited choice of officially appointed counsel, and the counsel then adopted the attitude of a prosecutor, the right of the accused to

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[52] See Human Rights Committee—General Comment 13, para. 9.

[53] Principles 13 and 14 of the Basic Principles on the Role of Lawyers.

[54] Principle 6 of the Basic Principles on the Role of Lawyers.

[55] *Kelly v. Jamaica* (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 248, para. 5(10).

[56] Eur. Court HR Artico Case, 13 May 1980, 37 Ser. A 16.

[57] Comments of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para. 23.

an adequate defence had been violated.[58] In the case of a lawyer representing an accused on appeal, effective assistance, in the view of the Committee, would have included the lawyer consulting the accused and informing him of the lawyer's intention to withdraw the appeal or argue that it had no merit.[59]

The ECtHR has found violations in cases in which:

- there has been a delay in providing access to counsel in cases in which complex legal issues were raised;
- a State has refused free legal counsel in cases in which complex legal issues were raised;
- defence counsel has been appointed to represent an individual in a criminal proceeding, but has failed to adequately represent him or her;
- a State has prevented or failed to ensure confidential communication between counsel and the accused;
- a State has refused to allow counsel to represent an absent accused.

The Bar is subject to political interference in its structure or operations;

- Lawyers taking sensitive cases are subject to threats, intimidation, harassment, or to dubious measures of investigation or prosecution by State authorities.

In addition, the presence or absence of counsel is a vital factor in assessing the weight to be given to out of court confessions or statements, and the failure of the accused to provide explanations for suspicious circumstances.

Box 6A.3. Soft Law Instruments on the Role of Lawyers

United Nations Basic Principles on the Role of Lawyers

These principles cover the following areas: access to lawyers and legal services, special safeguards in criminal justice matters, qualifications and training of lawyers, duties and responsibilities of lawyers, guarantees for the functioning of lawyers, lawyers' freedom of expression and association, professional associations of lawyers, and disciplinary proceedings. They are a useful analytical tool in examining respect for the rights of the defence and

[58] *Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. December 93, para. 1(8), 8(6), 10.

[59] *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 248.

legislation on the organization of the legal profession. The reports of the UN special Rapporteur on the Independence of Judges and Lawyers give insight into problems associated with their practical application.

6A.9. The Right to Summon and Examine Witnesses

A fundamental element of the principle of equality of arms and of the right of defence is the right of the accused to call and to question witnesses. Everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witnesses on their behalf under the same conditions as witnesses against them.[60]

The right to call and examine witnesses ensures that the defence has an opportunity to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused. The right of the accused to adequate time and facilities to prepare a defence includes the right to prepare the examination of prosecution witnesses. There is therefore an implied obligation on the prosecution to give the defence adequate advance notification of the witnesses that the prosecution intends to call at trial. However, the defence may be deemed to have waived its right of adequate time to prepare if it does not ask for an adjournment when a previously undisclosed witness statement is introduced at trial.[61]

The right to examine or have examined witnesses against the accused means that all of the evidence must normally be produced in the presence of the accused at a public hearing, so that the evidence itself and the reliability and credibility of the witness can be challenged. Although there are exceptions to this principle, the exceptions must not infringe the rights of the defence. The right of the accused to examine or have examined witnesses against them may be limited on the basis of the conduct of the accused (for example, if the accused absconds), or if the witness becomes unavailable (having moved country or moved residence leaving no forwarding address).

The notion of a **witness** is given an autonomous meaning and statements made outside of the court, to the police for example, are to be regarded as statements by witnesses as far as the domestic courts take them into account.

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[60] Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the European Convention.

[61] See *Adams v. Jamaica*, (607/1994), 30 October 1996, UN Doc: CCPR/C/58/D/607/1994.

The wording of the right indicates a blanket ban on the use of hearsay evidence, i.e., evidence of a statement produced in court other than being given orally by the maker.

The Testimony of Anonymous and Absent Witnesses

Especially in cases of organized crime (including terrorism) when the witness reasonably fears reprisal, the question occasionally arises of the use of anonymous witnesses (i.e. witnesses whose identity remains hidden from the accused and/or his or her counsel) in criminal proceedings. Obviously, a practice such as this is highly problematic for a variety of reasons. The demand that evidence be given in public is a strong safeguard against perjury. The credibility of witnesses drawn from a criminal milieu is often suspicious. Motives for turning against comrades may affect credibility. An accused that is unaware of the identity of the witness against him will be unable to point to such motives or other factors likely to influence credibility.

The ECtHR has permitted the use of anonymous witnesses in all cases, but has emphasized that their use, as well as the weight given to their evidence, must be strictly limited. Firstly, the use of such witnesses must be shown to be strictly necessary (typically to protect witnesses). Secondly, a conviction must not be solely or mainly based on such evidence.[62] Thirdly, sufficient safeguards or counterbalancing procedures must be adopted. The counterbalancing is the protection of the witness' rights against the protection of the rights of the accused. In assessing this, one should first look to domestic law and examine whether it has been followed.[63]

The ECtHR considered a case where two anonymous witnesses gave statements to a police officer, who subsequently testified in court. The Court found that although the defence could submit written questions to the witnesses, there was a violation of the rights of the accused. The Court stated that "[b]eing unaware of [the witnesses'] identities, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility."[64]

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[62] See *Doorson v. The Netherlands*, 26 March 1996, 2 Ser.A 470, para. 69.

[63] *Van Mechelen and others v. The Netherlands*, (55/1996/674/861–864), 23 April 1997, para. 51.

[64] *Windisch* Case, 27 September 1990,186 Ser. A 11; see *Kostovski v. the Netherlands*, 20 November 1989, 166 Ser. A 20.

One should thus examine to what extent the accused, through his legal representative, has been able to challenge such evidence, and whether there have been any insurmountable obstacles in this respect. In order to comply with this requirement, the legal representative of the accused must be permitted to personally question the witness, and be able to see the witness so as to examine his demeanour and his physical response to questioning in order to challenge his credibility. Anything falling short of this has been held to amount to a violation.

In another case, examined by the European Court, the accused was convicted 'to a decisive extent' on the basis of statements by anonymous police officers. The defence was not only unaware of the identity of the witnesses, but was also prevented from observing their demeanour, and thus from testing their reliability, under direct questioning. The police officers gave evidence to the examining judge, while the accused, defence counsel and the prosecutor were in a separate room where they could hear the questions asked and the replies through a sound link. The rationale behind these measures was the officers' stated fear of reprisals. The Court concluded that "these measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability", and decided therefore that the proceedings as a whole were not fair.[65]

When examining whether the rights of the accused have been violated under this provision, one should concentrate less on whether statements of witnesses were properly admitted into evidence, but more on whether the proceedings as a whole, including the way in which evidence was taken, were fair.

Other Causes of Absence of Witnesses

The European Court, noting the difficulties in prosecuting drug trafficking cases, including problems relating to producing witnesses in court, stated that such considerations cannot justify restricting to this extent the rights of the defence to examine witnesses.[66]

In a drug trafficking case, the ECtHR found a violation of the rights of the accused when a court based its judgment on the reports of an under-cover police officer, transcripts of intercepted telephone calls,

[65] *Van Mechelen and others v. The Netherlands*, (55/1996/674/861–864), 23 April 1997.
[66] *Saïdi v. France*, (33/1992/378/452), 20 September 1993, at 17.

and statements made by the accused after being shown the transcripts. The accused had no opportunity to check or challenge the transcripts or to examine the under-cover police officer, who was not named or called as a witness in order to protect his identity. The Court noted, however, that the under-cover officer was not an "anonymous witness", as he was a sworn police officer, the investigating judge knew of his function and the accused knew the officer as a result of having met him five times.[67]

In a case where the accused was brought to court after three years' absence from the country, and the main prosecution witness failed to appear, the ECtHR held that the witness' failure to appear did not in itself make it necessary to halt the prosecution if the authorities had not been negligent in their efforts to find the person concerned. The Court noted that the statements of the missing witness to the police and the examining magistrate, which were read out in court, corroborated other evidence.[68]

The HRC found that there was no violation of the rights of the accused when a court allowed into evidence the testimony of a police officer who had since left the country. His evidence had been given under oath at a preliminary hearing when the defence had been able to question him, and the defence had not objected to the introduction of other evidence that subsequently contradicted this account.[69]

Thus, there is a consistent line that the right to question witnesses is violated, and the trial is unfair when a conviction has been based on evidence provided by witnesses granted a privileged status (royalty, family members whose testimony was accepted as factually correct) that prevented the defence from challenging that evidence.

The Choice of Witnesses to be Called

The right to call defence witnesses under the same conditions as prosecution witnesses gives criminal courts relatively broad discretion in deciding which witnesses to summon, although judges must not violate the principles of fairness and equality of arms.

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[67] *Lüdi v. Switzerland*, (17/1991/269/340), 15 June 1992.

[68] *Artner v. Austria*, (39/1991/291/362), 28 August 1992, at 7.

[69] *Compass v. Jamaica*, (375/1989), 19 October 1993, UN Doc. CCPR/C/49/D/375/1989, at 6.

The European Court has held that although Article 6(3)(d) of the European Convention does not require the attendance and examination of *every* witness on behalf of the accused, a court must exercize its discretion over which witnesses will be called in accordance with the principle of equality of arms. It found a violation of the right to a fair trial, where a judgment did not explain the reasons why the court had rejected the request of the accused that four witnesses be examined.[70]

In a murder trial where a witness for the defence was willing to testify but was unable to be present in court on the particular day because she did not have a means of transport, the Human Rights Committee found a violation of Articles 14(1) and 14(3)(e) of the ICCPR, to the extent that the witness' failure to appear was attributable to the authorities, who could have adjourned the proceedings or provided her with transportation.[71] On the other hand, in several cases in the past, the (former) European Commission on Human Rights expressed the view that there was no violation of the rights of the accused, where the national court exercised its discretion not to summon a witness requested by the accused, on the grounds that it deemed that the testimony of the witness would not assist in elucidating the truth.[72]

The Human Rights Committee criticized the system of 'faceless judges' in Colombia, in which the names of judges, prosecutors and witnesses were kept from the defence in regional public order courts trying cases involving charges of drug trafficking, terrorism, rebellion and illegal possession of weapons. The Committee recommended that the system be abolished.[73]

6A.10. The Rights of Victims and Witnesses

As is seen from the foregoing, the rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. In balancing

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[70] *Vidal v. Belgium*, (14/1991/266/337), 22 April 1992.

[71] *Grant v. Jamaica*, (353/1988), 31 March 1994, UN Doc. CCPR/C/50/D/353/1988, at 10.

[72] *X v. Austria*, 31 May 1973, 45 Coll. Dec. 59; *X v. United Kingdom*, 6 April 1973, 43 Col. Dec. 151; *X v. the Federal Republic of Germany*, 1 April 1970, 37 Coll. December 119; *X v. the Federal Republic of Germany*, 21 July 1970, 35 Coll. Dec. 127.

[73] Concluding Observations by the Human Rights Committee, UN Doc. CCPR/C/79/Add.75, 9 April 1997, para. 21 and 40.

these rights, measures taken by courts have included providing victims and witnesses with information and assistance throughout the proceedings, closing all or part of the proceedings to the public and allowing the presentation of evidence by electronic or other special means.

The European Court has stated that where the interests of the life, liberty or security of witnesses may be at stake, States must organize criminal proceedings so as to ensure that these interests are not unjustifiably imperilled. It explained: "Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses and victims called upon to testify."[74] Nevertheless, as the court more recently stated, the right to the fair administration of justice requires that measures restricting the rights of the defence must be carefully limited and strictly necessary.[75]

Other Instruments Concerning Rights of Victims (soft law)

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power calls for judicial and administrative processes that are responsive to the needs of victims, including by allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings, where their personal interests are affected. This should be done without prejudice to the accused and consistent with the relevant national criminal justice system.[76] In addition the Declaration emphasizes that victims should be given information and assistance throughout the legal process, measures should be taken to minimize inconvenience, protect their safety and avoid unnecessary delay.[77]

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.[78]

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[74] *Doorson v. The Netherlands*, 26 March 1996, 2 Ser. A 470, para. 70.

[75] *Van Mechelen and others v. The Netherlands*, (55/1996/674/861–864), 23 April 1997, para. 54 and 58.

[76] Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly Resolution 40/34 of 29 November 1985.

[77] Ibid.

[78] See section on the right to a remedy, below.

6A.11. Right to Free Interpretation and to Translation

An accused shall have the right to the free assistance of an interpreter if he/she cannot understand or speak the language of the court.[79] The right to interpretation and translation are in these circumstances crucial to ensuring the fairness of the proceedings. The right to an interpreter is an integral part of the right to defend oneself and the right to adequate time and facilities to prepare a defence. This right is unqualified. The right to an interpreter must also be granted to an accused completely free of charge, irrespective of his or her financial means and regardless of the outcome of the trial.[80] Lesser measures, such as a conditional remission of repayment, temporary exemption or a suspension of payment were considered insufficient.

An **interpreter** translates orally between the language of the court and the language of the accused, and *vice versa*. A **translator** produces written versions of documents in the relevant language. Both functions are crucial.

The right to an interpreter applies at all stages of criminal proceedings, including during police questioning and preliminary examinations or inquiries.[81] The ECtHR has held that this principle extends to documents as well as to oral proceedings. Thus the right also covers the free translation of prosecution material. This does not refer to every document in the possession of the prosecution, but can be restricted to documentation necessary for the accused to have sufficient knowledge of the case against him.[82] The HRC took a similar view in a case, where it was argued that the failure of the State Party to provide translations of all documents in the case was a violation of the right to adequate time and facilities to prepare a defence. The Committee noted that the complainant was represented by a lawyer of his choice, who had access to the entire file, and that the lawyer had the assistance of an interpreter in his meetings with the complainant. Defence counsel therefore had opportunity to familiarize himself with the file and, if he thought it necessary, to read out documents to his client during their meetings, so that the complainant could take note of its contents through interpretation.[83]

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[79] Article 14(3)(f) of the ICCPR, Article 6(3)(e) of the European Convention.

[80] Case of *Luedicke, Belkacem and Koc*, 28 November 1978, 29 Ser. A, 17–19.

[81] Principle 14 of the Body of Principles.

[82] Eur. Court HR 1989 case of *Kamasinski v. Austria*, December 19th, 1989, Series A 168.

[83] *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991 (1994).

For this right to be meaningful, the interpretation must be competent and accurate. The HRC has made it clear that the right to free assistance of an interpreter must be available to nationals and non-nationals alike.[84] However, if the accused *does* speak and understand the language of the court adequately, but prefers to speak another language, there is no obligation on the authorities to provide the accused with the free assistance of an interpreter.[85]

6A.12. The Right not to be forced to Testify against Oneself or to Confess Guilt

No one charged with a criminal offence may be compelled to testify against him- or herself or to confess guilt. This prohibition is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition against torture and other cruel, inhuman or degrading treatment.[86] The prohibition against compelling an accused to testify or confess guilt prohibits any form of coercion, whether direct or indirect, physical or psychological. It prohibits torture and cruel, inhuman or degrading treatment. It prohibits treatment which violates the right of detainees to be treated with respect for the inherent dignity of the human person. It also prohibits the imposition of judicial sanctions to compel the accused to testify.[87]

This fundamental right is considered to be inherent in Article 6 of the European Convention, even though it is not expressly set out. The European Court has stated that: "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."[88]

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[84] Human Rights Committee General Comment 13, para 13.

[85] *Cadoret and Bihan v. France*, (221/1987 and 323/1988), 11 April 1991, Report of the HRC, (A/46/40), 1991, at 219; *Barzhig v. France*, (327/1988), 11 April 1991, Report of the HRC, (A/46/40), 1991, at 262.

[86] Article 14(3)(g) of the ICCPR.

[87] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, NP Engel, 1993, at 264.

[88] *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, para. 45.

Investigation of Claims of Torture, Ill-treatment, and Coercion

If an accused alleges during the course of proceedings that he or she has been compelled to make a statement or to confess guilt, the judge should have authority to consider such an allegation at any stage.[89] All allegations that statements have been extracted through torture or other cruel, inhuman or degrading treatment must be promptly and impartially examined by the competent authorities, including judges.[90] If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge at the end of a period of police custody, it is incumbent upon the judge to record the allegation in writing, immediately order a forensic medical examination and take all necessary steps to ensure the allegation is fully investigated.[91] This should also be done in the absence of an express complaint or allegation if the person concerned bears visible signs of physical or mental ill-treatment. The UN Convention against Torture unequivocally provides that evidence obtained through the use of torture is inadmissible save as evidence that torture took place in cases against the person alleged to have committed this crime.

The Right to Silence

The right of an accused to remain silent during police questioning and at trial has been deemed to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify or confess guilt.[92]

In *Murray v UK*, the European Court has stated that drawing adverse inferences against an accused for remaining silent would violate the presumption of innocence and the privilege against self-incrimination, if a conviction was based solely or mainly on the silence of the accused.

However, the European Court held that the right to silence is not absolute. The ECtHR ruled that a court could draw adverse inferences from a failure of an accused to explain his presence at the scene of a crime during police questioning and at trial, without violating the presumption of innocence or the corresponding right not to be compelled to testify. In reaching this conclusion the Court considered

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[89] Human Rights Committee General Comment 13, para. 15.
[90] Articles 13 and 16 of the Convention against Torture.
[91] CPT/Inf/E (2002) 1, p. 14, para. 45.
[92] *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, para. 45.

the following to be decisive: such inferences were drawn only after the prosecution made out a **prima facie** case (i.e. a case which, unless contradicted, is sufficient to prove the matter in question) against the accused; the judge had discretion about whether or not to draw inferences; the only permissible inferences which could be drawn were 'common sense' inferences and the reasons for drawing them were explained in the court's judgment. The case against the accused was also described as 'formidable'. Nevertheless, the ECtHR did find that the failure to grant the accused access to counsel for the first 48 hours of his detention, when he was being questioned by police and had to decide whether to exercize his right of silence, was a violation of Article 6 of the European Convention.[93]

6A.13. The Right to Review of Conviction and Sentence

This right was not contained in the ECHR as originally written, but this lacuna was remedied by Protocol 7 to the Convention. The right is ensured by the ICCPR. The HRC found in a case that a full review must be available: the right to review must not be limited only to formal or legal aspects.[94] The right to a review of the conviction and sentence has other important implications, including the right to receive a reasoned written judgement within a reasonable time.[95]

6A.14. Permissible Derogations

The right to a fair trial is **derogable** under the global and European systems in time of public emergency (see chapter 2 for further description of the notion of derogation). However, any derogation from the right to a fair trial must be temporary, and restrictions must only be to the extent that is absolutely necessary under the prevailing circumstances and subject to regular review. More recent developments in international humanitarian law recognize that the right to a fair trial should be applied even during international armed conflict.[96]

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[93] *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996.

[94] Communication No. 701/1996, CCPR/C/69/D/701/1996, 11th August 2000.

[95] *Henry v. Jamaica*, UN Human Rights Committee, Communication No. 230/1987, 1 November 1991.

[96] Protocol Additional to the Geneva Conventions of 12 August 1949, and relat-

6A.15. The Prohibitions on Retroactivity and Double Jeopardy

No one may be convicted for an act or an omission which was not an offence at the time it was committed under national or international law or according to the general principles of law recognized by the community of nations.[97] This prohibition on retroactive application of criminal laws may not be suspended in any circumstances, including during states of emergency.[98]

The prohibition on retroactive criminal law also bars the imposition of a heavier penalty than was prescribed in law at the time of the offence. Conversely, however, States are obliged to give convicted persons the benefit of reductions in penalties that are enacted into law after the commission of their crimes.

No one may be tried or punished again in the same jurisdiction for a criminal offence, if they have been finally convicted or acquitted of that offence.[99] The prohibition prevents new trials or punishments in the same jurisdiction. The Human Rights Committee has found that subsequent trials for different offences or in different jurisdictions do not violate the prohibition against being tried or punished twice for the same offence (also known as **double jeopardy**.)[100]

National Courts and International Tribunals

People who have already been tried in national courts for acts which constitute serious violations of humanitarian law may be tried again before the International Tribunals for the former Yugoslavia and Rwanda, if: the act for which the person was tried before the national court was characterized as an ordinary crime (as opposed to a serious violation of humanitarian law); or the proceedings in the national court were not independent or impartial; or the proceedings in the national court were designed to shield the accused from international criminal responsibility; or if the case before the national court was not diligently

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ing to the Protection of Victims of International Armed Conflicts (Protocol 1), Article 75.

[97] Article 11(2) of the Universal Declaration, Article 15 of the ICCPR, Article 7 of the European Convention.

[98] Article 4 of the ICCPR, Article 15(2) of the European Convention.

[99] Article 14(7) of the ICCPR, Article 4 of Protocol 7 to the European Convention.

[100] *A.P. v. Italy*, (204/1986), 2 November 1987, 2 Sel. December 67 at 68.

prosecuted. However, people who have been tried for acts constituting serious violations of humanitarian law before either the International Tribunal for the former Yugoslavia or for Rwanda may not be subsequently tried for those acts before a national court.[101]

6A.16. Challenges in Monitoring the Right to a Fair Trial

The right of trial observers to "attend public hearings, proceedings and trials, and to form an opinion on their compliance with national law and applicable international obligations and commitments" is expressly included as a right in the United Nations Declaration on Human Rights Defenders.[102]

The purpose of trial monitoring is to assess the fairness of the proceedings and whether they comply with fair trial standards. Trial monitors should be careful not to interfere in court proceedings. Since court cases are often lengthy, sometimes with proceedings extending over many weeks or months and through several levels of appeals, very few field operations would have the resources needed to attend all sessions or phases of a trial. It is therefore usually necessary to select certain key or representative sessions to monitor.

Trial monitoring has political implications, since attending a trial demonstrates the international community's interest in and concern about an individual case. As such, beyond the value of monitoring to ascertain the fairness of the proceedings, the act of trial monitoring itself is one small, practical step a mission can take to demonstrate its concern over an individual case. One of the most difficult assessments to make during trial monitoring concerns complaints regarding the independence and impartiality of the court. Often, this is an assessment that must be made with limited information and considered in hindsight.

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[101] Article 10 of the ICTY Statute, Article 9 of the ICTR Statute, see also Article 22(2) of the ICC Statute.

[102] A/RES/53/144 adopted by the UN General Assembly in 1998.

6A.17. Monitoring Checklist on the Right to a Fair Trial

Checklist – The Right to a Fair Trial

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification?
   - Has the State declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to a fair trial?
   - Is the independence of the judiciary guaranteed by the constitution or by law?
   - Is the independence of the Bar guaranteed by law?
   - Is the separation of the judicial function from the investigative function guaranteed by law?
2. Monitoring the Right in Practice
   a. Independence Checklist
      - Are there guarantees to enable the court to function independently, i.e., that members of the court cannot be removed at will or based on improper grounds by the executive?
      - Can the court function independently of the executive, base its decisions on its own free opinion concerning facts and legal grounds?
      - Was there any semblance of dependence?
   b. Impartiality Checklist
      - Did the court show signs of bias with regard to the decision it took or in the conduct of the proceedings?
      - Did the court allow itself to be influenced by popular feeling or by any outside pressure whatsoever?
      - Did the court base its opinion on objective arguments on the basis of what was put forward at trial?
   c. Reasonable Time Checklist
      - How much time passed from the charge to the final judgement?
      - Was it a long period?
      - Was the accused at large for part of this period?
      - Was the case a very complex one?
      - Were the legal issues very complex?
      - Was there a large number of co-accused?
      - Were the facts very complex?
      - How did the accused conduct himself/herself?
      - Were they (partly) responsible for the delay?
      - How did the authorities conduct themselves?
      - Did they pursue the case diligently?
   d. Presumption of Innocence Checklist
      - Did the authorities by their statements indicate that the accused was guilty prior to a final judicial finding of guilt?

- Was the accused forced in any way to bear attributes indicating guilt?
- Were measures taken to ensure that the media did not treat the accused as guilty prior to conviction?
- In jury cases, was the jury warned or instructed to have regard only to evidence validly produced in court?
- Was the case conducted in a manner that squarely placed the burden of proving guilt upon the prosecution?
- Did the accused in some way have to prove his or her innocence?
- Was an acquitted person officially penalized in some way that indicated guilt?

e. Time, Facilities, Presence and Witnesses Checklist
- Did the accused and/or his or her counsel have access to all files and documents in the case, and sufficient time and resources to examine them?
- Was information that could have been helpful to the defence made available to it?
- Was information withheld on security or other grounds?
- If so, were any safeguards put in place?
- Which ones?
- Were requests by the defence for information from the state authorities met with cooperation?
- Was the accused present in court?
- Were any court sessions held in the absence of the defence?
- If not, was this due to the conduct of the accused?
- Where the accused was not able to understand the language of the proceedings, were there adequate facilities available for (a) translation of relevant documents and (b) interpretation during the proceedings in court?
- Did the defence have the possibility to question witnesses on the same basis as the prosecution?
- Was witness testimony introduced in ways other than through physical presence of the witness in court?
- If so, did the defence have the chance to question the witness(es) satisfactorily?
- Was the identity of the witness(es) made known to the defence?
- If not, were there safeguards to allow the defence and/or the court to test the credibility of the witnesses? and
- What reliance was placed on the testimony of such witnesses?
- Was the defence able to (i.e. both legally and in practice) call witnesses?
- Were the witnesses protected against intimidation or other threats to the integrity of their testimony?

f. Right to Counsel Checklist
- Has there been a delay in providing or a refusal to provide access to counsel in cases in which complex legal issues were raised?

- Has defence counsel appointed to represent an individual in a criminal proceeding failed to adequately represent him or her?
- Has the state prevented or failed to ensure confidential communication between counsel and the accused?
- Has the state refused to allow counsel to represent an absent accused?
- Are lawyers taking sensitive cases subject to threats, intimidation, harassment or to dubious measures of investigation or prosecution by state authorities?
- Are there guarantees of the independence of lawyers? Is the Bar and/or legal profession subject to political interference that places doubt upon the will or independence of lawyers in acting to defend their clients?

g. Right to Silence and not to be Compelled to Testify against Oneself Checklist
- Was the case of the prosecution based to a significant extent on a confession from the accused?
- Was this confession obtained out of court?
- Was counsel for the defence present when the confession was obtained?
- Did the accused reject the confession during court hearings?
- Did the accused allege ill-treatment or bear any sign of ill-treatment?
- If so, how was this treated by the court?
- Was a prompt and impartial investigation carried out?
- Was the silence of the accused in the face of the allegations against him a significant factor in any judgement against him or her?
- If so, did the accused have the benefit of counsel to warn him/her of the consequences of a failure to provide an explanation?

h. Right to an Appeal Checklist
- Did the accused receive a written judgment within a reasonable time?
- Was the accused adequately informed of the rules and procedures surrounding the filing of an appeal?
- Did the court having authority to review the case have the possibility of ensuring a re-examination of factual issues as well as legal ones?

i. Right to Non-Retroactivity Checklist
- Was the law applied in the case already in force at the time the crime was committed?
- If not, did the accused benefit from the application of the new law, by receiving a lower sentence, better protection of his or her rights in the procedure, etc?

j. Right against Double-Jeopardy Checklist
- Was the accused tried more than once in the same country for the same offence?

6A.18. REFERENCES

American Bar Association, Central European and Eurasian Law Initiative (ABA Ceeli), *Compilation of International Standards on Judicial Reform and Judicial Independence: Judicial Reform Program*, (Washington: ABA Ceeli, 2004), http://www.abanet.org/ceeli/areas/judicial_reform/compilation_jan04.pdf
The ABA also produces a "Judicial Reform Index (JRI)", an analytical tool based on international (principally UN and Council of Europe) standards to assess performance in carrying out judicial reforms. It has assessed a number of countries in Europe and Central Asia according to the JRI. These are available electronically at: http://www.abanet.org/ceeli/publications/jri/home.html

Amnesty International, *Fair Trials Manual*, (1998), www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm
A very comprehensive reference work of all international standards and case law in the area up to 1998.

International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: a Practitioners' Guide* (Geneva, Switzerland: Practitioners' Guide Series No. 1, 2004).
This is broader than the ABA Ceeli JRI reports, as it relates to defence and prosecution as well as the judiciary. It contains a good discussion of case law on the issues presented.

Lawyers Committee for Human Rights, *What is a fair trial? A Basic Guide to Legal Standards and Practise* (USA: Lawyers Committee for Human Rights, March 2000), http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf
This guide is intended mainly as a practical guide for monitors, rather than an exhaustive examination of standards and their interpretation.

Mole, N. & Catharina Harby, *Right to a Fair Trial: a guide to the implementation of Article 6 of the European Convention on Human Rights* (Germany: Council of Europe, 2001), http://www.humanrights.coe.int/aware/GB/publi/publiresla.asp?F=1
This handbook is updated to 2001. It is available in several languages at the above internet address. It gives a more detailed explanation of the component rights of the fair trial guarantee than the present handbook can do. It is explained mostly in non-technical language.

Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 2005).
Probably the most comprehensive guide to the interpretation of the ICCPR by a member of the UN Human Rights Committee.

Office of the United Nations High Commissioner for Human Rights, *UN Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers: Annual Reports*, http://www.ohchr.org/english/issues/judiciary/annual.htm

The reports of the special rapporteur give a very good picture of the real state of affairs in many countries and practical recommendations for improvements. The reports of the Special Rapporteur are available on the website of the UN Human Rights Commission (http://www.ohchr.org/english/).

Office of the United Nations High Commissioner for Human Rights, *UN Working Group on Arbitrary Detention: Annual Reports*, http://www.ohchr.org/english/issues/detention/annual.htm

The reports of the working group, presented to the UN Commission on Human Rights, give an insight into the application of the concept of 'arbitrariness' and into concrete problems and current issues and cases.

CHAPTER 6 – PART B

RIGHT TO AN EFFECTIVE REMEDY

The right to an effective remedy is established in Article 13 of the European Convention on Human Rights (ECHR) and Article 2(3) of the International Convention on Civil and Political Rights (ICCPR), as well as in a number of OSCE documents.[1]

The Special Rapporteur on the Question of Impunity has stated that, "any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator. (…) All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings (…). In exercising this right they shall be afforded protection against intimidation and reprisals. Exercise of the right to reparation includes access to the applicable international procedures."[2]

6B.1. DEFINITION

Remedy is a retrospective notion in that it repairs damage that has already occurred. It is also individual, that is, the violation and damage relate to a particular person whose personal rights have been violated. Remedies for violations of rights, which entail recourse to an independent authority competent to ensure respect for those rights, exist within most if not all legal systems. But the types of recourse may vary from country to country and from context to context.

In order for a remedy to be seen as effective it has to have authority to repair a problem. For example, if a court can find a violation of a right but cannot force the State to take action to repair the problem or to pay compensation or damages to the individual injured, recourse to that court cannot be considered an effective remedy.

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[1] See Vienna (1989), Copenhagen (1990) and Moscow (1991).
[2] UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

The right to an effective remedy has been defined in OSCE commitments as including the following:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a **fair and public hearing** within reasonable time, before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially **informed** of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies;[3]
- the right of the individual to seek and receive adequate **legal assistance**;
- the right of the individual to seek and receive **assistance from others** in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms;
- the right of individuals or groups acting on their behalf to **communicate with international bodies** with competence to receive and consider information concerning allegations of human rights abuses.[4]

The OSCE commitments also underline the importance of an effective remedy in the context of **administrative decisions**:

- everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;
- administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available.[5]

Types of Remedies

The following types of remedy and reparation have been identified in the Basic Principles and Guidelines on the Right to a Remedy and

[3] Vienna (1989) para. 13(9).
[4] Copenhagen (1990) para. 11.
[5] Copenhagen (1990) para. 5(10) and 5(11).

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[6] They are of course particularly applicable to violations of this kind.

- **Restitution** should, whenever possible, restore the victim to the original situation before the violation occurred. Restitution includes: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- **Compensation** should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
  1. Physical or mental harm;
  2. Lost opportunities, including employment, education and social benefits;
  3. Material damages and loss of earnings, including loss of earning potential.
  4. Moral damage;
  5. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- **Rehabilitation** should include medical and psychological care as well as legal and social services.
- **Satisfaction** should include, where applicable, any or all of the following:
  1. Effective measures aimed at the cessation of continuing violations;
  2. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
  3. The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed

[6] UN Doc. E/CN.4/2000/62, 18 January 2000.

wish of the victims, or the cultural practices of the families and communities;

4. An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
5. Public apology, including acknowledgement of the facts and acceptance of responsibility;
6. Judicial and administrative sanctions against persons liable for the violations;
7. Commemorations and tributes to the victims;
8. Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

– **Guarantees of non repetition** should include, where applicable, any or all of the following measures, which will also contribute to prevention:

1. Ensuring effective civilian control of military and security forces;
2. Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
3. Strengthening the independence of the judiciary;
4. Protecting persons in the legal, medical and health care professions, the media and other related professions, and human rights defenders;
5. Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
6. Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
7. Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
8. Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Concepts that are related to the idea of a remedy are those of accountability and impunity. The right to a remedy is implicit in the idea of accountability. **Accountability** applies both to individuals and to States. Individual accountability finds its legal expression in the form of criminal and civil liability for crimes and civil wrongs, which may also constitute human rights violations. The opposite of such accountability is the situation of **impunity**, where certain persons (and/or certain kinds of crime) are not investigated and/or punished for their crimes. The obstacles to accountability that cause impunity may be either legal or institutional. Common examples of impunity of government officials arise where police or prison officials abuse or even torture detainees and are never disciplined or prosecuted for their conduct, or where military personnel conduct combat operations in a manner that violates human rights and international humanitarian law without punishment.

6B.2. Legally Binding Standards

The European Convention on Human Rights provides that everyone whose rights and freedoms under the Convention are violated shall have an effective remedy before a national authority even if the violation has been committed by persons acting in an official capacity.[7] The ICCPR offers the same guarantee and, while remedies may initially be administrative, legislative or judicial, the Covenant obliges States Parties to develop the possibilities of judicial remedies, making it clear that these provide the firmest guarantees.[8]

6B.3. Current Interpretation (Key Case Law)

The Requirement of Effectiveness

In the case of *Aydin v. Turkey*,[9] the European Court of Human Rights (ECtHR) held that, "Article 13 guarantees the availability at the nation-

[7] Article 13.
[8] Article 2(3).
[9] *Aydin v. Turkey* (Judgment of 25 September 1997, Reports of Judgments and Decisions 1997-VI, para. 103).

al level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order."

The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. States are afforded some discretion as to the manner in which they meet these obligations.

The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, so that a violation of the right to life, for example, may require a higher degree of independence on the part of the relevant authority than violations of some other rights. In all cases, however, the remedy required by Article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.

A judicial authority is not necessarily required. However, the powers and the guarantees which an authority affords are "relevant in determining whether the remedy before it is effective".[10] This means that if the authority competent to determine the question is not a judicial authority, the Convention requires an examination of whether the authority enjoys the status powers necessary to secure a remedy. One can pose such questions as whether it can obtain evidence necessary to arrive at a fair determination, whether it can prescribe, or merely recommend remedial measures, whether it offers reliable guarantees of impartiality and a hearing of both parties.

Although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.[11] It may be the case, for example, that a court challenge to a government action will be limited to the formal legality of the action, whereas a challenge to the substantive grounds for the action can be heard and decided by another body. The sum of the legal possibilities offered may be sufficient to satisfy Article 13.

Neither Article 13 nor the Convention in general lays down any given manner for ensuring effective implementation within national law, for example adoption of the Convention by statute (cf. chapter 2,

[10] *Silver and Others v. the United Kingdom*, judgement of 25 March 1983, Series A no 61, para. 110.

[11] Ibid.

section *Monist and Dualist Principles*).[12] Thus the choice of how to ensure the rights guaranteed by the Convention is a matter for national legal systems, which differ quite considerably from one another.

The Question of When the Right Arises

The first question relates to when the obligation to make an effective remedy arises. The difficulty is that while theoretically the right to a remedy arises only when there has been a violation, in practice the remedy is necessary precisely to determine whether such a violation has taken place. The ECtHR has thus ruled that if the claim of violation is 'arguable', a remedy both to have it decided and, if appropriate, to obtain redress is required. Thus in *Klass and Others*[13] the Court held that, "[w]here an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress."

In *Leander v. Sweden*[14] the Court accepted that the applicant had had an 'arguable claim' even though no violation of another article had been made out. In *Boyle and Ryce v. UK*[15] the Court, while confirming this line of reasoning, placed a limitation on its scope. The Court said that Article 13 cannot require a remedy simply because someone alleges a violation "no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention." Thus, national courts (applying national law) have the same possibility as the European Court itself to dismiss claims that are "manifestly ill-founded" or an abuse of the right of application under Article 35 of the Convention.

The Meaning of Effectiveness: Four Elements

Effectiveness in relation to an effective remedy has, according to the Court, four elements and must be assessed in relation to the alleged violation of the substantive article. As stated above, the assessment of

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[12] Ibid., p. 42, para. 113.

[13] *Klass and Others v. FRG*, judgement of 6 September 1978, Series A no. 28.

[14] Judgement of 1987, Series A No. 116, para. 79.

[15] Judgement of 27 April 1988, Series A no. 131, para. 51. See also: Klass case, supra nota 1, para. 64.

whether an effective remedy was available must take into account the totality of available procedures in national law.

The first element that is required is **institutional effectiveness**. By this is meant that

a decision-making body to secure an effective remedy must be 'sufficiently independent'[16] of the authority at fault for the violation.

The second element, **substantive effectiveness**, requires that the applicant has possibility to raise the substance of the right at issue before the national authority before which he/she is seeking the remedy. It is important to note that Article 13 does not require the adoption of the Convention in the domestic legal system (cf. chapter 2, section *Monist and Dualist Principles*). If a State chooses to do so, then precise Convention arguments may be raised directly before national courts. If that is not the case, then the minimum condition of substantive effectiveness is a possibility to examine the substance of the Convention argument.

The third element, **remedial effectiveness**, requires that the national authority be capable of finding the violation of the right in question and granting the remedy. Consequently, a procedure that only provides for the issuing of a non-binding recommendation does not in itself satisfy the requirement.

The fourth element, **material effectiveness**, requires that an effective remedy is not only available in the national legal system, but also that the applicant be able to take effective advantage of it. The principle adopted by the Court in the *Airey* case,[17] which applies here, is that rights in the Convention must be effective and not theoretical. Naturally, the effectiveness of a remedy for the purposes of Article 13 does not mean that there must be a favourable outcome for the applicant, but simply that a fair and effective procedure is available to determine the claim.[18]

Exhaustion of Domestic Remedies

Article 35(1) of the European Convention provides that the Court may only deal with a matter after all domestic remedies have been

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[16] Ibid., para 116.

[17] *Airey v. Ireland*, judgment of 1979, Series A no. 32.

[18] *Smith and Grady v. UK*, judgment of 27 September 1999, Reports 1999-VI, para. 135; also *Vilvarajah and Others* (judgment of 30 October 1991), Series A no. 215, para. 122.

exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. This rule of exhaustion of domestic remedies obliges applicants to allow the State the opportunity to redress the violation of Convention rights through their national legal systems before seeking protection from international bodies. This rule is based on the assumption that there are available effective remedies in the national legal system, as required by Article 13 of the Convention.

Remedies referred to in Article 35 must be "available and sufficient to afford redress in respect of the breaches alleged", and the existence thereof "must be sufficiently certain not only in theory but in practice".[19] If these requirements are not met, then the remedies in question will lack the required accessibility and effectiveness, and there will therefore be "no obligation to have recourse to remedies which are inadequate or ineffective".[20] Nevertheless", mere doubts as to the prospects of the success of national proceedings do not absolve the applicant from the obligation to exhaust domestic remedies."[21]

Also, this rule does not apply if "according to the generally recognized rules of international law there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal".[22] These rules relate again to the effectiveness of the remedies in question. In addition to this, if an applicant can show that there is an administrative practice whereby acts amounting to or alleged to amount to a violation repeatedly take place with the tolerance of the State authorities that make proceedings futile or ineffective, it will not be necessary to exhaust domestic remedies.[23]

Some examples of the lack of an effective remedy can be seen in the Court's case law on the right to life. An official investigation into a death in custody for instance, must be capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure. Cases relating to the destruction of homes due to the conflict in South East Turkey were declared admissible by the Court despite

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[19] *Akdivar and Others v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, para. 66.

[20] Ibid., para. 67.

[21] Ibid.

[22] Supra nota 11, para. 67.

[23] Ibid.

the existence of civil and administrative remedies pointed out by the Turkish Government. In ruling that these remedies were insufficient, the Court took note of several factors, including the vulnerable situation of the applicants after their houses were destroyed, the delays on the part of the authorities in taking statements from the claimants, and the risk of reprisals. In relation to remedies in the administrative courts, the ECtHR pointed to the lack of examples of compensation being awarded or prosecutions brought, despite the extent of the problem of village destruction. The Court also noted the general reluctance of the authorities to admit that this type of illicit behaviour by members of the security forces had occurred, and the lack of any impartial investigation, any offer to cooperate with a view to obtaining evidence or any *ex gratia* payments (i.e. not legally required) made by the authorities to the applicants.[24]

This rule in Article 26 of the Convention requiring exhaustion of domestic remedies is not an absolute one or capable of being applied automatically. Therefore, in reviewing whether the domestic remedies have been exhausted, the circumstances of the particular case must be considered. In the *Akdivar* case, the Court stated that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the States Parties have agreed to set up. Accordingly, it has recognized that Article 26 must be applied with some degree of flexibility and without excessive formalism.[25] In legal proceedings it is easy to use technicalities. The Court will look at whether the applicant had a real possibility to argue his case and achieve satisfaction, rather than simply taking a technical approach.

6B.4. Politically Binding Commitments (OSCE Commitments)

In the so called Vienna Document of 1989 the States Parties of the OSCE committed themselves to make known the regulations and laws on human rights, in order to facilitate their exercise, i.e. to allow for the free exercise of the rights, so that it does not entail discrimination of any

[24] *Akdivar v. Turkey*, European Court of Human Rights, Strasbourg (Judgment of 16 September 1996).
[25] Ibid., para. 69.

kind. Likewise, information as to available legislative, administrative and judicial remedies should be disseminated to the public.

The States Parties should moreover ensure fair trial rights to victims of violations, such as those of hearing within a reasonable time by and independent and impartial tribunal, including the right to present legal arguments and to be represented by legal council of one's choice. Also, rights to appeal should be ensured to victims, including the right to be promptly and officially informed of the decision taken on any appeal, and the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.[26]

In the Copenhagen Document, the States Parties went further, affirming the right of the individual to seek and receive adequate legal assistance, to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms. In addition, the right of individuals or groups acting on their behalf to communicate with international bodies with competence to receive and consider information concerning allegations of human rights abuses was guaranteed.[27]

6B.5. Other Sources (Soft Law)

The 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[28] give excellent guidance on the scope of the right to a remedy in case of serious violations of international human rights and humanitarian law.

[26] Concluding Document of the Vienna Meeting 1989, 13(4)–13(9).

[27] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, para. 11(1)–11(3).

[28] Adopted by resolution of the UN General Assembly, 10 November 2005.

6B.6. Challenges in Monitoring the Right to an Effective Remedy

Post-War Situations and Effective Remedies

The right of individuals who have suffered human rights violations to an effective remedy is particularly important in societies experiencing conflicts and post-conflict situations.

Field officers should bear in mind, when working in post-conflict areas, that in the aftermath of an armed conflict in which a massive number of claims arise demanding justice for continuing violations generated by the conflict itself (such as displacement and property loss), effective claims mechanisms to resolve such claims can be crucial for building peace and stability.

Unfortunately, many post-conflict situations are characterized by the weakness or even non-existence of effective judicial or administrative systems capable of handling large numbers of individual claims according to international standards. A key objective of the international community in such situations is to bring persistent patterns of violations to an end. In such circumstances, individual complaints handling needs to be supplemented by legislative or other means to redress wrongs committed. Without such systematic action, the effects of an individual complaints-based system can be uneven and skewed. Those with resources and access to the system may receive some satisfaction, while others, often the people who experience the most serious consequences of the violations, are not easily able to file complaints or to pursue them to a conclusion. Past discrimination, poverty and poor education may have often deprived them of the skills needed to use the complaint process.

For example, public reports and policy inquiries and political intervention can be useful in identifying root causes and making recommendations for change, as well as bringing to bear the political impetus necessary to ensure their adoption.

6B.7. Monitoring Checklist on the Right to an Effective Remedy

Checklist – The Right to an Effective Remedy

1. Legislation and Regulation Check
   - Has the State declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to a remedy?
   - Is the independence of the judiciary guaranteed by the constitution or by law?
   - Have relevant international human rights instruments been incorporated into national law?
   - If so, do the courts refer to international obligations in their decision making?

2. Monitoring the Right in Practice
   - Do remedies for violations of human rights include the possibility of restitution, compensation, rehabilitation and guarantees of non-repetition?
   - Are there identifiable remedies available in the instances in which violations of human rights are typically alleged in the country?
   - Does the authority, having competence to examine the claim, have the power to (a) determine whether there has been a violation and (b) make a legally enforceable decision to redress the situation?
   - Are the decisions of the competent authority usually respected and promptly carried out?
   - See also the questions in the checklist on fair trial in relation to the question of impartiality.

6B.8. Instruments on the Right to a Fair Trial and the Right to an Effective Remedy

Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements[29]
Article 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	UN Human Rights Committee, General Comment no. 13

[29] The Human Rights Committee's conclusions and recommendations on country reports and decisions on individual cases give the best available picture of the thinking of the Human Rights Committee on the right to a fair trial and other rights protected under the ICCPR. Unlike the CoE HUDOC website, it is unfortunately not currently possible to carry out case searches according to articles of the Covenant. The cases of the HRC can, however, to some extent be researched by subject and key word on the website of the Netherlands Institute for Human Rights.

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.

Article 2(3)	Guarantees the right to a remedy for violations of the rights protected in the covenant.	General comment # 31 of the Human Rights Committee
Article 26	Guarantees the right to equal protection of the law, without discrimination.	General comment # 18 of Human Rights Committee on non-discrimination
Article 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 the 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.	
Article 16	Everyone shall have the right to recognition everywhere as a person before the law.	

Convention on the Rights of the Child, 1989

Article 40	This article aims firstly to ensure basic fair trial rights to children, and secondly to promote special measures in the field of juvenile justice that are particularly adapted to the welfare of children.	

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 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. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 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. The right is also subject to the non-discrimination clause of Article 14 of the ECHR.	Case law as developed through the European Court of Human Rights

Article 7	**No Punishment Without Law**
	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 recognized by civilised nations.

ECHR Protocol No. 7

Article 2	**Right of Appeal in Criminal Matters**
	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.
	2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal, or was convicted following an appeal against acquittal.
Article 3	**Compensation for Wrongful Conviction**
	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 non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4	**Right not to be tried or punished twice**
	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.

CSCE/OSCE Instruments

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

Section	Critical Substantive Points
Paragraph 5	5) [The participating States] solemnly declare that among those elements of justice, which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings, are the following:
	(…)
	5(14)—the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;
	5(16)—in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

	5(17)—any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given free when the interests of justice so require; 5(18)—no one will be charged with, tried for or convicted of any criminal offence, unless the offence is provided for by a law which defines the elements of the offence with clarity and precision; 5(19)—everyone will be presumed innocent until proved guilty according to law.
Paragraph 12	(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments. The commitments also state that trials may be held in camera (behind closed doors) but only in circumstances prescribed by law and consistent with obligations under international law and international commitments.

Other International Instruments

Instrument	Section	Critical Substantive Points
Universal Declaration of Human Rights (UDHR)	Articles 10 and 11	The strength of this Declaration of the UN General Assembly is that it is so universally accepted that many of its provisions are considered to have become customary international law. The weakness is that there is no implementation mechanism for enforcement.
Basic Principles on the Use of Force and Firearms by Law Enforcement Officials	Entirety	This set of principles sets limits for the use for force and firearms in policing. It is of importance as an interpretive source in determining the legitimacy of the use of force, including in relation to interrogation and investigation. It may thus be of relevance in determining whether evidence should be excluded, because it is obtained through use of torture.
UN Basic Principles on the Independence of the Judiciary December 1985	Entirety, but see particularly Principle 2 and Principle 8	Decisions about facts must be made solely on the evidence, and the facts must be applied to the applicable laws. There must be no interference, restriction, inducements, pressure, or threats from any quarter. Judges should conduct themselves in a manner which preserves the impartiality and independence of the judiciary, as well as the dignity of their office.
UN Guidelines on the Role of Prosecutors	See especially Articles 10–16, though whole document is relevant	Articles 10–16 relate to the role of prosecutors in criminal justice.
UN Standard Minimum Rules for the Treatment of Prisoners	See esp. rules 84–93	These rules relate to untried persons
UN Basic Principles on the Role of Lawyers	See esp. principles 1 and 5–8	These guarantees relate to the role of the lawyer in criminal justice

UN Body of Principles for the Treatment of all Persons under any form of Detention or Imprisonment	See esp. principles 8–27	These principles relate particularly to ensuring that the detainee enjoys rights to a defence (especially at the pre-trial stage).
UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	Article 6(b)	'The responsiveness of judicial and administrative process to the needs of the victims should be facilitated by … allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.' In addition the Declaration emphasises that victims should be given information and assistance throughout the legal process, measures should be taken to minimize inconvenience, protect their safety and avoid unnecessary delay.
Declaration on the Rights and Responsibilities of Individuals, Groups or Organisations to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998)	See esp. Article 9	This article is relevant to trial monitoring activities.
UN 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	Entirety	As the name implies, these principles and guidelines are especially applicable to the question of remedies and reparations, where gross violations are concerned. Adopted in 2005.
European Prison Rules	See esp. rules 91–98	These rules relate to untried prisoners

Recommendation No. R. (94) 12 on the Independence, Efficiency and role of Judges	See esp. principles 1, 2 and 5	These principles are particularly important in regard to the guarantees of independence, impartiality and proper conduct in ensuring a fair trial
Recommendation (2000) 21 on the freedom of exercise of the profession of lawyer.	See esp. principles 1, 4 and 5	
Recommendation (2000) 19 on The Role Of Public Prosecution In The Criminal Justice System	Entirety	
Rec. R (99) 19 concerning mediation in penal matters	Entirety	
Rec. R (97) 13 concerning intimidation of witnesses	Entirety	
Rec. R (92) 17 concerning consistency in sentencing	Entirety	
Rec. R (85) 11 on the position of the victim	Entirety	
Rec. R (80) 11 concerning custody pending trial	Entirety	
Charter of the Fundamental Rights of the European Union (2000)	See esp. chapter VI	Though not yet a legally binding document, the Charter does innovate in some ways, including for example in declaring that penalties should not be disproportionate
The Bangalore Principles of Judicial Conduct, 2002	Entirety	The Bangalore principles go in some respects further than the UN and European standards.

6B.9. References

Gottehrer, Dean M., *Ombudsman and Human Rights Protection Institutions in OSCE Participating States* (Warsaw: OSCE/ODIHR, 1998).
This background paper considers the minimum standards to guarantee the effective functioning of an Ombudsman's Office, potential obstacles to its effective functioning, and addresses recommendations to the OSCE and others, including international organizations working in this domain. The paper is available at: http://www.osce.org/odihr/documents/background/ombu-98.pdf

The European Ombudsman, *European Code of Good Administrative Behaviour*. (Luxembourg: Office for Official Publications of the European Communities, 2005).
The right to a remedy is closely linked to the theme of administrative justice. The above document is useful as it contains elements essential to the right to a remedy. It is developed at the behest of the European Ombudsman and is available in several languages at: http://www.euro-ombudsman.eu.int/code/en/default.htm

United Nations, *The Report of the UN Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights*. UN Doc. E/CN.4/2000/62, 18 January 2000.
This is the report that led to the adoption in 2005 of the Basic Principles. It thus provides background and insight into the thinking that led to their elaboration.

United Nations, *UN Manual on International Human Rights Law and the Role of the Legal Professions*, Chapter 15, http://www.unhchr.ch/pdf/CHAPTER_15.pdf
A useful source on the rights of victims of crime and human rights violations.

Electronic Resources

http://www.redress.org
The website of the UK based organization Redress contains a lot of useful information on remedies for torture and other serious violations of human rights.

CHAPTER 7

FREEDOM OF EXPRESSION

Freedom of expression is a cornerstone of any democracy. The right to freely receive, share, and disseminate information and opinions, is a prerequisite for public debates and critical scrutiny of the various actors in society. The right is closely linked to the creation, development, and work of political parties, trade unions, the media and others wishing to influence the public. It goes hand in hand with other rights, in particular the rights to freedom of opinion, association, assembly, religion, and the obligation of States to hold free elections and to prevent propaganda or advocacy for war and national, religious, or racial hatred. Consequently, national courts as well as international systems for protection guard it jealously. Its application will often spark controversy, especially when addressing the behaviour of Governments or public figures.

7.1. Definitions

Every person or group of persons has the right to freedom of expression. The term 'person' also includes the media and companies. The right to freedom of expression is applicable to every person regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

An 'expression' covers all spoken or non-spoken statements, be they oral, in writing or in print, in artistic form, or through any other media of choice. The 'expression' is any form of subjective ideas and opinions capable of transmission to others, of news and information, of commercial expression and advertisement, of works of art, etc. The protection is not confined to means of political or artistic expression.

Furthermore, the freedom is not limited to information or ideas that are regarded as inoffensive, but also to those that may offend, shock, or disturb the State, or any segment of the population if it is of public interest.

Finally, the freedom includes a right to seek, receive, and impart ideas and information regardless of frontiers, and an obligation upon the State to ensure access to information held by the State

7.2. Legally Binding Standards

The right to freedom of expression is protected in several universal and regional human rights conventions as well as national constitutions and ordinary legislation.

Box 7.1. Key Provisions on Freedom of Expression

The International Covenant of Civil and Political Rights (ICCPR) Articles19(1) and 19(2) state: "Everyone shall have the right to hold opinions without interference;

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."

The European Convention on Human Rights (ECHR) Article 10(1) declares that "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."

ICCPR explicitly includes the right to hold an opinion without interference, making any interference with this aspect of the right unacceptable. It is the expression of one's opinion that may be restricted.

The protection of the right to freedom of expression contained in the general human rights conventions is complemented by a number of special conventions. For instance, the UN Convention on the Rights of the Child; UN Convention on the Elimination of All Forms of Racial Discrimination; UN Convention on Elimination of all Discrimination against Women; UN Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters; European Convention on Transfrontier Television; European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; or European Framework Convention for the Protection of National Minorities (cf. the last section of this Chapter, Concerning Instruments regarding the Rights to Freedom of Opinion and Expression).

At the national level, the Constitution often offers the primary source of protection complemented by Human Rights Acts, Freedom of Speech Acts, Media and Broadcasting Acts, Access to Information Acts, Administrations of Justice Acts, and Penal Codes.

7.3. International Recommendations

In addition to the international legal instruments and the national legislation, a variety of universal or regional recommendations, declarations, and standards elaborate further on this right, and various monitoring bodies have been established.

The OSCE is active in the field of freedom of expression through the Representative for the Freedom of the Media (for further information, see http://www.osce.org/fom). The Representative was established by Decision No. 193, Mandate of the OSCE, Representation on Freedom of the Media

7.4. Permissible Limitations

It is generally recognized that the right to freedom of expression entails duties and responsibilities. Consequently, the right to freedom of expression may be restricted, if such limitations are provided by law and are necessary in a democratic society.

Box 7.2. A Three-Step Examination of the Limitation of the Freedom of Opinion and Expression

To be justified and thus legitimate:

- The limitation must be prescribed by law;
- The limitation must pursue an internationally recognized legitimate aim;
- The limitation must be necessary in a democratic society.

The ICCPR accepts the following reasons for restrictions:

- Out of respect for the rights or reputations of others;
- For the protection of national security or of public order, or of public health or morals.

Furthermore, ICCPR does not distinguish between interference by a private or public person. ECHR, on the other hand, prohibits interference by public authorities only and for the following reasons:

- 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;
– For maintaining the authority and impartiality of the judiciary.

Whether the different wording has any effect in practice is doubtful. The wording of ICCPR is broad and probably covers the same situations as in the ECHR.

Article 16 of ECHR mentions that States may impose restrictions on the political activities of aliens, regardless of the right to free expression in Article 10. There is no similar provision in ICCPR. Consequently, ICCPR offers a better protection of aliens than ECHR, if the State has not made any reservations to the freedom of expression provisions in Article 19 of ICCPR.

7.5. Derogation of the Right to Freedom of Expression

ICCPR as well as ECHR permits derogation of the right to freedom of expression.[1]

Derogation is permissible during a public emergency that threatens the life of the nation[2] or in wartime.[3] Derogations shall be applied only to the "extent strictly required by the exigencies of the situation"[4] and only for a limited period. ICCPR Article 4(1) emphasises that the derogation cannot be permissible, if it involves discrimination on the ground of sex, language, religion, or social origin.

7.6. Current Interpretation (Key Case Law)

The scope of the right to freedom of expression and contents of permissible limitations is defined through numerous international and national decisions.

[1] ICCPR Article 4, and ECHR Article 15.
[2] ICCPR Article 4 (2) and ECHR Article 15 (1). ICCPR also requires that the state of emergency shall have been officially proclaimed.
[3] ECHR Article 15 (1).
[4] ICCPR Article 4(1); ECHR Article 15 (1).

What is an Expression?

The term 'expression' is broad and multifaceted. The ICCPR Article 19 includes a list of examples of expressions such as oral, in writing or in print, in artistic form, or through any other chosen media. Consequently, the term expression covers almost all thinkable forms of utterances, including the non-spoken statement, regardless of whether it is commercial or non-commercial.

The international instruments have not attempted to define the protected contents of the expression. The UN Committee under ICCPR held that Article 19 "must be interpreted as encompassing every form of subjective ideas and opinion (…) of news and information, of commercial expression and advertisement, of works of arts, etc.; it should not be confined to means of political or artistic expression".[5]

Furthermore, the European Court of Human Rights (ECtHR) has stated that freedom of expression is not limited to information or ideas that are "favourably received or regarded as inoffensive (…) but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society (…)".[6] And the ECtHR further held that "the limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism".[7] Likewise, the Government does not enjoy immunity from criticism, and the limits of permissible criticism are wider with regard to Governments than private individuals or even a politician.[8] The African Commission for Human and People's Rights and the Inter-American Commission for Human Rights have adopted similar approaches.[9]

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[5] *Ballantyne and Elisabeth Davidson and Gordon McIntyre v. Canada*, Case Nos. 359 and 385/1989.

[6] EctHR *Handyside v. The United Kingdom*, Judgment of 7 December 1976, para. 49.

[7] *Oberschliek v. Austria*, Judgment of 23 May 1991.

[8] ECtHR *Castells v. Spain*, Judgment of 23 April 1992.

[9] Cf. IAComHR 1994 report on "the compatibility of "desacato" laws with the American Convention on Human Rights and the AfrcomHPR case of the *Media Rights Agenda and Constitutional Rights Project v. Nigeria* 105/93, 128/94, 130/94 and 152/96.

Facts or Value Judgments in Matters of Public Interest

If a statement concerns facts, the author shall be able to verify his/her statement. If the author had good reasons to believe the factual circumstances, the authorities have to take this *good faith* into consideration when examining the matter.[10] On the other hand, if the statement is a value judgment—an opinion—the State cannot require that such statement shall be verified.[11] Such statements do not concern facts and are consequently impossible to prove. If the State requires verification of a value judgement, this in itself constitutes an infringement of the freedom of expression.[12] Yet the ECtHR has in a number of cases stated that even where a statement amounts to a value judgment, the proportionality of an interference with the statement may depend on whether there exists a sufficient factual basis for the impugned statement. If that is not the case, the interference will be justifiable in a democratic society.[13]

A Right to Seek, Receive and Impart Ideas and Information

The freedom of expression goes beyond the right to express oneself. The freedom also includes a right to seek, receive, and impart ideas and information. The right to seek information also includes a right to have access to information held by the State.[14]

The right to receive and impart ideas and information is not limited to a specific country, but is a right that transcends frontiers. In the case of *Open Door and Dublin Women v. Ireland*, the ECtHR found that an injunction imposed upon the applicants to restrain them from providing certain information to Irish women on abortion facilities outside the jurisdiction of Ireland was an interference with Article 10

[10] See *Bladet Tromsø and Stensaas vs. Norway*, ECtHR Judgment of 9 July 1998, para. 66.

[11] See ECtHR *Lingens vs. Austria*, Judgment of 8 July 1986 and *Ukrainian Media Group v. Ukraine*, Judgement of 23 March 2005.

[12] See ECtHR *Oberschlick v. Austria*, Judgment of 23 May 1991.

[13] See e.g ECtHR *Busuioc v. Moldova*, Judgment of 21 December 2004, para. 61 and 74. The court found a violation because there was a reasonable factual basis for the opinion expressed.

[14] See for instance the European Union Constitution's Charter on Fundamental Rights, Title V, Article II 102, the United Nations Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters and the Recommendation No. R (2002) 2 on access to official documents adopted by the CoE Committee of Ministers on 21 February 2002.

of ECHR. The Inter-American Court for Human Rights has observed that an unlawful restriction of an individual's freedom of expression is not only a violation of that individual's rights, but also of the right of all others to receive information and ideas.[15]

A general right to be informed by public authorities has so far not been recognized. In the case of *Gaskin v. UK*, the applicant wanted access to his file with the local child care authorities including information about a third party, i.e. a person that had been involved in his case. The ECtHR held that Article 10 prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. However, the public authorities, depending on the circumstances of the case, may decide not to disclose the information.[16] Article 10 does not embody a general obligation on the State to impart information.[17] The right to access to information about oneself held by public authorities may be examined in the light of the right to privacy of the person seeking said access to information.

In the case of ***Guerra and Others v. Italy***, the applicant claimed that the public authorities had failed "to provide local population with information about risk factor and how to proceed in the event of an accident at a nearby chemical factory." Again the ECtHR held that Article 10, under circumstances such as those of the present case, cannot be construed as imposing positive obligations on a State to collect and disseminate information of its own motion.[18]

In the case of *Robert W. Gauthier v. Canada*,[19] the HRC discussed whether a restriction of the author's access to the press facilities in Parliament fell within the scope of Article 19 of the Covenant. The HRC held that in "view of the importance of access to information about the democratic process, however, the Committee (…) is of the opinion that the author's exclusion constitutes a restriction of (…) Article 19 to have access to information." The HRC does not only emphasize the importance of access to information on the conduct of parliamentary affairs, but also of the role of the media. Furthermore, the HRC states that "citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opin-

[15] OC-5/85 on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.

[16] Judgment of 7 July 1989.

[17] See also *Leander v. Sweden*, Judgment 26 March 1987.

[18] Judgment of 19 February 1998.

[19] HRC Comm. No. 633/1995.

ions about the activities of elected bodies and their members". The HRC consequently found a violation of Article 19, because the interference was unnecessary.

It is also interesting to observe that the Canadian Government in that case "had restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organization, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery." The HRC held that the State also has an obligation to protect the author against actions of a private organization that could violate his/her right to access to information.

A Right of Every Person

The right to freedom of expression is applicable to every person regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Prisoners,[20] foreign citizens,[21] or public servants[22] have, as a point a departure, the same right as anyone else.

The Role of the Media

The role of the media is of particular importance in relation to the freedom of expression. Any restriction on the work of the media should be examined carefully and require a very good reason. The media is a public watchdog.[23] The role of the media has also been emphasized in other regional systems for protection. The Inter-American Court for Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the

[20] See e.g. UN Standard Minimum Rules for the Treatment of Prisoners, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or ECtHR *Herczefagalvy v. Austria*, Judgment of 24 September 1992.

[21] See HRC: General Comment No. 15: The position of aliens under the Covenant.

[22] See ECtHR *Vogt v. Germany*, Judgment of 26 September 1995; or *Ahmed and others v. United Kingdom*, Judgment of 2 September 1998 and HRC Communication No. 422/1990 *Adimayo M. Aduayom and others v. Togo*.

[23] Cf. ECtHR *Jersild v. Denmark*, Judgment 23 September 1993, para. 31.

barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists".[24] Although decisions from other regional systems are not binding outside that particular region, they may serve as an inspiration for other systems for protection.

In its General Comment No. 25, the HRC highlighted that: "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."

Consequently, there has been an increasing focus not only on the role of the media, but also on access to the media, positive measures necessary to counterbalance the increasing concentration in the media sector, transparency as regards the control of media enterprises, and the protection as well the role of journalists.[25]

The existence of a variety of independent and autonomous means of communication to reflect the diversity of ideas and opinions is of paramount importance for democratic societies.[26] The ECtHR held in the case of *Informationsverein Lentia and Others v. Austria*, Judgement of 24 November 1993, para. 38: "The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (…) Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor."

Nevertheless, regardless that the media is a public watchdog and bound to initiate a public debate with harsh criticism and exposure of public figures, Government and State is to be tolerated, and the media are still required to be fair and not provoke hatred. The ECtHR

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[24] Cf. Advisory Opinion OC-5/85 on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, para. 31.

[25] See also HRC GenCom 10/19 para. 2–3.

[26] See also Council of Europe Declaration on Freedom of Expression and Information of 29 April 1982; Recommendation Rec(2000)23 adopted by the Committee of Ministers on the Independence and functions of regulatory authorities for the broadcasting sector, and the 7th Ministerial Conference on Mass Media Policy—Kyev 10–11 March 2005.

held in the case of *Erdogdu and Ince v. Turkey*:[27] "The Court stresses that the 'duties and responsibilities', which accompany the exercise of the right to freedom of expression, by media professionals assume special significance in situations of conflict and tension. Particular caution is called for, when consideration is being given to the publication of the views of representatives of organizations, which resort to violence against the State, lest the media become a vehicle for the dissemination of hate speech and the promotion of violence".[28]

If the matter is not of public interest or concerns purely private aspects, the protection of the media is less significant.[29] In the case of *Campmany y Diez de Revenga and Perona v. Spain*, the ECtHR declared an application inadmissible[30] and noted that as "the reports concentrated on the purely private aspects of the life of those concerned and even though those persons were known to the public, the reports at issue cannot be regarded as having contributed to a debate on a matter of general interest to society."

7.7. Restrictions and their Proportionality

The right to freedom of expression may be limited in various ways—directly or indirectly. The restriction or limitation can, however, only be justified if it is necessary in a democratic society. "It is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation".[31] Depending on the interests at stake, this margin of appreciation may vary, but the restriction has to be proportionate to the legitimate aim pursued.

Defamation Cases

The majority of the cases concerning the right to freedom of expression involve issues of defamation/insults and the balance between the free-

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[27] Judgment of 8 July 1999, para. 54.

[28] See also *Bladet Tromsø and Stensaas v. Norway*, ECtHR Judgment of 9 July 1998, para. 65, and *Fressoz and Roire v. France*, Judgment of 21 January 1999, para. 45 and 52.

[29] See ECtHR Judgment of 6 February 2001, *Tammer v. Estonia*, para. 66.

[30] See reports of Judgments 12 December 2000 under the heading "the Law," para. 10.

[31] See *Fressoz and Roire v. France*, Judgment of 21 January 1999, para. 45.

dom of expression and the reputation of others. The consequences are criminal conviction and/or compensation to the defamed person.

Criminal conviction of a person and in particular punishment such as imprisonment is in general considered to be inappropriate in pursuing the legitimate aim of protecting the reputation of others: "Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression (…) only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence".[32]

The imposition of heavy fines or excessive compensation to the victim of defamation may also constitute a discrepancy between the interests at stake and consequently a violation of the right to freedom of expression.[33]

Injunctions

In a number of cases, the issue of an injunction with respect to the dissemination of a book or newspaper has constituted an unjustified interference.[34]

The Methods of the Press

Freedom of expression also includes a right to decide the methods of journalism and form in which the ideas and information are conveyed. The press alone can determine its technique of reporting.[35] Nonetheless, the press shall to some extent check their sources, if possible, and attempt to contact the relevant parties, if the matter involves a serious allegation[36] in accordance with normal professional press ethics.

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[32] See ECtHR in *Cumpănă and Mazăre v. Romania*, Judgment of 17 December 2004, para. 115. See also *Salov v. Ukraine*, Judgment of 6 September 2005, para. 115.

[33] See ECtHR *Amihalachioaie v. Moldova*, Judgment of 20 April 2004, para. 38, *Busuioc v. Moldova*, Judgment of 21 December 2004, para. 95–96, or *Pedersen and Baadsgaard v. Denmark*, Judgment of 17 December 2004.

[34] See *Editions Plon v. France*, Judgment of 18 May 2004, para. 45—a violation in relation to the main proceedings.

[35] See ECtHR *Jersild v. Denmark*, Judgment of 23 September 1994, para. 31, and *Bergens Tidende v. Norway*, Judgment of 2 May 2000, para. 57.

[36] SeeECtHR *Gaudino v. Italy*, Decision of 21 February 2002—declared inadmissible.

If the press relies on other sources, e.g. official documents, passes on information published in other media, or quotes a third party, the press will rarely be held responsible for imparting such information.[37] The "punishment of a journalist for assisting in the dissemination of statements made by another person (…) would seriously hamper the contribution of the press to discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so".[38] Such interference is also known as the chilling effect. If one medium is penalized for contributing to or participating in public discussions, others will fear the same consequences.

Protection of Sources

Protection of journalistic sources is one of the basic prerequisites for press freedom.[39] The ECtHR observed in the case *Goodwin v. United Kingdom* that: "Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justified by an overriding requirement in the public interest".[40]

Commercial Expressions

Advertisements, commercial campaigns, etc. are also expressions falling within the scope of freedom of expression. Nevertheless, States are admitted a wider margin of appreciation, and interferences are more likely to be tolerated.[41]

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[37] See for instance ECtHR *Colombani and Others v. France*, Judgment of 25 June 2001, para. 65, or *Thoma v. Luxembourg*, Judgment of 29 March 2001, para. 64.

[38] *Jersild v. Denmark*, Judgment of 23 September 1994, para. 35.

[39] See also Resolution on the Confidentiality of Journalists' Sources by the European Parliament, Official Journal of the European Communities No. C 44/34.

[40] Judgement of 27 March 1996.

[41] See ECtHR *Jacubowski v. Germany*, Judgment of 23 June 1994, para. 26, or *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of 28 September 2001, para. 69.

Issuing of Licenses

Sometimes the State may seek to use its powers to issue or withdraw licenses as a means of controlling the flow of information and protecting national interests, State legal entities, or public broadcasters.[42]

In the case of *Informationsverein Lentia and Others v. Austria*, the applicants complained that they had each been unable to set up a radio station and a television station, as under Austrian legislation this right was restricted to the Austrian Broadcasting Corporation. The ECtHR held that: "Of all the means of ensuring that these values (principles of pluralism) are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need".[43] The Court subsequently found a violation of Article 10 of ECHR because there was no sufficient pressing need to justify the restriction.

In the case of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94 and 152/96, para. 54–57 before the African Commission for Human and People's Rights, the Commission held that excessively high registration fees for newspapers are essentially a restriction on the publication of the news media.

In Employment Relations

An employee has the same right to freedom of expression as anyone else subject to rules on confidentiality and loyalty.[44] If an employee is working in the private sector and dismissed for having publicly criticised the employer, the State is still under an obligation to ensure freedom of expression. In the case of *Fuentes Bobo v. Spain*, the ECtHR concluded that Article 10 also applies, when the relations between employer and employee were governed by private law and, moreover, that the State had a positive obligation to protect the right to freedom

[42] See *Autronic AG v. Switzerland*, Judgment of 22 May 1990, and *Groppera Radio v. Italy*, Judgment of 28 March 1990.

[43] Judgement of 24 November 1993, para. 39.

[44] See ECtHR *Vogt vs. Germany* Judgement of 26 September 1995, *Ahmed and others v. United Kingdom*, Judgment of 2 September 1998, or HRC Comm. No. 422/1990 *Adimayo M. Aduayom and Others v. Togo*.

of expression.[45] In the case of *Diego Nafria v. Spain*, the Court found Article 10 of ECHR applicable in a case where the applicant had been dismissed from the Bank of Spain after having made some very offensive remarks about the Bank's services and management. The ECtHR did not find a violation of Article 10, because of the character of the remarks and the fact that the accusations were not factually substantiated.[46]

Expressions in Connection with Public Gatherings

In the case of *Auli Kivenmaa v. Finland*,[47] the HRC found that the police—by pulling down a banner displayed by the complainant—unnecessarily interfered with her right to freedom of expression. The banner was displayed during the visit of the Head of a foreign State and questioned the human rights record of that particular Head of State. The complainant had gathered with some members of her organization outside the Presidential Palace, where the Head of State meeting took place.

The Legitimate Aims

Any interference with the right to freedom of expression has to pursue one of the legitimate aims listed in ICCPR or ECHR. The international bodies will rarely reject the aims invoked by the States and the examination is not intense. Be that as it may, the State has to specify the precise nature of the threat allegedly posed by the specific act of expression.[48]

The international bodies are rarely confronted with the criteria of public safety, prevention of crime, or public health.[49] National security[50] and territorial integrity[51] have been more frequently invoked and accepted.

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[45] Judgment of 29 February 2000, para. 44–48.
[46] ECtHR Judgement of 14 February 2002.
[47] Comm. No. 412/1990.
[48] See HRC Comm. No. 518/1992, *Jong-Kyu Sohn v. Republic of Korea.*
[49] See ECtHR in the case of *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, para. 63, where the justification prevention of a crime was rejected by the Court.
[50] See HRC Comm. case of *Womah Mukong* 458/1991.
[51] See e.g. ECtHR case of *Surek v. Turkey*, Judgment of 8 July 1999.

Prevention of disorder or crime *vis-à-vis* the term *public order* was discussed in the ECtHR case of *Engel and Others v. the Netherlands*: "[Disorder] also covers the order that must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole".[52]

The criterion of public morals has, in particular, been invoked in cases concerning restrictions on pornographic or blasphemous publications.[53]

A common reason for restriction of the right to freedom of expression is respect for the rights and reputations of others. This includes defamations, insults, and photos; see e.g. ECtHR in the case of *Pedersen and Baadsgaard v. Denmark*[54] concerning allegations in a TV programme of miscarriage of justice perpetrated by police investigators; or *McVicar v. the United Kingdom*[55] concerning allegations against an internationally known athlete for having used doping; or *Perna v. Italy*[56] where the applicant had accused a prominent civil servant of having broken the law.

Disclosure of information was invoked and accepted in the case of *Autronic AG vs. Switzerland*.[57] The Government claimed that the restriction was in order to protect the secrecy of telecommunication.

The concern for maintaining the authority and impartiality of the judiciary was examined in the ECtHR cases of *Sunday Times v. the United Kingdom I and II*.[58] The cases concerned the legitimacy of an injunction preventing the publication of information relevant to the outcome of a court case while the matter was still pending before the courts. In both cases, the ECtHR did not find the interference necessary in a democratic society. In the case of *Worm v. Austria*,[59] the matter concerned a journalist's inappropriate attempt to influence the outcome of a criminal case. And in *Barfod v. Denmark*,[60] the applicant

[52] Judgement of 8 June, 1976, para. 98.

[53] See HRC Comm. *Hertzberg and Others vs. Finland*, Comm. No. 61/1979, ECtHR in the case *Handyside vs. the United Kingdom*, 7 December 1976 and *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992. The latter concerned prohibition of publications on abortion services offered in another State.

[54] Judgement of 17 December 2004**.**

[55] Judgement of 7 May 2002.

[56] Judgement of 6 May 2003.

[57] Judgement of 22 May, 1990, para. 58–59.

[58] Judgement of 26 April, 1979, para. 54–67, and 26 November, 1991, para. 52–56.

[59] ECtHR Judgment of 28 August 1997.

[60] Judgment of 22 January 1989.

had excessively criticised the composition and impartiality of the court. He was convicted and fined for the criticism. The ECtHR did not find the conviction and the fine levied to be a violation.

7.8. National Implementation Mechanisms

Usually, the national Parliament or other legislative bodies will be responsible for passing framework legislation governing the right to freedom of expression. Many countries are adopting freedom of speech acts to supplement provisions of their respective constitutions (e.g. Georgia), laws on the right to information (e.g. Albania and Montenegro), or laws on public broadcasting (e.g. Macedonia). In addition to these explicit laws, the freedom of speech is regulated in criminal, civil, or administrative laws, ensuring the protection of the rights and reputations of others.

Different bodies may be established to monitor the situation in a country. National Human Rights Institutions may be empowered to receive complaints about human rights violations including interference with the freedom of expression, and Ombudsman Institutions may be approached, if an act of public authority is interfering with the right to freedom of expression (e.g. dismissal of civil servants or withdrawal of licences). National directorates are created to ensure the protection of data (e.g. Macedonia). And national systems for licensing of broadcasting are established with councils responsible for issuing broadcasting licenses and revoking them (e.g. Latvia and Ukraine).

In some countries, standards for press ethics have been developed (e.g. Denmark, Norway, Sweden, and the United Kingdom). In some—in particular Western European—countries, press councils or boards have been established (e.g. Denmark and the United Kingdom). These councils may receive complaints about the press from ordinary citizens or private entities. Nonetheless, their decisions are not necessarily legally binding.

Despite the different mechanisms, the courts still play a very important role in the national implementation as a last recourse for protection.

7.9. Additional Sources including OSCE Standards

For decades now, the right to freedom of expression has evolved at the international level through conventions and other standards emanating from the United Nations, the European Council (CoE), the European Union (EU) and the Organization for Security and Cooperation in Europe (OSCE).

The Helsinki Final Act, adopted by OSCE in 1975, includes a chapter on information outlining the principles in relation to improvement of the circulation, access to, and exchange of information; as well as cooperation in the field of information; and improvement in the work conditions for journalists (see the Chapter on Co-operation in Humanitarian and Other Fields, subsection 2). In the following years, the OSCE repeatedly stressed the importance of the right to freedom of expression.[61]

In 1996, the OSCE Lisbon Summit Declaration on the freedom of expression and media mechanism was established (see para. 11) and, in 1997, the Mandate of the OSCE Representative on Freedom of the Media was determined.[62] The Representative shall among other things assist participating States in furthering free, independent, and pluralistic media as one of the basic elements of a functioning pluralistic democracy. The Representative observes media developments in all participating States and advocates and promotes compliance with relevant OSCE principles and commitments. The Representative may at all times collect and receive requests, suggestions and comments from participating States and other interested parties (e.g. from organizations or institutions, from media and their representatives, and from relevant NGOs) related to strengthening and further developing compliance with relevant OSCE principles and commitments and make recommendations to the Permanent Council.

In the 1999 Istanbul Summit Declaration, the importance of independent media and the free flow of information as well as the public's access to information were reaffirmed. In the period from 1999 to 2004, the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, and the OAS Spe-

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[61] See for instance the concluding Document of Vienna, 1989; Charter of Paris for a new Europe, 1990; and the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE.

[62] Permanent Council Decision No. 193.

cial Rapporteur on Freedom of Expression have issued a number of joint declarations. These declarations concern issues such as access to information; secrecy legislation; freedom of expression and the administration of justice;

commercialisation and freedom of expression; criminal defamation; media and racism; countering terror; broadcasting; internet; and censorship by killing.

The CoE has also been very active in developing standards for freedom of expression, most recently through the 2005 Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism. Other declarations deal with communication via the Internet, political debate in the media, media pluralism, access to official documents, public service broadcasting and measures to promote media transparency (for more information see the Chapter's last section with list of instruments).

Under the CoE, the Steering Committee on the Media and New Communication Services has been established to promote free, independent, and pluralist media in accordance with CoE standards on Freedom of Expression and Information.

A Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has been established under the UN. The Rapporteur is mandated to receive communications from Governments, non-governmental organizations, and any other parties who have knowledge of pertinent situations and cases. Similarly, the UN including UNESCO (sector for communication and information and a sector for communication and media) have developed different standards for freedom of expression. Some of them cover issues such as the public's right to know; principles on information legislation; and promotion of independent and pluralistic media (cf. the list of instruments).

In December 1998, the UN General Assembly adopted the 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, which emphasizes the right 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.

7.10. Monitoring Checklist on the Right to Freedom of Expression

Checklist – Freedom of Expression

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the state ratified, and what reservations were made upon ratification?
   - Has the State declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to freedom of expression?
   - Are all national regulations and all legislation related to criminal and civil liability, access to information, protection of personal data, public service broadcasting, and the media made easily available?
   - Has the monitor undertaken a critical review of legislative requirements for criminal and civil liability? What are the criminal sanctions or amount of fines? Are the criminal or civil sanctions disproportionate? What are the requirements for forcing a journalist to disclose the identity of a confidential source? What are the requirements for setting up or closure of a media agency? Are the national public service broadcasting and/or media council/board independent? Is there access to an independent body monitoring the implementation of the legal framework for access to information?
   - Has a code of conduct for the media been introduced?
   - Are all requirements clear and specific, or vague, allowing a wide margin of appreciation?
   - Are all restrictions legally established?
   - Is there a right to appeal warranted by law?
   - What is the standard of review for an administrative decision relating to freedom of expression?
   - Are there any restrictions related to journalists or representatives from the mass media?
   - Are there particular exceptions for refugees or stateless persons, or other aliens?
2. Monitoring the Right in Practice
   - Is the national public service broadcasting agent independent of the Government and does it reflect the political, religious, cultural, and ethnical diversity, etc. of the country?
   - Are there any official policies to ensure access to the media and information for minorities and vulnerable groups of society?
   - Are restrictions imposed on the freedom of expression and, in particular, the media linked to characteristics that may be discriminatory?
   - Are any of the media or other actors advocating for national, religious, or racial hatred, or war?
   - Are there any monopolizing practices that may prevent freedom of expression, access to information, or the establishment of media agencies?

- Are there instances of the media, members of the media, or others being excluded from public meetings, certain areas of the territory, public information, public advertisements, public employment, or public contracts and grants?
- Are there instances of the media being evicted from office premises, denied printing material, or otherwise harassed?
- Are there any restrictions on the use of Internet?
- What is the length of time taken to receive an administrative decision related to freedom of expression or access to information, e.g. media registration and issue of licences?
- Are grounds of refusal to register the media or grant a licence provided in writing, and are they clear?
- Are administrative requirements for registration and obtaining licences reasonable under the prevailing circumstances in society?
- Do the authorities exhibit a practice of suspending or revoking licences?

7.11. Instruments on the Right to Freedom of Opinion and Expression

Legally Binding Instruments

UN Instruments

Universal Declaration on Human Rights

Section	Critical Substantive Points
Article 19	"Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers." The strength of this Declaration of the UN General Assembly is that it is so universally accepted that it has become customary international law. The weakness is that there is no implementation mechanism for enforcement.
Article 20(1)	Everyone has the right to freedom of peaceful assembly and association.
Article 20(2)	No one may be compelled to belong to an association.
Article 23(4)	Everyone has the right to form and to join trade unions for the protection of his/her interests.

International Covenant on Civil and Political Rights (ICCPR)

Article 19	"Everyone shall have the right to hold opinions without interference…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."	Human Rights Committee case law and General Comment No. 10, 15, 16 and 28
Article 20	"Any Propaganda for war shall be prohibited by law (…) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."	No general comment by Human Rights Committee

Article 25	"The right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service."	Human Rights Committee case law and General Comment No. 25
Article 27	"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these 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."	Human Rights Committee case law and General Comment No. 23

Convention on the Rights of the Child (CRC)

Article 12	"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."	Committee on the Rights of the Child, General Comment No. 4 and 5
Article 13	"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."	Committee on the Rights of the Child, General Comment No. 4
Article 17	"States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health." To this end, States Parties shall encourage in particular the mass media to adopt specific measures.	No general comment by the Committee on the Rights of the Child

Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

Article 5	"States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."	The Committee on the Elimination of Discrimination against Women, General Recommendation 19

Article 7	"States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country…", including the right to participate in the formulation of government policy and the implementation.	The Committee on the Elimination of Discrimination against Women, General Recommendation 23

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 4	"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."	Committee on the Elimination of Racial Discrimination, General Recommendation No. XV and case law developed through the Committee.

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 10	"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."	Case law as developed through the European Court of Human Rights
Article 16	"Nothing in Articles 10 (…) and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."	Case law as developed through the European Court of Human Rights.

The European Social Charter (revised)

Article 19	The States undertake to assist such migrant workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration.	Secretary General of the Council of Europe and a Committee of Experts
Article 21	The right of workers to be informed within the undertaking	Secretary General of the Council of Europe and a Committee of Experts
Article 23	The States undertake to provide elderly persons with information about services and facilities available for them and their opportunities to make use of them.	Secretary General of the Council of Europe and a Committee of Experts
Article 29	The right to information in collective redundancy procedures	Secretary General of the Council of Europe and a Committee of Experts

Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems

Entirety	"This Protocol entails an extension of the Convention's scope, including its substantive, procedural and international cooperation provisions, so as to cover also offences of racist and xenophobic propaganda. Thus, apart from harmonising the substantive law elements of such behaviour, the Protocol aims at improving the ability of the Parties to make use of the means and avenues of international cooperation set out in the Convention in this area." An explanatory report is available.	The European Committee on Crime Problems will monitor the implementation.

European Charter for Regional or Minority Languages

Article 11	Concerns the relationship between the media and the users of regional or minority languages.	Committee of experts under the Council of Europe examination of period reports

European Framework Convention for the Protection of National Minorities

Article 7	Ensures every person belonging to a national minority the right to freedom of expression.	Committee of Ministers of the Council of Europe explanatory report
Article 9	"The Parties undertake to recognize that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media (…) Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises (…) The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that	Committee of Ministers of the Council of Europe explanatory report.

	persons belonging to national minorities are granted the possibility of creating and using their own media (…) In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism."	Committee of Ministers of the Council of Europe explanatory report
Article 17	"The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage."	

CSCE/OSCE Instruments

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (The Aarhus Convention)

Critical Substantive Points	Relevant Treaty Body Interpretative Statements
The Convention includes the right of everyone to receive environmental information that is held by public authorities; citizens are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession. This convention is binding upon all States members of the Economic Commission for Europe, and States with consultative status to the Economic Commission for Europe.	A compliance committee under the UN Economic Commission for Europe assesses submissions from States Parties, referrals from the secretariat under the Committee or communications from members of the public.

European Convention on Transfrontier Television

States shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of the Convention. The Convention also covers issues such as responsibilities of broadcasters, the right to reply, access to public information, access to public events of major importance, media pluralism, and advertisements. The Convention as amended entered into force in 2002. An explanatory memorandum is available.	A standing committee that monitors the compliance with the Convention and complaints from States Parties.

UN Convention on the International Right of Correction

Confirms the customary practice of the right to correction of information or facts demonstrated to be false or distorted. The Convention concerns relations between States.	Communiqués may be submitted to the General Secretary of the United Nations.

CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Treaty No. 108 (1981)

Balancing the right to access to information and respect for the rights and fundamental freedoms of an individual, and in particular his/her right to privacy, with regard to automatic processing of personal data relating to him/her ("data protection"). Confirming the right of an individual to have access to information held by a controller about him/herself.	A Consultative Committee under CoE is established to express an opinion on any question concerning the application of the Convention.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Balancing the right to access to information and respect for the rights and fundamental freedoms of an individual, and in particular his/her right to privacy, with regard to automatic processing of personal data relating to him/her ("data protection"). Confirming the right of an individual to have access to information held by a controller about him/herself.	Member States shall provide that one or more public authorities are responsible for monitoring the application within its territory of the Directive

The Helsinki Final Act 1975, OSCE

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Chapter on Information	Principles in relation to improvement of circulation, access to and exchange of information; cooperation in the field of information and improvement in the work conditions for journalists.	Adopted under the Conference on Security and Cooperation in Europe. OSCE's Office for Democratic Institutions and Human Rights monitors' freedom of expression and media.

Concluding Document of Vienna, 1989, OSCE

34–45	The document contains several references to freedom of expression, access to information and rights and duties of the media.

Charter of Paris for a New Europe 1990, CSCE

Chapter on Human Dimension	The charter reaffirms the right to freedom of expression, and that the free flow of information and ideas are crucial for the maintenance and development of free societies and flourishing cultures.

Document of the Cracow Symposium on the Cultural Heritage of the OSCE Participating States

Chapter 1	Relationship between culture and freedom of expression.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

Paragraphs 9 and 10	"Everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright (…) Respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate and publish such views and information (…) Allow members of such groups and organizations to have unhindered access to and communication with similar bodies within and outside their countries and with international organizations, to engage in exchanges, contacts and co-operation with such groups and organizations and to solicit,

	receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law." This was reaffirmed and elaborated in the Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE, paragraph 26.

Lisbon Summit Declaration, 1996, OSCE

Paragraph 11	Establishment of a freedom of expression and media mechanism.

Permanent Council Decision No. 193, Copenhagen 1997, OSCE

Entirety	Mandate of the OSCE Representative on Freedom of the Media.

Istanbul Summit Declaration, 1999, OSCE

Declaration paragraph 27 and Charter on European Security, paragraph 26	The importance of the work of the Office of the Representative on Freedom of the Media. Reaffirmation of the importance of independent media and the free flow of information as well as the public's access to information.

International Mechanisms for Promoting Freedom of Expression joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression 1999–2004

Entirety	Joint declarations on access to information; secrecy legislation; freedom of expression and the administration of justice; commercialization and freedom of expression; criminal defamation; media and racism; countering terror; broadcasting; internet; censorship by killing.

Joint Declaration of the OSCE Representative on Freedom of Expression of the Media & Reporters Without Borders on Guaranteeing Media Freedom on the Internet

Entirety	"Any law about the flow of information online must be anchored in the right to freedom of expression as defined in Article 19 of the Universal Declaration of Human Rights."

2004 OSCE Tbilisi Declaration on Challenges for the Media in the South Caucasus

Entirety	A declaration by the OSCE representative, journalists and NGOs on defamation, access to information, the judiciary and the role of the media and NGOs.

Dushanbe Declaration 2004: Dealing with Libel and Freedom of Information in Central Asia

Entirety	A declaration by the OSCE representative, journalists and NGOs on defamation, access to information.

Paris Recommendations on Libel and Insult Laws

Entirety	OSCE and Reporters Without Borders recommendation on decriminalising libel and repealing insult laws that provide undue protection for public officials.

OSCE Bishkek Declaration: Media in Multi-Cultural and Multi-Lingual Societies

Entirety	An OSCE declaration approved by 120 participants included journalists from four of the Central Asiatic countries, government officials, members of Parliament and the civil society among others.

OSCE Principles for Guaranteeing Editorial Independence

Entirety	The OSCE Representative on Freedom of the Media has approached media companies with international business interests to agree to a set of principles.

OSCE 2003 Amsterdam Recommendations Freedom of the Media and the Internet

Entirety	A set of recommendations related to access, freedom of expression, education and professional journalism. Adopted at a conference by journalists, NGOs, European Parliament, Council of Europe and European Commission.

The Charter of Fundamental Rights of the European Union

Articles 8, 11, 24, 42	The charter includes protection and access to personal data; freedom of expression and information; pluralistic media; the right of the child to express his/her view freely, and access to information held by union institutions.

Article 19: Defining Defamation: Principles on Freedom of Expression and Protection of Reputations

Entirety	A set of principles in relation to defamation that have been generally accepted by international mechanisms such as the OSCE representative on Freedom of the Media.

Other International Instruments

UN Instruments

UN Declaration on Race and Racial Prejudice

Section	Critical Substantive Points
Article 5	"The mass media and those who control or serve them, as well as all organized groups within national communities, are urged (…) to promote understanding, tolerance and friendship among individuals and groups and to contribute to the eradication of racism, racial discrimination and racial prejudice, in particular by refraining from presenting a stereotyped, partial, unilateral or tendentious picture of individuals and of various human groups. Communication between racial and ethnic groups must be a reciprocal process, enabling them to express themselves and to be fully heard without let or hindrance. The mass media should therefore be freely receptive to ideas of individuals and groups which facilitate such communication."

UN Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	This declaration is in its entirety directed towards the role of the mass media. Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session in Paris, on 28 November 1978.	No monitoring body, but adopted under UNESCO. The UNESCO Committee on Conventions and Recommendations may review or make recommendations based on individual complaints.

The UN Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange

Entirety	Establishes principles for satellite broadcasting. Adopted in 1972 by the General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris at its seventeenth session in 1972.	No monitoring body, but adopted under UNESCO. The UNESCO Committee on Conventions and Recommendations may review or make recommendations based on individual complaints.

Declarations on Promoting Independent and Pluralistic Media

Entirety	The 1992 declaration of Alma Ata endorsed by the UNESCO General Conference at its twenty-eighth session—1995. Concerns principles for initiatives and programmes in the newly independent Central Asian Republics. The principles include reference to legislation, training, free flow of information, safety of journalists, public service broadcasting, professional associations and special economic issues.	No monitoring body, but adopted under UNESCO. The UNESCO Committee on Conventions and Recommendations may review or make recommendations based on individual complaints.

Sofia Declaration on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe)

Entirety	Principles concerning the establishment, maintenance and fostering of independent, pluralistic and free media is essential to the development and preservation of democracy. Adopted by the participants in European Seminar on Promoting Independent and Pluralistic Media in 1997 organized by the United Nations Department Of Public Information (UNDPI) and United Nations Educational, Scientific and Cultural Organization (UNESCO).

Council of Europe (CoE)

The 2005 Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	The Declaration contains a set of recommendations in relation to initiatives taken by governments of member States aiming at reinforcing measures, in particular in the legal field, to fight terrorism as far as they could affect the freedom of the media. An explanatory Memorandum is available.	CoE Committee of Ministers.

Recommendation Rec (2004) 16 on the right of reply in the new media environment

Entirety	Concerns the right to reply in the light of the technological development.	CoE Committee of Ministers.

Declaration on Freedom of Communication on the Internet by the Steering Committee on the Mass Media (CDMM) of the Council of Europe

Entirety	Set of principles directed at a tendency by some governments to restrict and control access to the Internet in a manner which is incompatible with international norms on freedom of expression and information.

The 2004 Declaration on Freedom of Political Debate in the Media

Entirety	The declaration reaffirms the right of the media to disseminate information and opinions criticising government, politicians, other branches of Government, and civil servants.	CoE Committee of Ministers.

The Recommendation no. R (2003) 13 on the Provision of Information through the Media in Relation to Criminal Proceedings

Entirety	The recommendation contains a set of principles such as Information of the public via the media, presumption of innocence, accuracy of information, access to information, ways of providing information to the media, regular information during criminal proceedings, prohibition of the exploitation of information, protection of privacy in the context of on-going criminal proceedings, right of correction or right of reply, prevention of prejudicial influence, prejudicial pre-trial publicity, admission of journalists; access of journalists to courtrooms, live reporting and recordings in court rooms support for media reporting, protection of witnesses, media reporting on the enforcement of court sentences and media reporting after the end of court sentences.	CoE Committee of Ministers.

Recommendation No. R (2002) 2 on Access to Official Documents

Entirety	The recommendations cover issues such as definitions, limitations, procedures, forms of access, review, complementary measures to be taken by the member States and own initiatives to make information accessible. An Explanatory Memorandum is available.	CoE Committee of Ministers.

Recommendation REC (2001) 8 on Self-regulation concerning Cyber Content

Entirety	Principles and mechanisms concerning self-regulation and user protection against illegal or harmful content on new communications and information services.	CoE Committee of Ministers.

Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information

Entirety	A set of requirements for an adequate protection of the right of journalists not to disclose their sources of information, in order to safeguard freedom of journalism and the public's right of information by the media. An Explanatory Memorandum is available.	CoE Committee of Ministers.

Recommendation No. R (99) 1 on measures to promote media pluralism

Entirety	A set of guidelines aiming at the promotion of pluralism and at ensuring a minimum level of diversity of media supply throughout Europe. An Explanatory Memorandum is available.	CoE Committee of Ministers.

Recommendation no R (96) 10 on the Guarantee on the independence of public service broadcasting

Entirety	A set of guidelines intended to provide indications as to the desirable content of the necessary provisions in the legislative or regulatory framework concerning public service broadcasting organizations. An Explanatory Memorandum is available. This recommendation is supplemented by recommendation no. R(2000)23 on the independence and functions of regulatory authorities for broadcasting.	CoE Committee of Ministers.

Recommendation N° R (94) 13 on Measures to Promote Media Transparency

Entirety	A set of guidelines intended to offer the governments specific solutions for guaranteeing and strengthening media transparency. An Explanatory Memorandum is available.	CoE Committee of Ministers.

Declaration on Freedom of Expression and Information adopted on 29 April 1982

Entirety	Reaffirmation and elaboration of the freedom of expression.	CoE Committee of Ministers.

7.12. References

Council of Europe, *Freedom of Expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights*, 2. rev. ed. (Strasbourg: Council of Europe Publishing, 2002).

A thorough description of the freedom of expression with reference to judgments and decisions of the Court and the Commission.

Joseph, Sarah, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials, and commentary*, 2. ed. (New York: Oxford University Press, 2004).

The book includes a foreword by Ivan Shearer and a chapter on the freedom of expression (pp. 517–568).

Macovei, Monica, *Freedom of Expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd edition (Council of Europe, 2004).

A practical guide on application and interpretation that targets mainly legal practitioners, but readable to others as well.

Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2. rev. ed. (Kehl: N.P. Engel, 2005).

A classic work on the UNHRC. Includes chapters on all the provisions of the Covenant.

Thorgeirsdottir, Herdis, *Journalism Worthy of the Name: Freedom Within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights* (The Netherlands: Koninklijke Brill NV Leiden, 2005).

The book describes the national and international framework regulating the work of the Media and its rights and duties.

Torremans, Paul L.C. (ed), *Copyright and human rights: freedom of expression, intellectual property, privacy* (The Hague: Kluwer Law International, 2004).

The book describes the right to expression in an information society and the relationship to other intellectual rights.

Van Dijk, Pieter, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 2002).

A classic work on the European Convention that describes the case law of all the provisions under the Convention.

Electronic Resources

www.article19.org

The organization *Article 19* has been very active in developing model standards for the protection of freedom of expression. Most of the model laws and guiding principles developed and examination of legislation worldwide are accessible at its homepage.

www.europarl.eu.int/comparl/libe/elsj/charter/art11/default_en.htm?textMode=on
EU homepage with reference to international law, EU law, summary of EU actions, international case law, national laws, links to NGOs working within the field, and European Parliament position.

www.freedomhouse.org
Freedom House. The organisation Freedom House has since 1980 published a worldwide freedom of the Press survey.

http://www.rsf.org/
Reporters without Borders. Publishes annual status reports for five continents, mission reports and publications on freedom of the press.

CHAPTER 8

THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The right to freedom of thought, conscience and religion encompasses freedom of thought on all matters, personal conviction, and the commitment to religion or belief, whether manifested individually or in community with others. The right to freedom of religion is a very important human right, which is central to the functioning of modern democracies. This right is also under pressure from many sides: Freedom of religion is often brought into play before national and international human rights mechanisms, and it is the subject of many scholarly discussions and public debates.

The fundamental character of the right to freedom of religion is reflected in the fact that the provision protecting it cannot be derogated from, even in time of public emergency.[1] However, the right to freedom of thought, conscience and religion does not protect every act motivated or influenced by a religion, belief, or personal moral sense or conscience. Some restrictions and limitations can be imposed on the right to manifest one's religion. While religion can be an intensely private matter for some, many religions include communal rites. In order to profess their religion, individuals will often need to associate with others and assert their religious freedom "in community with others" whether in "public or private".[2] Thus, freedom of association is linked to freedom of religion in that it protects religious groups [see Chapter 9 on Freedom of Association].

[1] ICCPR Article 4(2); ECHR Article 15(2).
[2] ECHR Article 9.

8.1. Definitions

Religion and Belief

The right to freedom of religion and beliefs protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. This right is not limited in its application to well-established religions or to religions and beliefs with institutional characteristics or practices similar to those of traditional religions.[3] The terms 'belief' and 'religion' are to be broadly understood. International or regional human rights mechanisms do not operate with a specific definition of religion or belief, since they claim that the meaning of these two words is generally understood by all.[4]

There are three distinguishable elements embedded in freedom of religion: the freedom to have a religion or no religion,[5] the freedom to practice a religion or not practice a religion,[6] and the freedom to manifest one's religion.[7] While freedom of religion is fundamentally a matter of individual conscience and is exercised within one's private sphere, it also implies freedom to manifest one's religion alone and in private; or in community with others, in public and within the circle of those whose faith one shares.

Thought and Conscience

No definitions of thoughts and conscience are directly used by international or regional human rights bodies. The notions are, however, different, as 'thought' covers the mere act of thinking and exercising reason, while 'conscience' includes a reference to moral sense. In practice, the right to freedom of thought and conscience has mostly been applied to conscientious objection.

A large number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service, replacing it with

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[3] General Comment no.22, para. 2.

[4] UN Doc. E/CN.4/Sub.2/1987/26.

[5] ECtHR *Buscarini and others v. San Marino*, 18 February 1999, Article 34.

[6] ECtHR *Metropolitan Church of Bessarabia v. Moldova*, 13 December 2001, Article 37.

[7] See for example, concerning the wearing of a headscarf: ECtHR *Leyla Sahin v. Turkey*, 29 June 2004; or, concerning proselytism: ECtHR *Kokkinakis v. Greece*, 25 May 1993, A. 260-A, Article 31.

alternative national service. There is no explicit right to conscientious objection in international human rights, but it has been accepted that conscientious objection must be provided for in cases where the obligation to use lethal force may be seriously at odds with the freedom of conscience, and the right to manifest one's religion or belief. Furthermore, when this right is recognized by law or practice, there shall be no differentiation among conscientious objectors based on the specific nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.[8]

8.2. Legally Binding Standards

Both the International Convention on Civil and Political Rights (ICCPR) (Article 18) and the European Convention on Human Rights (ECHR) (Article 9) recognize that the protection of the right to freedom of religion includes the right to change one's religion or belief. Among other things, this comprises the right to replace one's current religion or belief with another; or to adopt atheistic views; as well as the right to retain one's religion or belief.[9] In this respect, legislative provisions that impose limitations on the right to change religion are inconsistent with the right to freedom of religion.

In addition, everyone has the freedom, either alone or in community with others, in public or in private, to manifest his/her religion or belief in worship, observance, practice, and teaching.[10] Both individual and community beliefs are protected. Thus, the manifestation of an individual's beliefs may be protected, even if the individual's dedication and conviction to his/her beliefs is more radical than that of other members of the community to which he or she belongs. Outward manifestations of religion or belief, in contrast to internal freedom, may be restricted, but only under strictly limited circumstances set forth in the applicable limitations clauses discussed below.

ECHR Article 9 and ICCPR Article 18 list a number of possible manifestations of a religion or belief; namely worship, teaching, practice, and observance. More specifically, this can include erecting places

[8] General Comment No. 22, para. 11.
[9] General Comment No. 22, para. 5.
[10] ICCPR, Article 18(1); ECHR, Article 9(1).

of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may also include the observance of dietary regulations, the wearing of distinctive clothing, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. Moreover, the practice and teaching of religion or belief includes acts integral to how religious groups conduct their basic affairs; such as the freedom to choose their religious leaders, priests and teachers; the freedom to establish seminaries or religious schools; and the freedom to prepare and distribute religious texts or publications.[11]

Under ECHR Article 9, the State has a concurrent obligation of neutrality in religious matters, an obligation to abstain from interfering in freedom of religion, and an obligation to intervene in order to protect religious freedom. According to Article 14, States are also obliged to respect and provide for all individuals under their jurisdiction the right to freedom of religion or belief without distinction of any kind, be it based on race, colour, sex, language, religion or belief, political or other opinion, national or other origin, property, birth or other status.

Moreover, the ECHR and the ICCPR both contain provisions concerning the right of parents to ensure the religious and moral education of their children in conformity with their own religious and philosophical convictions.[12]

Some of the specialized UN conventions also protect freedom of religion and belief. According to Article 14 of the Convention on the Rights of the Child, the State shall respect the rights and duties of the parents (or legal guardians) to provide direction to the child in the exercise of his/her right to freedom of religion and belief in a manner consistent with his/her evolving capacities.[13] Concerning Refugees, Article 4 of the Convention relating to the Status of Refugees stipulates that the States shall extend to refugees within their territories treatment at least as favourable as that accorded to their nationals regarding freedom to practise their religion and the religious education of their children.[14]

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[11] General Comment no. 22, para. 4.

[12] ICCPR Article 18(4) and ECHR Prot. 1, Article 2.

[13] Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989.

[14] Convention relating to the Status of Refugees, adopted on 28 July 1951 by

The rights of religious minorities are also protected by the ICCPR Article 27. Their right to freedom of thought, conscience, religion and belief has to be implemented by the State. Similarly, ICCPR Article 20(2) constitutes an important safeguard against infringement of the rights of religious minorities and of other religious groups to exercise their right to freedom of religion and against acts of violence or persecution directed towards those groups.[15] In the European context, the right to freedom of religion is also protected by minority rights instruments, cf. Chapter 13.

8.3. Permissible Limitations

Freedom of thought, conscience, religion or belief has to be distinguished from the freedom to manifest religion or belief. It is not permitted to impose any limitations or restrictions on the freedom of thought and conscience, or on the freedom to have or adopt a religion or belief of one's own choice. These freedoms are protected unconditionally, and they cannot be derogated from, even in times of public emergency.[16] Yet there is no doubt, from the wording of the provisions concerning the right to freedom of religion, that the State may legitimately, in some situations, intervene in religious matters and thereby interfere with some aspects of individuals' freedom of religion, more specifically the right to manifest one's religion or belief.[17]

However, restrictions on the freedom to manifest religion or belief are permissible only, if they are prescribed by law and are necessary in a democratic society in the interests of public safety; for the protection of public order, health or morals; or for the protection of the rights and freedoms of others. Limitations may be applied only towards the purposes for which they were prescribed and must be directly related and proportionate to the specific need, on which they are predicated.

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the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

[15] General Comment No. 22, para 9. ICCPR Article 20(2) states: "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

[16] ICCPR Article 4(2); ECHR Article 15(2).

[17] ICCPR Article 18(3); ECHR Article 9(2).

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[18]

8.4. Current Interpretation (Key Case Law)

In Europe, freedom of thought, conscience and religion is considered by the European Court of Human Rights (ECtHR) as one of the foundations of a democratic society.[19] The bulk of case law concerns freedom of religion.

The ECtHR has also stated very clearly that religious pluralism is an inherent feature of the European democracy.[20] This pluralism requires tolerance and respect for the beliefs of others whether or not those beliefs fall within the scope of well-established religions. However, the right to freedom of thought, conscience and religion does not protect every act motivated or influenced by a religion or belief, or by personal moral sense or conscience.[21] In consequence, in a State where several religions coexist, it may become necessary to place restrictions on the freedom to manifest one's religion or belief, in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[22]

Freedom of Belief

There are only very few cases concerning 'beliefs'. The former European Commission on Human Rights[23] has stated that pacifism as a philosophy may be seen as a conviction or a belief protected by ECHR

[18] General Comment No. 22, para. 8.

[19] ECtHR *Kokkinakis v. Greece*, 25 May 1993, A. 260-A, Article 31.

[20] ECtHR *Manoussakis and Others v. Greece*, 26 September 1996, Article 44.

[21] See concerning freedom of religion: ECtHR *Refah Party v. Turkey [GC]*, 13 February 2003, Article 92.

[22] ECtHR *Leyla Sahin v. Turkey*, judgement of 29 June 2004 Article 97; ECtHR *Kokkinakis v. Greece*, judgement of 25 May 1993, A. 260-A, Article 33.

[23] The European Commission of Human Rights (EComHR) examined the admissibility of all individual applications to the ECtHR and made reports on the merits of the cases. It was abolished by Protocol 11 from 11 May 1994, which created a single full-time European Court of Human Rights. The EComHR ceased to function a couple of years after the entry into force of Protocol 11.

Article 9.[24] Concerning the interpretation of Article 2 of Protocol 1 to the ECHR (on the right of parents to ensure education according to their philosophical convictions), the ECtHR has stated that the term 'philosophical convictions' is synonymous with 'beliefs', when denoting "views that attain a certain level of cogency, seriousness, cohesion and importance".[25]

Neutrality and Impartiality of the State

According to the ECtHR, the State is the neutral and impartial organizer of the exercise of various religions, faiths, and beliefs. Accordingly, the State has an obligation to ensure mutual tolerance between opposing groups.[26] The ECtHR has also judged that the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs, or the means used to express such beliefs, are legitimate.[27] Concerning an authorization requirement to open a place of worship, the ECtHR judged it consistent with Article 9 of the Convention only in so far as it is intended to verify whether the formal conditions to inaugurate such a place are satisfied.[28]

Concerning the Muslim communities living in Europe, the ECtHR judged more recently that the State may not favour one leader of a divided religious community.[29] More generally, in democratic societies, the State should not initiate measures to ensure that religious communities are brought under a unified leadership.[30]

Finally, the ECtHR has also judged that obliging Members of Parliament to be sworn in pledging an oath on the Gospels was contrary to ECHR Article 9. According to the Court, it would be contradictory to

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[24] EComHR *Arrowsmith v. UK*, 12 October 1978, DR 19/5; EComHR *Le Cour Grandmaison and Fritz v. France*, 6 July 1987, DR 53/150.

[25] ECtHR *Campbell and Cosans v. UK*, 25 February 1982, A.48, Arts. 36–37.

[26] ECtHR *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, Article 123, ECHR 2001-XII.

[27] ECtHR *Cha'are Shalom Ve Tsedek v. France* [GC], 27 June 2000, Article 84, ECHR 2000-VII.

[28] ECtHR *Manoussakis v. Greece*, 26 September 1996, Article 47. However, in the specific case, it appeared from the evidence and from the numerous other instances that the State had tended to use the authorization regime to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses (Articles 47–48).

[29] ECtHR *Hasan and Chaush v. Bulgaria* [GC], 26 October 2000, Article 78.

[30] ECtHR *Serif v. Greece*, 14 December 1999, ECHR 1999-IX, Article 53.

subject the exercise of a mandate intended to represent different views of society within Parliament to a prior declaration of commitment to a particular set of beliefs.[31]

The Freedom to Manifest Religion

According to the Human Rights Committee, the freedom to manifest religion or belief in worship, observance, practice, and teaching encompasses a broad range of acts. As mentioned above, this includes, among others, some ritual and ceremonial acts, the building of places of worship, the display of symbols, and the observance of religious holidays, as well as the observance of dietary regulations or the wearing of distinctive clothing or headwear. Furthermore, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers; the freedom to establish seminaries or religious schools; and the freedom to prepare and distribute religious texts or publications.

In a specific case, the HRC declared inadmissible a manifesto from an avowedly religious group claiming that their belief consisted exclusively in the worship and distribution of cannabis. The HRC was of the opinion that this practice did not fall within the scope of Article 18 of the Covenant.[32]

The right to freedom of religion has been interpreted as a collective right in the sense that it can be exercised by a community or an institution (for example, by a Church or a religious association), acting as a representative of its members.[33]

The practice of the European Court and Commission of Human Rights is very elaborate in identifying what a religious manifestation is. Many religious manifestations are covered by a very abundant ECtHR case law. The criterion that the Commission has applied in most of the cases has been to determine whether the activity in question was necessary for the fulfilment of the religious obligations.[34]

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[31] ECtHR *Buscarini v. San Marino*, 18 February 1999, Article 39.

[32] HRC *M.A.B., W.A.T. and J.-A.Y.T. v. Canada* (Communication No. 570/1993), views adopted 8 April 1994.

[33] EComHR *Finska Församlingen i Stockholm and Hautaniemi v. Sweden*, 11 April 1996; EComHR *Church of Scientology v. Sweden*, 5 May 1979, DR16/68.

[34] See references to decisions and reports of the European Commission of Human Rights in Evans (2001), p. 307ff.

For example, the Commission held that an applicant had not shown that he was required by Islam to violate his contractual obligation (he was a school teacher) by attending mosque during school hours.[35]

Concerning Jewish ritual slaughter, the Grand Chamber of the Court has ruled that ritual slaughter, as indeed its name indicates, constitutes a rite the purpose of which is to provide Jews with meat from animals slaughtered in accordance with religious precepts, being an essential aspect of practice of the Jewish religion. Therefore, ritual slaughter must be considered to be covered by the right to manifest one's religion in practical observance.[36] In this judgement, the ECtHR considered that the fact that a minority among the French Jewish community could not perform ritual slaughtering according to very specific religious rules (glatt meat) was not a violation of Article 9, because the persons concerned were, *de facto*, able to import and purchase the glatt meat.

Concerning traditional Islamic headscarves, a recent judgement refers to the applicant's own religious motivation for covering her head, without ruling on whether or not such decisions are always religiously motivated. Accordingly, and without really settling the matter, the Court proceeded on the assumption that placing restrictions on the right to wear the Islamic headscarf in universities constituted an interference with the applicant's right to manifest her religion.[37] However, in all the cases concerning the prohibition from wearing Islamic headscarves that the ECtHR has examined, no violation of Article 9 has been found.

Concerning the prohibition from wearing the Islamic headscarf at a State university, the ECtHR has ruled that in the country concerned (Turkey), the principle of secularism was the paramount consideration underlying the ban on wearing religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others, and, in particular, equality before the law of men and women

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[35] EComHR (appl. 8160/78), *X. v. UK*, December 1981, *DR* 27, p. 36. See also another case where the Commission doubted that denying a prayer chain to a Buddhist was covered by Article 9 because it might not have been an indispensable element in the proper exercise of Buddhist religion (EComHR, appl. 1753/63, *X. v. Austria*, *Year Book of the European Commission*, 1965, p. 184).

[36] ECtHR *Cha'are Shalom Ve Tsedek v. France* [GC], 27 June 2000, Article 73–74.

[37] ECtHR *Leyla Sahin v. Turkey*, 29 June 2004, Article 71. In a previous decision concerning a teacher, the Court moved directly to examining whether or not the disputed measure was prescribed by the law: ECtHR *Dahlab v. Swiss*, 15 February 2001.

were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn on university premises. The ECtHR reiterated that Article 9 did not always guarantee the right to behave in a manner governed by a religious belief and did not confer on people, who did so, the right to disregard rules that had proved to be justified. As far as a possible violation of the right to education was concerned,[38] the ECtHR stated, inter alia, that the applicant could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if she continued to wear the Islamic headscarf, after the rule prohibiting this entered into force. The ECtHR ruled that the ban on wearing the Islamic headscarf had not impaired the very essence of the applicant's right to education.[39]

Concerning the case of a teacher who had been forbidden to wear a scarf in a public school in Switzerland, the ECtHR also ruled that the function of the State was to be the guardian of the principle of secularism and to be a neutral and impartial actor. The ECtHR held that in a democratic society, the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order, and public safety. The main point of the judgement was that the ECtHR considered that it was very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. According to the ECtHR, it could not be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Qur'an and which, according to the Swiss Federal Court, is hard to square with the principle of gender equality. Weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the ECtHR considered that, considering circumstances and, above all, the tender age of the children (4 to 8 years old) for whom

[38] ECHR, Protocol 1, Article 2: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[39] ECtHR *Leyla Sahin v. Turkey* [GC], 10 November 2005.

the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation, thus, the measure they took (dismissal of the teacher) was not unreasonable.[40]

Finally, a State may always forbid the wearing of religious signs or headwear if the security of the persons concerned is at stake. Forcing a Sikh to wear a crash helmet on a motorcycle or safety headgear at work was not considered a violation of his freedom to manifest his religion by the HRC and the EComHR.[41]

The Freedom to Have or to Change Religion or Belief

According to the Human Rights Committee, the freedom to have or to adopt a religion or belief includes the freedom to *choose* a religion or belief; as well as the right to replace one's current religion or belief with another or to adopt atheistic views. It also entails the right to retain one's religion or belief. Among other things, it is prohibited to make use of penal sanctions to compel believers or non-believers to adhere to certain religious beliefs and congregations, to force people to renounce their religion or belief, or compel them to convert.[42]

For its part, the ECtHR has tried to make a distinction between proper and improper proselytism. According to the ECtHR, the former, also called "bearing Christian witness", corresponds to true evangelism, which can be described as an essential mission and a responsibility of every Christian and every Church. On the other hand, improper proselytism represents a corruption or deformation of evangelism. It may take the form of activities offering material or social advantages with a view to gaining new members for a Church. It may also take the form of exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing. According to the Court, improper proselytism is not compatible with respect for the freedom of thought, conscience, and religion of others.[43]

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[40] ECtHR *Dahlab v. Switzerland* (Dec.), 15 February 2001, ECHR 2001-V.

[41] HRC *K. Singh Bhinder v. Canada* (Communication No. 208/1986), views adopted on the 9 November 1989; EComHR *X. v. UK*, 12. July 1978, DR 14/234. However, concerning the obligation for Sikhs to wear a crash helmet on motorcycles, an exception has been made in the law of some European countries (UK, Denmark, for instance).

[42] General Comment No. 22, para. 5.

[43] ECtHR *Kokkinakis v. Greece*, 25 May 1993, Article 48.

State Religion and Official Religion

According to the Human Rights Committee, the fact that a religion is recognized as a State religion, or that it is established as an official or traditional religion, is not in itself incompatible with the right to freedom of religion and belief, as long as this right is protected for all persons living in that country, and provided it does not result in any discrimination against adherents of other religions or non-believers.[44] Concerning forbidden discriminatory measures against adherents of a minority religion, the HRC explicitly mentions government-initiated restrictions on the eligibility for government service to members of the predominant religion, on giving economic privileges to them, or on imposing special restrictions on the practice of other faiths.[45]

The case law of the ECHR institutions is also very clear and pragmatic on the point of the compatibility of a State Church with Article 9 of the Convention. As the HRC, the EComHR specified that a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. The main element is that no one may be forced to enter, or be prohibited from leaving a State Church.[46]

In the context of the existence of an official church, the EComHR has stated that the fact that priests have to express ideas and opinions in accordance with the policies of their official church was not a violation of the right to freedom of religion.[47] More generally, the EComHR has found that ECHR Article 9 does not oblige the States to ensure that churches within their jurisdiction grant religious freedom to their members and servants. Freedom of religion is secured by the fact that anyone has the possibility to leave the church concerned.[48]

Religion and Schools

Concerning religious instruction in public schools, the HRC is of the opinion that ICCPR Article 18(4) permits public school instruction in subjects such as the general history of religions and ethics, if it is

[44] General Comment No. 22, para. 9.
[45] General Comment No. 22, para. 9.
[46] EComHR (appl. 11581/85), *Darby v. Sweden*, Comm. Rep 9 May 1989, Article 45 (case concerning the former Swedish State Church, the Lutheran Church of Sweden).
[47] EComHR *Karlsson v. Sweden*, 8 September 1998, DR 57/172.
[48] EComHR *Spetzand others v. Sweden*, 12 October 1994.

given in a neutral and objective way. In instances where there is public education that includes instruction in a particular religion or belief, it is paramount to the respect of freedom of religion of everyone that provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians of the children.[49]

Concerning the public funding of religious schools, the HRC has observed that the ICCPR does not oblige States to fund schools which are established on a religious basis. However, if a State chooses to provide public funding to a religious school, it should make this funding available without discrimination.[50]

Prisoners

According to the HRC, persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their right to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.[51] The ECtHR stated that a prisoner could request that religious service be arranged at the place of detention.[52] However, the EComHR has underlined that the modality of a particular religious manifestation can be influenced by the constraints of detention. For instance, the EComHR refused the argument that the requirement to wear prison clothes offended a Sikh prisoner's religious principles.[53]

In a recent case, the ECtHR also states that forbidding prisoners to participate in the weekly religious services available to other prisoners or to be visited by a priest is not in itself a violation of the prisoner's right to practise his/her religions, but that such a limitation need to be prescribed by law as described under Article 9, section 2.[54]

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[49] General Comment No. 22, para. 6.

[50] HRC, Communication No. 694/1996, *Arieh Hollis Waldman v. Canada*, views adopted on 3 November 1999.

[51] General Comment No. 22, para. 8.

[52] ECtHR *Guzzardi v. Italy*, 6 November 1980, A.39, Article 110.

[53] EComHR *X. v. UK*, 6. March 1982, DR 28/5.

[54] ECtHR *Poltoratskiy and Kuznetsov v. Ukraine*, 29 April 2003.

Conscientious Objection

The HRC has recognized that a right to conscientious objection can be derived from ICCPR Article 18. In this respect, the HRC has accepted a system where national law recognizes the right to conscientious objection, but also establishes limits to it.[55]

Contrary to the position of the HRC, the Strasbourg institutions have so far been reluctant to find that the right to conscientious objection is *per se*, guaranteed by Article 9, although the Commission has decided that conscientious objection to military service does fall within the realm of this provision.[56] Instead, the Commission decided that Article 4(3)(b) of the ECHR expressly recognizes that civilian service may be imposed on conscientious objectors as a substitute for military service and that objections of conscience do not entitle a person to exemption from such service.[57] In this respect, Article 9 should be read in the light of Article 4(3)(b).

A couple of times, the ECtHR has been presented with a case of Jehovah's Witnesses jailed for refusing to perform military service. So far, however, the ECtHR has managed to avoid giving a clear answer on this issue.[58]

8.5. Relevant National Implementation Mechanisms

No matter which type of constitutional relationship exists between the State and the religious communities in a country, public authorities are under an obligation to remain neutral and impartial in religious matters. This implies that the Government and the Parliament have the responsibility to ensure up-to-standard framework legislation and regulations concerning the right to freedom of belief, conscience and religion. All provisions regarding limitations on the freedom to manifest one's religion have to be precise, accessible, and foreseeable in their effects. They also need to be necessary in the specific context. Also, all

[55] HRC, Communication No. 682/1996, *Westerman v. The Netherlands*, views adopted on 3 November 1999.

[56] EComHR *Autio v. Finland*, 6 December 1991, DR 42/245; EComHR *Raininen v. Finland*, 7. March 1996**,** DR 84/17.

[57] EComHR *N.C. van Buitenen v. The Netherlands*, 2 March 1987.

[58] In the case of *Tsirlis and Kouloumpas v. Greece*, 29 May 1997, the ECtHR found a violation of Article 5 and did not rule on Article 9. In the case of *Stefanov v. Bulgaria*, 6 April 2000, an amicable settlement was found by the parties.

legislation has to ensure that differential treatment among religions is justified by genuinely objective reasons.

Moreover, various national and local authorities are responsible for the implementation of the right to freedom of thought, belief and religion; this responsibility includes prison authorities (e.g. access to religious service, visits from clergy or other religious authorities). Similarly, authorities responsible for primary and secondary education, as well as post-secondary education also have a role to play in the effective implementation of the right to freedom of religion, especially in order to support and encourage a climate of tolerance and understanding in a multi-religious society.

Effective remedies must be available to ensure that individuals as well as religious communities will have their religious rights protected. For example, there must be remedies for religious communities to contest decisions regarding their legal status. In this respect, the judicial and administrative systems play a prominent role in ensuring the right to freedom of religion.

The role of local authorities is paramount in this field, especially in a situation where tensions between religious communities exist. Hence, local authorities have to play a role in promoting dialogue between the various religious groups as well as between themselves and representatives of the religious communities.

8.6. Other International Instruments, Including OSCE Commitments

Freedom of Religion and Belief

Concomitant to the general provisions of the UDHR and the ICCPR, the UN General Assembly has chosen to emphasize elimination of religious intolerance. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[59] defines religious intolerance and discrimination as any distinction, exclusion, restriction, or preference based on religion or belief with the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of human rights and fundamental freedoms on an equal

[59] Proclaimed by UN General Assembly resolution 36/55 of 25 November 1981.

basis (Article 2). According to the Declaration's Article 4(1), States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights in all fields of civil, economic, political, social, and cultural life.

Finally, the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities (1992) proclaims that States shall protect the existence and the religious identity of minorities within their respective territories and shall encourage conditions facilitating the promotion of that identity.[60]

OSCE commitments on freedom of thought, conscience, religion or belief were first enshrined in the Helsinki Final Act (1975), ranking them among the most longstanding of OSCE human dimension commitments. In Helsinki, the participating States agreed to recognize and respect the freedom of the individual to profess and practice, alone or in community with others, their religion or belief of choice, acting in accordance with the dictates of one's own conscience. The Helsinki commitments have been reaffirmed and expanded substantially in subsequent OSCE documents, notably the Concluding Document of the Vienna Third Follow-up Meeting (1989).[61]

The OSCE commitments include freedom to choose and practice a religion or belief and to replace one's current religion or belief with another. The phrase 'religion or belief' highlights each individual's right to subscribe to and profess his or her beliefs, even if these may not be officially recognized by a government as a 'religion'. It also means that an individual can freely choose to have no religion.

Additional responsibilities are placed on governments to create a climate conducive to the respect for the right to freedom of thought, conscience, religion or belief; among these the responsibility to

– foster a climate of tolerance;
– grant recognition upon request to communities of believers;

[60] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992—Article 1(1). See also, in a European context, the General Assembly of the Council of Europe, Recommendation 1134 on the Rights of Minorities adopted on 5 February 1992 by General Assembly of the Council of Europe; this Recommendation contains various provisions on the religious rights of minorities.

[61] See also the Madrid (1983) and Budapest (1994) Documents.

– respect the right of religious communities to establish places of worship, organize themselves according to their own structures, select and appoint their personnel and receive donations;
– engage in consultations with religious faiths;
– respect the right to give and receive religious education, and parents' rights to ensure religious education for their children;
– allow the training of religious personnel in appropriate institutions;
– allow religious groups to acquire, possess, produce, and disseminate publications.[62]

More recently, the OSCE States have expressed their concern about the exploitation of religion for purposes of aggression. Also, it should be mentioned that the OSCE participating States have made it clear that their increased efforts to combat terrorism will not affect their commitments to religious freedom.[63] The Bucharest Ministerial Declaration (2001), for example, stated that "the struggle against terrorism is not a war against religions", while the Bucharest Ministerial Decision on Combating Terrorism reiterated that efforts to combat terrorism must fully respect human rights. The participating States firmly rejected "identification of terrorism with any nationality or religion."

Conscientious Objection

A right to conscientious objection has been recognized in resolutions and recommendations adopted by the United Nations Commission on Human Rights, the United Nations Human Rights Committee, the Council of Europe and the European Parliament. These bodies have all urged governments to guarantee that individuals objecting to compulsory military service because of their conscientiously held beliefs are given the opportunity to perform an alternate community service.

For instance, the Committee of Ministers of the Council of Europe underlines the basic principle according to which anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms shall have the right to be released from the obligation to perform such service.[64] Similarly, the

[62] Concluding Document of the Vienna Third Follow-up Meeting (1989), at point 16.
[63] Budapest Document 1994: Towards a genuine partnership in a new era (point 27).
[64] Recommendation No. R (87) 8 (April 1987).

Parliamentary Assembly of the Council of Europe finds that the right of conscientious objection should be incorporated as a fundamental right in the legal systems of the member States.[65] The Parliament's subsequent Resolution on the subject states that conscientious objection to military service is inherent in the concept of freedom of thought, conscience and religion, as recognized in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[66]

Completing this battery of European standards on conscientious objection as a human right, the Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE records that participating States should note that the United Nations Commission on Human Rights has recognized the right of everyone to have conscientious objections to military service. Accordingly, the Copenhagen Document (1990) commits participating States to consider introducing non-punitive forms of alternate community service of a non-combatant or civilian nature, and to make information available to the public on this issue.[67]

8.7. Monitoring the Right: the Special Challenges

Many individuals and groups face restrictions on their right to freedom of religion or belief. The problems they encounter include discrimination against individuals in the workplace and public services, defamatory campaigns against minority religions or beliefs, the disruption or prohibition of worship even in private homes, censorship of religious literature, and imprisonment of those who object to military service on religious grounds. These restrictions may be a direct result of State legislation and policies; or, in other cases, they may be the result of a lack

[65] Resolution adopted on 11 March 1993. The Resolution refers to the recognition by Resolution 89/59 of the UN Commission on Human Rights regarding conscientious objection against military service.

[66] Adopted on 18 January 1994.

[67] See para. 18(4): "[The participating States] agree to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature."

of protective action from State authorities, often in the face of a dominant religious majority.

Belief and religion cover a very subjective and intimate area of each individual's life. Untraditional or minority beliefs and religions may appear strange, eccentric, or even shocking to the outsider. In this respect, it is paramount that the monitor is open-minded and executes his/her work in a manner that encourages dialogue and understanding between the various communities (the believers and the non-believers or the members of various religious communities).

The main challenge concerning the monitoring of the right to freedom of religion or belief is to establish, to what extent the State or the public authorities may interfere in religious matters. Generally, there is a trend in Europe towards extricating the State from doctrinal and theological matters. In this respect, the State should be very reluctant to engage in matters regarding issues of faith, belief, or the internal organization of a religious group. However, whenever the freedom of religion of a group or of an individual enters into conflict with the interests of society or with the rights and interests of others, public authorities have to engage in a careful balancing of the rights and interests at stake. In this respect, it is important that the monitor is always aware of the possible conflicting rights that may be involved and always considers the least intrusive and the most nuanced manner of dealing with them.

8.8. Monitoring Checklist on the Right to Freedom of Religion, Thought and Conscience

Checklist – The Right to Freedom of Religion

1. Legislation and Regulation Check
   - Relevant international human rights instruments ratified by the State, and reservations made upon ratification.
   - Conformity of all national regulations and legislation related to freedom of thought, conscience and religion with international and regional standards.
   - Legal basis for restrictions to the right to freedom of thought, conscience and religion.
   - Requirements for an interference with the right to freedom of thought, conscience and religion: Are all requirements clearly understandable and specific, or do they allow for a wide margin of appreciation by the authorities concerned?
   - Direct or indirect discriminatory effects of some aspects of the legislation or the regulation restricting freedom of religion.
   - Effective and accessible remedies in case of interference with the freedom of religion of an individual (administrative or judiciary remedy).
   - Existence of a Church with an official status in the country: State Church or official religion?
   - Existence of a law concerning the formal registration, incorporation or recognition of religious communities: Which conditions does the law specify for qualifying as a religious community (document requirements)? Who is the registration authority? What is the extent of the power of the authority in charge of registration? Is there a right to appeal established by law?
   - Establishment of a place of worship: requirements, delays, and review of initial decision.
   - Other legal entity structures available to religious communities: Can the religious community be registered as a normal non-profit association or other type of association?
   - Law or regulations on conscientious objection: Is there a right to conscientious objection? Is there an alternative service option as non-combatant or civilian?

2. Monitoring the Right in Practice
   - Length of decision-making processes in cases concerning the official acknowledgement of a religious community or inauguration of a place of worship.
   - Length of time needed to receive an administrative decision related to the establishment of a place of worship.

– Review of documents presented by religious communities in procedures concerning the opening of places of worship: the review has to focus on formal matters. More substantive review (including doctrinal or ecclesiologic assessment of the religion) is not permitted.

8.9. Instruments on the Right to Freedom of Religion, Thought and Conscience

Relevant Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 18	1. Right to freedom of thought, conscience and religion (freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching). 2. No coercion which would impair the freedom to have or to adopt a religion or belief. 3. Freedom to manifest one's religion or beliefs may be subject only to limitations (prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others). 4. Liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.	General Comment no. 22 by Human Rights Committee
Article 20(2)	Prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence	General Comment No. 22 by Human Rights Committee, para. 9
Article 27	Protection of religious minorities	General Comment No. 23 by Human Rights Committee

Convention on the Rights of the Child, 1989 (CRC)

Article 14	1. Right of the child to freedom of thought, conscience and religion. 2. Liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. 3. Freedom to manifest one's religion or beliefs may be subject only to limitations (prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others).	No General Comment by the Committee of the Rights of the Child

Convention Relating to the Status of Refugees (1951)

Article 4	The States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.	

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 9	1. Right to freedom of thought, conscience and religion (freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching). 2. Freedom to manifest one's religion or beliefs may be subject only to limitations (prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others).	Case law developed by the European Court of Human Rights

CSCE/OSCE Instruments

OSCE

Concluding Document of the Vienna Third Follow-up Meeting (1989)

Section	Critical Substantive Points
Paragraph 16	– Freedom to choose and practice a religion or belief and to change one's current religion or belief for another. – Responsibilities placed on governments to create a climate that is conducive to the respect of the right to freedom of thought, conscience, religion or belief (for instance, responsibility to foster a climate of tolerance, to grant recognition upon request to communities of believers, or to respect the right of religious communities to establish places of worship).

Copenhagen Document (1990)

Critical Substantive Points
OSCE States commit themselves to consider introducing non-punitive forms of alternative service of a non-combatant or civilian nature, and to make information available to the public on this issue.

Budapest Document (1994)

Section	Critical Substantive Points
Paragraph 27	Concern of OSCE States about the exploitation of religion for aggressive ends

Bucharest Ministerial Declaration (2001) and Bucharest Ministerial Decision on Combating Terrorism (2001)

Critical Substantive Points
– The struggle against terrorism is not a war against religions.
– Efforts to combat terrorism must fully respect human rights. The participating States firmly reject "identification of terrorism with any nationality or religion".

Other International Instruments

United Nations

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

Section	Critical Substantive Points
Article 2	Definition of religious intolerance and discrimination as any distinction, exclusion, restriction or preference based on religion or belief with the purpose or effect being the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.
Article 4(1)	States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights in all fields of civil, economic, political, social and cultural life.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

Entirety	States shall protect the existence and the religious identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

Council of Europe

Recommendation R(87)8 on Conscientious Objection (1987) adopted by the Committee of Ministers of the Council of Europe

Critical Substantive Points
Right to be released from the obligation to perform military service (if compelling reasons of conscience).

Recommendation 1134 on the Rights of Minorities (1992) adopted by Parliamentary Assembly of the Council of Europe

Various provisions on the religious rights of minorities.

Resolution on Conscientious Objection (1993) adopted by the Parliamentary Assembly of the Council of Europe

Right of conscientious objection should be incorporated as a fundamental right in the legal systems of the member States.

Resolution on Conscientious Objection (1994) adopted by the Parliamentary Assembly of the Council of Europe

Conscientious objection to military service is inherent in the concept of freedom of thought, conscience and religion, as recognized in ECHR Article 9.

Recommendation 1134 on the Rights of Minorities (1992) adopted by General Assembly of the Council of Europe

Various provisions on the religious rights of minorities.

8.10. References

Boyle, Kevin and Sheen, Juliet (eds.), *Freedom of Religion and Belief: A World Report*. (London: Routledge, 1997).
This book provides a detailed account of how the individual's right to hold beliefs is understood, protected, or denied in theory and practice throughout the world. It is based on drafts commissioned from experts living in the countries surveyed.

Danchin, Peter G. and Cole, Elizabeth A. (eds.), *Protecting the Human Rights of Religious Minorities in Eastern Europe*. (New York City: Columbia University Press, 2002).
This book concerns freedom of religion in Central and Eastern Europe where official atheism has now been replaced by varying models of church-State arrangements. The book also discusses issues that are relevant to Western Europe.

Evans, Carolyn, *Freedom of Religion under the European Convention on Human Rights*. (Oxford: Oxford University Press, 2001).
This book provides a detailed analysis of the standards developed under the European Convention on Human Rights. It takes a critical stand on the restrictive manner in which the European Court of Human Rights has interpreted freedom of religion or belief in areas such as education, conscientious objection, proselytism, and employment.

Ghanea, Nazila (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium*. (Leiden: Martinus Nijhoff Publishers, 2003).
This book benefits from analyses by scholars of law, history, religious studies, and sociology. It examines the relationship between human rights, law and religion. It offers a typology for the study of religious persecution and analyzes the implications of international human rights law.

Lindholm, Tore, Durham, Cole W. Jr. and Tahzib-Lie, Bahia G. (eds.), *Facilitating Freedom of Religion or Belief: A desk book*. (Leiden: Martinus Nijhoff, 2004).
This anthology (fifty contributors) is designed as a resource for all who are concerned with facilitating improved global compliance with international standards in the area of freedom of religion. The book surveys central areas of controversy, including registration of organizations of religion or belief, emerging debates on religion and gender, parental and children's rights, new religious movements, proselytism, and conscientious objection.

OSCE, *OSCE Guidelines for review of legislation pertaining to religion or belief*, 2004. http://www.osce.org/odihr/item_11_13600.html

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CHAPTER 9

THE RIGHTS TO FREEDOM OF ASSEMBLY AND ASSOCIATION

9.1. Definition

The rights to freedom of assembly and freedom of association are critical to the functioning of modern democratic societies. Freedom of association guarantees the ability to establish, control and dissolve an association, so as to promote persons' common objectives. The right to freedom of assembly protects persons' and associations' ability to gather in a private or public forum for a specific purpose. There is a close relationship between these human rights, in that it would be difficult to have a meaningful freedom of association without freedom of assembly, and vice versa. For this reason, freedom of association and freedom of assembly are often presented as two closely related human rights.

Freedom of Association

Individuals have the right to join together in an association to pursue a common objective; and to pursue the objective through the association, free from illegal impediments by the State or other bodies. All persons are entitled to exercise their right to freedom of association without discrimination. International law permits legally based restrictions of the exercise of this right by police, military, and public administrators. All restrictions or regulations imposed by the authorities must be prescribed by the law, necessary in a democratic society and proportionate to the aims and objectives trying to be achieved (cf. chapter 2, section *Limitation of Rights*). In this context, proportionality requires that the interests of individuals or groups wishing to exercise the freedom be balanced against the needs of the community.

International protection under the right to freedom of association is provided to groups that meet the definition of an association, as defined by international human rights standards. The group must have at least two members, and the associations' members must be natural

persons or have legal personality. **Legal personality** is a structure created by law that allows a group of individuals to be recognized as one unit for certain defined purposes. Some typical examples of legal personality are corporations or companies, and non-profit associations or organizations.

The association must have a common, permissible objective, which is promoted through the association by legal means. As a rule of thumb, any political, social or cultural objective that an individual may legally pursue may also be pursued by an association. Even advocating the adoption of a currently illegal policy or law is protected, provided that it is not promoted through illegal activities or methods.

Associations must have some degree of stability, though a formal or established structure is not required. However, a group that organizes only for a discrete event or activity probably does not qualify as an association. Registration of an association with the authorities is not a prerequisite for qualifying for protection under international law, even though national laws might require registration in order to qualify for protection under national law.

Associations may engage in all legal activities that promote their objectives, free from interference by the State, including all administrative and management-related tasks. Some noteworthy protected activities include: freedom to form or found an association; the right of an association to choose its members based on relevant criteria—including the right to refuse membership to individuals; the right to acquire legal personality where it is essential to enable pursuit of the association's objectives; the right to be free from unjustified penalties resulting from membership of an association; the right to operate an association without unnecessary regulation or interference by the authorities; the right to establish contact and linkages with other associations nationally or internationally; and the right not to be dissolved by the authorities. Furthermore, the right to appeal authorities' decisions is protected, including refusal to register an association, and refusal to provide tax-exempt status.

Freedom of Assembly

Freedom of assembly can be defined as the right of persons or groups, including but not limited to associations, to peacefully gather with a specific purpose in a public or private forum. It is not intended to protect purely private gatherings or parties, but is rather intended

to protect gatherings that take place with the purpose of discussing or disseminating information and ideas, directed at the public or a segment of the public. The assembly must be lawful, meaning that it must comply with administrative requirements laid down by the authorities; it must have a lawful objective; and it must be peaceful and non-violent. A broad range of activities can be categorized as assemblies, including demonstrations, parades, rallies, speeches, and meetings. All regulation of the right to freedom of assembly must be exercised in a non-discriminatory manner.

9.2. Legally Binding Standards

The rights to freedom of assembly and association are included in all of the most important international human rights instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and The International Convention for Civil and Political Rights (ICCPR) provide broad and general protection of the freedom of association and peaceful assembly, in similar language. The ICCPR separates the rights into two separate articles, while the ECHR joins the two rights under one article.

Box 9.1. Core Provisions of Freedom of Assembly and Association

ICCPR Article 21: "The right of peaceful assembly shall be recognized." Article 22: "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."

ECHR Article 11: "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 these interests."

Both treaties explicitly mention the right to form and join trade unions as included within the scope of protected associational activities.[1] However, the highlighting of trade unions' rights is not intended to diminish the importance of freedom of association and assembly for other groups, but should rather be understood as merely emphasizing that trade unions are protected. The ICCPR further includes a provision that supports the International Labour Organization's (ILO) Freedom

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 1, Article 11 Section 1, and International Covenant on Civil and Political Rights (1966) Article 22 Section 1.

of Association and Protection of the Right to Organize Convention (Convention No. 87).

The ICCPR and ECHR both allow States to restrict the rights to freedom of association and assembly only according to law, and where necessary for reasons of national security or public safety, protection of public health, morals, and the protection of the rights and freedoms of others.[2] While the ICCPR includes public order as a possible ground for restriction of the rights,[3] the ECHR permits restrictions on the basis of prevention of disorder or crime.[4]

These human rights conventions also require the State to even-handedly administer the rights to freedom of assembly and association, because the rights are subject to non-discrimination clauses included in the treaties. For example, Article 14 of the ECHR guarantees that all rights in the treaty are secured without discrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status".[5] The same grounds for non-discrimination are set forth in the ICCPR with respect to all State action in Article 26, with the exception of 'national minorities'.[6] Nonetheless, it is likely that equal protection for the associational and assembly rights of national minorities would be guaranteed on other grounds, such as political opinion, national or social origin, or the category of 'other status' in the ICCPR Article 26.

Trade Unions, Non-Governmental Organizations, and Political Parties

Protection of the rights to freedom of assembly and association applies to all associations and groups, but some groups in society are guaranteed an additional or specially tailored level of international protection. In particular, trade unions, workers, and employees feature prominently in international human rights law, and their rights are elabo-

[2] International Covenant on Civil and Political Rights (1966), Article 21 and Article 22 Section 2, and Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as amended by Protocol no. 11, Article 11 Section 2.

[3] International Covenant on Civil and Political Rights (1966) Articles 21, 22 Section 2.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as amended by Protocol No. 11, Article 11 Section 2.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 11, Article 14.

[6] International Covenant on Civil and Political Rights (1966), Article 26.

rated in extensive detail through the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[7] ILO Conventions, and in particular through the decisions of the ILO's Committee of Freedom of Association (CFA). The main international conventions that protect refugees, stateless persons, and national minorities also provide specific protection of the rights to freedom of association and assembly for their target groups. The Convention relating to the Status of Refugees[8] and The Convention Relating to the Status of Stateless Persons[9] provide international protection to refugees and stateless persons that is at least as great, as that provided to other aliens in their host country, although it is explicitly limited to non-political and non-profit-making associations and trade unions. National minorities' rights to peaceful assembly and freedom of association are protected by the Framework Convention for the Protection of National Minorities.[10] The Convention on the Rights of the Child provides children with protection of their rights to freedom of assembly and association.[11]

Reflecting the worldwide growth of civil society's impact on democratic processes, other groups that have obtained specific guarantees of their rights to freedom of association and assembly through international law include environmental workers[12] and international non-governmental organizations. Non-governmental organizations are singled out as having a particular interest in access to information, participation in decision making and access to justice related to environmental matters in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[13] Though the impact of this regional treaty is limited to States members of the UN Economic Commission for Europe, and States with consultative status, it is significant, because it guarantees some kinds of associational rights for environmental workers whose activism often places them under pressure. International non-governmental organizations have succeeded in obtaining improved

[7] International Covenant on Economic, Social and Cultural Rights (1966), Article 8.

[8] Convention and Protocol Relating to the Status of Refugees (1951), Article 15.

[9] Convention Relating to the Status of Stateless Persons (1954), Article 15.

[10] Framework Convention for the Protection of National Minorities (1998), Article 7.

[11] Convention on the Rights of the Child (1990), Article 15.

[12] Convention on Access to Information, Public Participation in Decision-Making and Access to justice in Environmental Matters (1998), Articles 2(4), 2(5) and 3.

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to justice in Environmental Matters (1998), Articles 2(4), 2(5) and 3.

cross-border recognition of legal personality and capacity in Council of Europe (CoE) States signatory to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.[14] Although this treaty is in force, its impact is limited due to the rather low number of States Parties to the Convention, at ten.

Special Protection Related to Unions, Workers, and Employers

The most detailed protection of workers' freedom of association and assembly is found in UN conventions, including the ICESCR and ILO Convention No. 87, and ILO Convention No. 98 (cf. the list of instruments in the last section of this chapter for more detailed information on the content of the ILO conventions).

Box 9.2. Provision on the Rights to Form Trade Unions

ICESCR Article 8:

"1. The States Parties to the present Covenant undertake to ensure:

a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
b) The right of trade unions to establish national federations of confederations and the right of the latter to form or join international trade-union organizations;
c) the right of trade unions to function freely, subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

The ICESCR guarantees all persons' right to form and join trade unions,[15] the right of trade unions to establish national labour organizations and to join with international organizations,[16] to function

[14] European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (1986).

[15] International Covenant on Economic, Social and Cultural Rights (1966), Article 8, Section 1(a).

[16] International Covenant on Economic, Social and Cultural Rights (1966), Article 8, Section 1(b).

freely,[17] and to strike.[18] However, the most detailed and extensive standard setting in the field of freedom of association for workers, employers and trade unions has been the ILO. All ILO member States are subject to the supervisory procedure implemented via the CFA, even if they have not ratified Conventions No. 87 and No. 98. When complaints are brought against countries that have ratified these two conventions, legal aspects of the complaints may be taken to the ILO Committee of Experts by the CFA. Convention No. 87, guaranteeing primarily freedom of association, sets the standard related to detail and scope of protection, with over fifty years of decisions on ILO member States' alleged violations. It is also extensively ratified with 144 ratifications. Some human rights advocates argue that ILO standards related to trade unions' freedom of association and assembly should be used for guidance to develop human rights standards for association and assembly rights for associations that are not trade unions, such as non-governmental organizations. Certainly in cases where the international human rights law related is unclear or not yet developed the ILO standards could be used to advocate from a principled standpoint.

Convention No. 87 guarantees workers and employers the right to establish and join organizations,[19] organize and manage them free from interference of the public authorities,[20] including reserving to the organization the power to dissolve or suspend itself.[21] Such organizations may found and join federations and confederations nationally or internationally,[22] which have the same rights as trade unions.[23] In addition, the State's authority to grant legal personality may not be applied in such a way so as to impair or constrain the guarantees set forth in Convention No. 87, in particular the free establishment of organizations.[24]

Convention No. 98 makes it illegal for an employer to set as a condition for hiring a person that he makes a promise to abstain from joining

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[17] International Covenant on Economic, Social and Cultural Rights (1966), Article 8, Section 1(c).

[18] International Covenant on Economic, Social and Cultural Rights (1966), Article 8, Section 1(d).

[19] Freedom of Association and Protection of the Right to Organize Convention, (1948) (No. 87), Article 2.

[20] Ibid., Article 3.

[21] Ibid., Article 4.

[22] Ibid., Article 5.

[23] Ibid., Article 6.

[24] Ibid., Article 7.

a union, or to give up union membership,[25] and forbids employers from dismissing employees or retaliating against them based on union activities.[26] It further guarantees workers' integrity in establishing and administering organizations,[27] and explicitly forbids acts taken by employers designed to gain control of workers' organizations.[28]

Restriction and Limitation of Freedom of Assembly and Association

The ECHR and the ICCPR both allow national authorities to lawfully restrict the associational rights of the armed forces and the police. However, while the ICCPR does not include the same restriction ground with respect to freedom of assembly, the ECHR gives States a freer hand to restrict the assembly rights of police, the armed forces, and administrators of the State. ILO Convention No. 98 explicitly removes "public servants engaged in the administration of the State" from the reach of the Convention.[29] The ECHR[30] and the ICESCR[31] similarly allow States Parties the latitude to impose restrictions on the exercise of freedom of association by employees engaged in administration of the State if they are provided by law and follow proportionality principles (cf. chapter 2, section *Limitation of Rights). The* ECHR allows States Parties to restrict the political activities of aliens,[32] and the political activities of refugees and stateless persons may similarly be limited by host countries that are Parties to the relevant conventions.[33]

The grounds for restriction of the freedom of association and assembly with respect to society at large are similar in the ECHR, ICCPR, and ICESCR. These instruments provide that all restrictions must be established by law and necessary within the context of a democratic

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[25] Freedom of Association and Protection of the Right to Organize Convention, (1948) (No. 98), Article 1, section 2(a).

[26] Ibid., Article 1, section 2(b).

[27] Ibid., Article 2(1).

[28] Ibid., Article 2 section 2.

[29] Ibid., Article 6.

[30] Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 11, Article 11 Section 2.

[31] International Covenant on Economic, Social and Cultural Rights (1966), Article 8, Section 2.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 11, Article 16.

[33] Convention and Protocol Relating to the Status of Refugees (1951), Article 15, and Convention Relating to the Status of Stateless Persons (1954), Article 15.

society. Restrictions must be designed to meet a national security or public safety interest, be in the interest of public order, protect health or morals, or protect the rights and freedoms of others. The ECHR contains the additional ground consisting of the prevention of crime. While setting forth these broad grounds for restriction of the rights, however, the ECHR contains two provisions that discourage the excessive use of restrictions or limitations of all rights in the instrument. Articles 17 and 18 prohibit States, groups and persons from limiting or restricting any rights further than provided for in the said convention, and from limiting or restricting them for purposes other than those allowed. In contrast, the ILO Conventions No. 87 and No. 98 contain no such general grounds for restriction or limitation.

All restrictions based on the grounds listed above are nonetheless subject to the principle of proportionality, legal certainty and foreseeability. They must be based in law, and be clear enough such that associations and individuals can understand the requirements for registration of associations and for holding public assemblies. The law must avoid vagueness or ambiguity, such that the authorities do not give the impression of being subjective in their regulation of the rights to freedom of association and assembly.

Derogation of the Rights to Freedom of Assembly and Association

The ECHR and the ICCPR allow for derogation of freedom of assembly and association. Derogation under the ECHR is permissible in wartime or during a public emergency that threatens the life of the State Party[34] and in the ICCPR during officially proclaimed public emergencies that threaten the life of the nation.[35] Derogations must be tailored only to the extent required by the exigencies of the crisis or circumstances.[36] The ICCPR further requires that no derogations involve discrimination.[37]

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[34] Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 11, Article 15.

[35] International Covenant on Civil and Political Rights (1966), Article 4(1).

[36] International Covenant on Civil and Political Rights (1966), Article 4(1); Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as amended by Protocol No. 11, Article 15.

[37] International Covenant on Civil and Political Rights (1966), Article 4(1). See also, General Comment No. 5: Derogation of Rights (Article 4): 31/07/81.

9.3. Interpretation of the International Instruments (Key Case Law)

The relevant bodies of case law with respect to the rights to freedom of assembly and association include the rulings of the European Court of Human Rights (ECtHR), a very few UN Human Rights Committee individual cases, and the Reports and Cases of the CFA. Although the CFA relates to trade and employers' unions and is limited to that context in terms of legal precedent, the principles developed could be used as general guidance as to how freedom of association could be shaped in other contexts. This could be particularly valuable in providing guidance for principles for which there is no precedent under ECHR and the ICCPR, and in countries that are ILO members or which have ratified Conventions No. 87 and No. 98.

9.4. Freedom of Association

What is an Association?

The State may set a requirement related to how many members a group must have before it qualifies as an association. While no international law or precedent has set an absolute minimum number, it is clear that the State-required number must not be so high so as to hinder the exercise of freedom of association. In the context of trade unions, the CFA has stated that a requirement of twenty members did not by itself seem excessive,[38] while fifty members was a hindrance to the right to establish a trade union.[39] It is probable that the determination of whether a minimum number of members acts as an obstacle to the exercise of freedom of association should be determined on a case-by-case basis.

The name or category that a group is designated under State law, such as whether it is a parastatal, an association, an administrative body, or an NGO, is not conclusive as to whether it is an association protected by international human rights law.[40] On the other hand, rel-

[38] Committee on Freedom of Association, Digest of Decisions 1985, para. 257. Online at www.ilo.org/ilolex/english/digestq.htm.

[39] Ibid., para. 258. Online at www.ilo.org/ilolex/english/digestq.htm.

[40] *Chassagnou and Others v. France*, 29 April 1999.

evant factors include whether membership is voluntary or mandatory, or if the members come together to promote an objective or to be regulated as a profession.[41] If membership is involuntary or required by State or other law, or if the group is one that regulates or licences members of a particular profession, the group probably does not fall within the definition of association for the purposes of international human rights protection.

What are Permissible Objectives?

Political activities, and in particular political Parties, are protected by the right to freedom of association.[42] Associations that have the objective of earning profits and distributing them to the members are not protected under this right, although profit-making activities may in some circumstances be promoted through an association that falls within the definition. An association may establish itself in order to pursue a change in the law, for example, to promote the criminalization or decriminalization of certain conduct,[43] but registration may be denied if the organization undertakes or promotes activities regarded as inciting illegal activity.[44] Advocating for the change of the constitutional structure of a State is also a legal objective,[45] although the nature of the change advocated is not limitless. The ECtHR has ruled that the means used to promote the change must be legal and democratic, and the change proposed must itself be compatible with fundamental democratic principles.[46] For example, seeking to change a State Party to a sharia law-based State was considered incompatible with fundamental democratic principles, with respect to the Refah (Welfare) Party in Turkey, and was part of the reason why the Turkish government's dissolution of the Party was allowed.[47]

However, the ECtHR was careful not to tolerate national authorities' oversensitivity in their assessment of what poses a national security threat. The ECtHR did not accept the Turkish State's argument that a political Party's choice of a name involving 'Communist' indicated

[41] *LeCompte, Van Leuven and De Meyere v. Belgium*, 23 June 1981.
[42] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998.
[43] *X v. United Kingdom*, 11Dr117, 1978.
[44] *Lavisse v. France*, Appl. No. 14223/88 70 DR 218 (1991).
[45] *Socialist Party and Others v. Turkey*, 25 May 1998.
[46] *Refah Partisi (The Welfare Party) and Others v. Turkey* 31 July 2001.
[47] *Refah Partisi (The Welfare Party) and Others v. Turkey* 31 July 2001.

that the Party sought to establish the domination of one social class over others, which, in the Turkish State's view, would pose a national security threat. Further, inclusion of terms such as Kurdish 'people', 'nation', and 'citizens' in the Party's materials was not viewed as adequate to support the Turkish State's perception that the organization intended to promote secession of Eastern Turkey from the country.[48]

However, where an association appears to advocate for activities that promote secession, the ECtHR has been more restrictive. In the case where a nationalist group in Poland actually promoted secession of one region from the Polish State, the ECtHR upheld the Polish State's decision to refuse registration. The Polish State claimed that although the group's objective was legal, its use of a name that actually promoted secession was illegal.[49]

Right to Register and Possess Legal Personality

Acquiring legal personality by registering with the authorities is often a critical step in an organization's formation and administration. In that way the association can acquire a bank account, obtain a special tax status, enter into leases and other contracts, on a basis other than the individual members' legal capacity. The ECtHR has ruled that the right to legal personality is inherent in the right to freedom of association, because citizens "should be able to create a legal entirety in order to act collectively in a field of mutual interest."[50]

Organizations may be required to fulfil certain formalities, on the condition that the formalities do not have the impact of functioning as previous authorization.[51] Formalities must not be too burdensome so as to delay or prevent the setting up of organizations.[52] In the labour context, factors which have been described as tantamount to prior authorization include a complicated and lengthy registration procedure, or excessive discretionary powers by administrative authorities.[53]

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[48] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998.

[49] *Gorzelik and Others v. Poland*, 20 December 2001.

[50] *Sidiropoulos and Others v. Greece*, ECHR (57/1997/841/1047) (Chamber decision, July 10, 1998).

[51] Committee on Freedom of Association Digest of Decisions 1985 para. 283. Online at www.ilo.org/ilolex/english/digestq.htm.

[52] Ibid., para. 270, 244th Report, Cases No.s. 1176, 1195, 1215, 1262, para. 275. Online at www.ilo.org/ilolex/english/digestq.htm.

[53] Ibid., para. 281. Online at www.ilo.org/ilolex/english/digestq.htm.

For example, a period of one year between filing a registration application and receiving a decision constitutes a prior authorization.[54] Also, a requirement of submitting the organizational constitution and rules to the authorities before being permitted to register is an illegal prior authorization.[55]

Freedom of an Association to Manage its Own Affairs

Attempts by the authorities to dominate or influence associations' internal management or procedures are violations of the freedom of association. Even where the authorities' efforts are well-intentioned and would provide a public good, such interventions are illegal, as in the case where Iceland sought to use a taxi association to manage public taxi services.[56]

There are likely to be cases in which authorities would be entitled to force an association's dissolution, such as in instances where the organization undertakes illegal activities or fails to maintain a tax-exempt or other status that was a precondition for registration. However, in cases lacking such features, there must be a very well-founded basis for such action. One such strong case was found where the Turkish State was permitted to dissolve the Welfare Party because the Party's objective was anti-democratic and anti-secular.[57] In that case, the case was strengthened because it was demonstrated that the anti-democratic objective was achievable, which the Turkish State convincingly argued, by showing that the Welfare Party had a strong presence in the Turkish national assembly and had achieved substantial success in local elections. Thus, an indication of the possibility of achieving anti-democratic objectives further bolstered the case for the Welfare Party's dissolution.

Right to Appeal

In the trade union context, there must be a right to appeal from the authorities' refusal to register an association.[58] Dissolution or suspension of associations and trade unions are serious interventions in their

[54] ILO Case 1176, para. 272. Online at www.ilo.org/ilolex.

[55] ILO Committee on Freedom of Association 194th Report, Case No. 1704, para. 152. Online at www.ilo.org/ilolex.

[56] *Sigurdur A. Sigurjonsson v. Iceland*, 13 August 1993.

[57] *Refah Partisi (The Welfare Party) and Others v. Turkey*, 31 July 2001.

[58] ILO Digest of 1985, para. 276.

administration, and judicial guarantees, including the right to appeal, must be available to challenge an administrative authority's decision in this regard.[59]

Penalties for Membership in an Association

Persons may not be dismissed from their jobs, or subject to any other sanction due to their membership in any form of association, including trade unions. For example, making members of Masonic lodges (Freemasons) ineligible for appointments to some public posts was ruled illegal,[60] as was rendering Freemason union members ineligible for certain pay increases.[61]

Penalties, which association members are protected from, also include disincentives to belong to an association, such as loss of eligibility for benefits or posts, or threat of deportation. However, where membership in an association is incompatible with the nature, objectives, and performance of an employee's professional responsibilities, under some circumstances an employer could terminate employment without violating the employee's freedom of association. The ECtHR allowed an employee's dismissal because his membership in an association, that advocated repatriation of immigrants, could have had an adverse effect on his employer's organization, which promoted the interests of immigrants.[62]

Right to be Free from Membership

The ECtHR has also recognized that individuals have the right to be free from membership in associations, both in the trade union context and in other contexts. Individuals cannot be forced to join a union in order to retain their job, or to continue to exercise their profession, in instances where membership becomes required after they are hired.[63] The ECtHR regarded the threat of losing one's source of income as an extraordinary and illegal form of compulsion to join an association.[64]

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[59] ILO Committee on Freedom of Association 194th Report, Case No. 1704, para. 152.

[60] *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, 2 August 2001.

[61] *Wilson and Others v. United Kingdom*, 2 July 2002.

[62] *Ven der Heijden v. The Netherlands*, Appl No. 11002/84, 41 Dr 264, (1985).

[63] *Young, James and Webster v. United Kingdom*, 13 August 1981.

[64] Ibid.

Furthermore, forcing an employee to join an association against his or her beliefs is a violation of the fundamental principle of the freedom of association,[65] and is also illegal because it is unforeseeable when it is imposed after the employee is hired.

These principles are also valid in a non-union context. For instance, the public interest in regulating hunting by creating communal hunting grounds did not justify forcing private landowners to join an association promoting objectives of which they disapproved.[66] However, the ECtHR has consistently permitted compulsory membership in professional associations, i.e. in licensing associations for particular professions such as physicians, engineers, lawyers, and other occupational groups. At the same time it must be noted that such compulsory membership has been upheld in contexts where the individual could still set up and join a different association, through which he or she could express a different point of view from that of the compulsory membership organization. This suggests that if membership is compulsory and exclusive, the member's freedom of association might be violated.[67]

Funding

In some countries, the authorities have sought to restrict the ability of associations to receive funding from international organizations or from other associations located abroad. While there is little case law relating to NGOs or most other types of associations, in cases before the CFA, such restrictions have been ruled as violating both the ban against prior authorization and the right of trade unions to affiliate internationally.[68]

Restrictions and Limitations

Restrictions related to the exercise of the right to freedom of association of police, armed forces, and the administration of the State must be based on the law. All such restrictions must be designed around the concerns of ensuring that those public servants' responsibilities can be fulfilled, and that the public can have confidence in their neutrality.[69]

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[65] Ibid., 13 August 1981.
[66] *Chassagnou and Others v. France*, 29 April 1999, § 117.
[67] *Revert and Legalais v. France*, 62 DR 309 (1989).
[68] Committee on Freedom of Association Digest of Decisions 1996, para. 630, 632, 633.
[69] *Ahmed and Others v. United Kingdom*, 2 September 1998.

One area that has potential for overuse is that of administration of the State, or public employees. The ECtHR has sought to limit this exception by narrowly interpreting the term 'administration of the State'. An employee does not fall within this category merely because he or she is paid from public funds. The term is increasingly being viewed as applying only to high-ranking officials and to other public employees whose engagement in a particular association or assembly is prejudicial to their professional responsibilities.[70] One instance where restrictions were allowed involved employees who worked at an institution that ensured the security of military and official communications.[71]

9.5. Freedom of Assembly

Administrative Requirements for Registration of Events

The authorities are entitled to set up a framework for registering and organizing public assemblies, because they may require advance notice of a public assembly, in order to make arrangements for ensuring public order.[72] Providing notice of intent to hold an assembly or even obtaining permission is allowed.[73] However, any decision making by the authorities, and all restrictions imposed, must be based on the individual case at hand and not on generalized restrictions.[74] Payment of fees may not be required as a condition of organizing an assembly. Where permission is refused, assembly organizers must have access to an appeal process and prompt judicial review.[75]

It is not necessary that assembly organizers be registered as an association or other legally constituted group. However, it is necessary that the authorities have clarity with respect to who is running the event.

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[70] Ibid.

[71] Appl. No. 11603/85, *Council of Civil Service Unions and Others v. United Kingdom*, 50 DR 228 (1987).

[72] Appl. 8191/778, *Rassemblement Jureassien Unite Jurassienne v. Switzerland*, 17 DR 93 (1979).

[73] Appl. 19601/92, *Ciraklar v. Turkey*, 80 DR 46 (1995).

[74] *Stankov and the United Macedonian Organization Ilinden v Bulgaria*, Judgment of the Court, 2 October 2001 and Comm. 628/199, *Park v. Korea*, Views 20 October 1998.

[75] Appl. 8440/78, *Christians against Racism and Fascism v. United Kingdom*, 21 DR 138 (1980).

Time, Place and Manner Restrictions

Restrictions on time, place, and manner of public assemblies are permitted, although they must be proportionate to the legitimate aim being pursued by the restriction. Groups are not entitled to hold assemblies at particular locations, or times, and their manner of holding the assembly may be regulated. Banning a rally concerning the Northern Ireland conflict from Trafalgar Square was ruled proportionate and therefore legal, because alternative sites were available to the organizers.[76] The nature of the assembly will shape the consideration of what a suitable site is. The critical issue is whether the assembly's message can be effectively communicated to its target audience, in the time period required to allow the message to have an impact. However, sometimes the site of a public demonstration will be so relevant to the message, that it justifies a temporary restriction on other freedoms. This was the case where the Austrian government allowed environmental demonstrators to restrict freedom of movement of goods and other movement through the Brenner Pass for 30 hours, because they judged the site to be essential to the demonstrators' message and objective.[77] It is also clear that assemblies may not be restricted merely because they cause an inconvenience to others.[78]

Counterdemonstration

There is a right to counter demonstrate, but it may not be used by the State as a justification for non-interference in a situation where counter demonstrators inhibit other demonstrators' ability to demonstrate. The State has a positive duty to protect demonstrators from those who would interrupt a legal assembly.[79] The authorities must take reasonable and appropriate measures to protect demonstrators, but they cannot be expected to guarantee results.[80]

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[76] *Rai, Almond, and "Negotiate Now" v. UK.*
[77] *Schmidberger v. Austria*, 12 June 2003, C-112/00, §69, §93.
[78] Appl 12079/87, *G. v. Federal Republic of Germany*, (1989) 60 DR 256.
[79] *Platform Arzte für das Leben v. Austria*, 21 June 1998, §31.
[80] *Platform Arzte für das Leben v. Austria*, 21 June 1998, p. 34.

Dispersals and Arrests

However, public assemblies may be dispersed where public disorder at the site is unmanageable in view of police resources. Arrests may sometimes be an appropriate response where breaches of the law have taken place and public order is threatened, but the response must be proportionate and respect international standards regarding the use of force.[81]

Restrictions

Restrictions of the right to freedom of assembly of civil servants, police and the military have also been upheld as long as they are proportionate.[82]

Restrictions on the grounds of public safety are often relevant to parades, though no cases have been decided by the ECtHR. The issue of what is a legitimate justification for State intervention in case of public disorder or crime has risen to the court on several occasions, and authorities are generally permitted a margin of discretion. Utilising the ground of prevention of disorder to restrict demonstrations has been upheld, to stop a sit-in protest on a public road,[83] to halt the setting up of a tent in an area open to public traffic,[84] and using loud noises including megaphones and pot and pan lids.[85]

9.6. National Implementation Mechanisms

Parliament or other legislative bodies usually have the responsibility of passing framework legislation for forming and registering political Parties, civil society organizations, trade unions and other forms of organizations.

All levels of the executive branch of government, ranging from national to municipal, may administer laws and regulations related to freedom of assembly and association. For example, in some States the government, employers, and trade unions negotiate a law for the establishment and functioning of trade unions and other collective bargain-

[81] Appl 19601/92, *Ciraklar v. Turkey*, 80 DR 46 (1995).
[82] *Ahmed and Others v. United Kingdom*, 2 September 1998.
[83] *G v. The Federal Republic of Germany* (1989), p. 263.
[84] *Gand E v. Norway*, (1990) at 37.
[85] *Chorherr v Austria* (1993).

ing organizations. Administrative departments may be responsible for setting up regulations related to professions and professional associations, in particular where licensing is required. Some such professions might include health professionals, legal professionals, engineers, and architects among others.

National and municipal authorities will frequently be involved in the registration of civil society organizations. Issuing of permits or registrations of intent to hold a lawful assembly may be implemented by the police or by a local municipality. It may also be required to obtain permission from the local administrative authority in charge of enforcing traffic regulations and managing roads. When it is intended to use a site of historic or artistic importance for a public assembly, permission from local authorities in charge of administration of historic venues may be required.

The police, and in some cases the military, will be responsible for policing public assemblies, including providing protection to demonstrators from counter demonstrators and members of the public.

The national court system will in most cases receive and hear complaints regarding the freedom of association and assembly. In some instances administrative authorities may be organized within the executive for hearing appeals. All court levels eventually could become critical in the resolution of complaints.

9.7. Politically Binding Instruments (OSCE Documents)

During the past decade a great number of international instruments have been developed and adopted within the OSCE, which have strengthened the framework for protecting the rights of freedom of association and assembly rights for civil society organizations and political Parties. The politically binding nature of these instruments enriches the basis from which monitoring and advocacy in Europe and other areas can be implemented.[86]

The OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension is a politically binding instrument,

[86] All of the documents discussed in this section are at a minimum politically binding within the OSCE. Their texts may be found under "freedoms of association and assembly" at www.osce.org/odihr/documents.html, and in the instance of UN documents, www.ohchr.org/english/law/.

which guarantees the rights of freedom of assembly and association in a detailed manner. It makes special mention of political Parties and organizations, the right to form and join trade unions, and includes freedom of association for workers and freedom to strike. Further, the rights to freedom of peaceful assembly and association are specifically mentioned.

The OSCE Commitments related to the right to freedom of association and assembly are compiled in a useful document entitled OSCE Commitments Related to Freedom of Assembly and Association. It compiles commitments related to human rights defenders, non-governmental organizations, freedom of expression, free media and information, freedom of thought, belief, conscience and religion, workers rights, national minorities, rule of law, right to fair trial, independence of the judiciary, right to effective remedies and respect for private and family life.

Three additional documents pertaining to the right to freedom of association and assembly of political Parties were drafted by the Venice Commission of the Council of Europe. The Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures sets specific guidelines by which political Parties may be prohibited and dissolved. It limits the circumstances under which those actions may take place, and describes which institutional mechanisms should be used at critical stages by States Parties. The Guidelines on the Financing of Political Parties pertain to the private and public financing of political Parties, electoral campaigns, and control and sanctions of the financing. The Guidelines on Legislation on Political Parties (2004) pertain to States' legislation for regulating political Parties.

In the area of civil society organizations and freedom of association and assembly, the Fundamental Principles on the Status of NGOs in Europe, which has been adopted as an official document of the OSCE, complements the legally binding European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations. The Fundamental Principles on the Status of NGOs in Europe applies even to NGOs which operate within only one State, while the latter convention, which is legally binding, applies to NGOs that have presence in more than one State. It further sets forth four basic principles for the treatment of NGOs in Europe, including their establishment, right to freedom of expression, legal personality, and access to legal protection.

The United Nations (UN) and European Union (EU) have developed guidelines for protecting human rights defenders, which have been adopted by the OSCE. The UN General Assembly has established the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, wherein the rights to freedom of peaceful assembly and association of human rights defenders are discussed in detail. The EU endorsed this Declaration and issued its own Ensuring Protection: European Union Guidelines Protecting Human Rights Defenders, which is intended to assist EU missions in their relations with countries external to the EU.

Other International Instruments

An important source of guidelines related to the right to freedom of assembly is the UN. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials contains twenty six articles relating to the use of force. The most relevant provisions in the context of policing assemblies recognize the right to lawful and peaceful assemblies, call for avoiding and restricting the use of force while dispersing unlawful and non-violent assemblies, and call for the minimum necessary use of firearms only in dispersal of non-violent assemblies, and under stipulated conditions.[87]

The freedom of association and assembly of judges and lawyers have been deemed so critical to the smooth functioning of democratic society that the UN General Assembly has promulgated special declarations to promote that end. In Basic Principles on the Independence of the Judiciary, judges' rights to freedom of association and assembly are emphasized, though it must be exercised so as to preserve the dignity, impartiality and independence of the Judiciary.[88] Similarly, the Basic Principles on the Role of Lawyers specifically emphasizes the right to freedom of association and assembly for lawyers, further mentioning their right to participate in public discussion relating to human rights, administration of justice and the law generally.[89]

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[87] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), Articles 12, 13, 14.

[88] Basic Principles on the Independence of the Judiciary (1985), Articles 8 and 9.

[89] Basic Principles on the Independence of the Judiciary (1990), Article 23.

9.8. Monitoring the Right to Freedom of Association and Assembly

In the context of the right to freedom of association and assembly, human rights monitors face the challenge of monitoring a diverse array of activities, actors, and contexts. Therefore the monitor must critically assess his or her priorities and define what he or she aims to accomplish. For organizational purposes, it could be useful to categorize the rights to freedom of association and assembly into the following categories: trade unions and labour relations; political Parties; civil society and non-governmental organizations excluding the previous two categories; and assembly generally.

After setting priorities, the monitor should gather all relevant legal information so as to establish an understanding of the legal framework. The monitor must gain an understanding of the State's international legal obligations, and national and local legislation. Noteworthy sources of legal information include regulations and legislation, case law, and executive orders from all relevant jurisdictions.

Active field-based monitoring will further require establishing a local network and observing assemblies and legal and administrative processes relating to administration of the rights, such as trials. Establishing a network will enable the monitor to understand the challenges in exercising these rights in a local context. The monitor should acquaint him or herself with administrators or authorities who play a role related to the rights, and obtain knowledge of all forms, formalities, procedures and other details that are relevant to associations and individuals who seek to exercise their rights to freedom of association and assembly. The monitor will establish working relationships with State or municipal authorities, so as to facilitate monitoring. This should include local bar associations and human rights organizations that monitor or advocate relating to the right to freedom of association and assembly.

Furthermore, the monitor should learn about and become engaged with local groups and individuals who seek to exercise their rights to freedom of association and assembly. The monitor should ensure that he or she regularly comes into contact with groups who are likely to experience violations, and should practice discretion and confidentiality with information he or she obtains.

During the course of work, the monitor should occasionally review the following checklists, to ensure that he or she does not overlook or

omit critical pieces of information. The monitor could also add other important issues to the checklist, according to what is relevant to the local situation.

9.9. Monitoring Checklists on the Right to Freedom of Association and Assembly

Checklist – Freedom of Association

1. Legislation and Regulation check
   - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification?
   - Has the State declared any State of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to freedom of association?
   - Has the State made any derogation?
   - Are all national regulations and legislation related to civil society organizations, political Parties, and trade unions easily available?
   - Has the monitor undertaken a critical review of legislative requirements for registration, including: minimum number of members, pre-registration requirements, amount and nature of fees, required linkages to other organizations or government departments?
   - Are all requirements clear and specific, or vague and permissive of a wide range of discretion?
   - Are all restrictions permissible under international law?
   - Is a right to appeal established at law?
   - What is the standard of review for an administrative decision related to freedom of association?
   - Are there any particular restrictions related to political Parties?
   - Are associations entitled to receive funding from associations in other countries?
   - Are there particular exceptions for refugees or stateless persons, or other aliens?
   - Are associations entitled to form federations, confederations, nationally and internationally?

2. Monitoring the Right in Practice
   - Is the State involved in the association's management, selection of leadership, and other critical internal procedures?
   - Are restrictions imposed on the association linked to characteristics that may be discriminatory?
   - Are any of the organization's objectives illegal?
   - Are there instances of members of particular associations being legally excluded from access to public goods, including, among other goods, public employment, grants, and contracts?
   - What is the length of time taken to receive an administrative decision related to registration of an association?
   - Are grounds of refusal to register an association provided in writing, and are they clear?

- Are administrative requirements for registering an association reasonable under the circumstances in society?
- Do the authorities exhibit a practice of suspending or dissolving civil society operations?
- Are members of particular organizations excluded from public employment, or discriminated against in access to that and other public goods?
- Do government employees belonging to particular associations experience discrimination in access to promotions, pay increases, and access to benefits?
- Are members of particular organizations discriminated against in access to public funded educational and training opportunities?
- Are public employees obligated to become members of particular unions in exchange for retaining their positions or established benefits?
- In cases where membership in a particular organization is required in order to obtain or retain a professional license, are members allowed to found or join similar organizations through which they can express their own points of view?

Checklist – Freedom of Assembly

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification?
   - Has the country declared any State of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to freedom of association?
   - Has the monitor collected national legislation and regulation related to assemblies?
   - Are there clear and established procedures for obtaining permission or providing notice of intent to assemble?
   - Are all requirements clear and specific, or vague and permitting a wide range of discretion?
   - Is a fee required for obtaining permission or providing notice of intent to assemble?
   - Are grounds of refusal to hold an assembly provided in writing, and are they clear?
   - Are any particular time, place and manner of assembly made categorically illegal by regulation?
   - If categorical restrictions on time, place and manner are made, do they meet the requirements of restrictions and limitations?
   - Are organizers of the demonstration made legally liable for all anticipated or unanticipated consequences of the demonstration?

2. Monitoring the Right in Practice
   - Is there a pattern or practice of refusing to grant permission to assemble to certain groups in society?
   - When the authorities refuse permission to assemble, are they willing to negotiate a solution to the refusal in time for the group to assemble within a time frame that meets the group's legal objectives?
   - When a group does not succeed in negotiating a solution with the authorities, is the appeal process implemented quickly enough so as to enable them to hold their assembly according to their legal objectives?
   - Do the participants in the assembly behave according to their stated intentions?
   - Do participants follow the instructions of the police?
   - Do participants keep to the time, place and manner of the demonstration allowed in their permit or notice of intent to assemble?
   - If counter demonstrators are present, are demonstrators protected from them by police?
   - If the general public becomes hostile or violent, are demonstrators protected from them by police?
   - Are the police neutral as to the subject matter of the assembly?
   - If the assembly is non-violent, do the police employ minimum use of force required?
   - If the assembly becomes violent, is the minimum use of force used to disperse it or to arrest the perpetrators?

9.10. Instruments on the Freedom of Association and Assembly

Relevant Legally Binding Instruments

UN Conventions

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 21	"The right of peaceful assembly shall be recognized."	No general comments by Human Rights Committee
Article 22	"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."	No general comments by Human Rights Committee

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 8	"1. (a) The right of every one to form trade unions and join the trade union of his choice (…) (b) The right of trade unions to establish national federations or confederations (…) (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law (…) (d) The right to strike (…)" Strengthened by a non-discrimination clause.	No General Comments by Committee on Economic, Social and Cultural Rights

Convention and Protocol Relating to the Status of Refugees, 1951

Critical Substantive Points
This instrument contains a clause that provides for refugees right to freedom of association. This instrument is binding upon all States Parties.

Convention Relating to the Status of Stateless Persons, 1954

This instrument contains a clause that provides for stateless persons the right to freedom of association. This instrument is binding upon all States Parties.

Convention on the Rights of the Child, 1989

This instrument contains a clause that provides for the freedom of association and assembly for children. This instrument is binding upon all States Parties.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998

This Convention provides for public participation for individuals and organizations related to environmental matters, including access to environmental information.

This convention is binding upon all States members of the Economic Commission for Europe, and States with consultative status to the United Nations Economic Commission for Europe.

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 11	"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 these interests." Subject to a non-discrimination clause.	Case law as developed through the European Court of Human Rights.

European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, 1986

Critical Substantive Points

This convention provides for automatic recognition of legal personality and capacity for NGOs that are established in a State Party. This is binding upon all States Parties, but is limited to the Council of Europe States.

European Social Charter (revised)

Section	Critical Substantive Points
Article 5	"All workers and employers have the right to freedom of association in national or international organizations for the protection of their economic and social interests."
Part V Article E	Strengthened by a non-discrimination clause.

Framework Convention for the Protection of National Minorities (1998)

Article 7	"The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion."

ILO Conventions

Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	This is the most critical ILO Convention, providing for the rights to establish and join organizations, draw up rules and constitutions and administer organizations, not be dissolved or suspended by administrative authority, to establish and join federations and confederations, nationally or internationally, to acquire legal personality.	Substantial Case Law developed via the Committee on Freedom of Association. The limitation of this convention with respect to freedom of association and assembly generally is that it only applies to trade unions and employers.

Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

Entirety	This protects workers against acts of anti-union discrimination, protects workers' and employers' organizations against acts of interference by the other, including by means of financing them.	Substantial Case Law developed via the Committee on Freedom of Association.

CSCE/OSCE Instruments

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

Critical Substantive Points
Paragraph 7, 7(6)
"respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities"
Paragraph 9, 9(3)
"the right of association will be guaranteed. The right to form and—subject to the general right of a trade union to determine its own membership—freely to join a trade union will be guaranteed. (…) Freedom of association for workers, including the freedom to strike, will be guaranteed(…)"
Paragraph 10, 10(3), 10(4)
"ensure that individuals are permitted to exercise the right to association". This section lists specific activities protected under this right.
Paragraph 9, 9(2)
"The participating States reaffirm that everyone will have the right of peaceful assembly and demonstration."

OSCE Commitments Related to Freedom of Assembly and Association (2004) www.osce.org/documents/odihr/1999/03/3673_en.pdf

This is a compilation of extracts from OSCE Commitments documents related to the right to freedom of association and assembly.

Other International Instruments

Universal Declaration of Human Rights (UDHR)

Critical Substantive Points
Article 20, Section 1
"Everyone has the right to freedom of peaceful assembly and association."

Article 20, Section 2 "No one may be compelled to belong to an association."	
Article 23, Section 4 "Everyone has the right to form and to join trade unions for the protection of his interests." The strength of this Declaration of the UN General Assembly is that it is so universally accepted that it has become customary international law. The weakness is that there is no implementation mechanism for enforcement.	

Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, Adopted by the Venice Commission at its 41st plenary session, December 1999

Critical Substantive Points	Relevant Treaty Body Interpretative Statements
This document sets specific guidelines by which political parties may be prohibited and dissolved. It limits the circumstances under which those actions may take place, and describes which institutional mechanisms should be used at critical stages in States Parties. The principal limitations of this document are that it is legally non-binding and it is limited to the members of the Council of Europe.	This is accompanied by an Explanatory Report.

Guidelines and Explanatory Report on Legislation on Political Parties: Some specific Issues, Adopted by the Venice Commission at its 58th Plenary Session, March 2004

This document sets forth guidelines regarding States' legislation for regulating political parties. The principal limitations of this document are that it is legally non-binding, and it is limited to the members of the Council of Europe.	This is accompanied by an Explanatory Report.

Guidelines and Explanatory Report on the Financing of Political Parties, Adopted by the Venice Commission at its 46th Plenary Meeting, March 2001

This document sets forth guidelines regarding the private and public financing of political parties, electoral campaigns, and control and sanctions of the financing. The principle limitations of this document are that it is legally non-binding, and it is limited to the members of the Council of Europe.	This is accompanied by an Explanatory Report.

Fundamental Principles on the Status of Non-Governmental Organisations in Europe (2002)

Entirety	Recommends the implementation of a number of principles relating to NGOs which should shape relevant legislation and practice in a democratic society founded on the rule of law.	Explanatory Memorandum, 2002

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)

Articles 12, 13, 14	This set of principles sets limits for the use of force in policing and dispersing assemblies. Its principal limitation is that it is a set of principles and not a binding body of law.

ILO Declaration of Fundamental Principles and Rights at Work (1998)

Critical Substantive Points	Relevant Treaty Body Interpretative Statements
This declaration reaffirms ILO members' duty to ratify all ILO Conventions if they have not, and reminds them of the obligation to promote and realize the obligation to act in accordance with the ILO Constitution. This includes freedom of association and assembly for trade unions. The limitation of this document is that it is merely a declaration and non-binding, but its strength is that it reminds members that they are nonetheless obligated to implement principles on the basis of membership in the organization.	www.ilo.org/dyn/declaris/ DECLARATION-WEB.INDEXPAGE

Charter of the Fundamental Rights of the European Union (2000)

Section	Critical Substantive Points
Article 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. 2. Political parties at the Union level contribute to expressing the political will of the citizens of the Union.

Declaration on the Rights and Responsibilities of Individuals, Groups or Organisations to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 5, and generally	UN General Assembly Declaration for the Protection of Human Rights Defenders. The UN General Assembly issued this declaration, wherein the rights to freedom of peaceful assembly and association of human rights defenders are elaborated in detail. The EU endorsed the UN's Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and annexed this to its own guidelines, entitled 'Ensuring Protection—European Union Guidelines Protecting Human Rights Defenders', which is intended to assist EU missions in their relations with countries external to the EU.	www.ohchr.org/english/law/freedom.htm

Basic Principles on the Independence of the Judiciary (1985)

Articles 8, 9	Adopted by the UN General Assembly. Judges' rights to freedom of association and assembly are emphasized in Articles 8 and 9, though the rights must be exercised so as to preserve the dignity, impartiality and independence of the Judiciary.	www.ohchr.org/english/law/indjudiciary.htm

Basic Principles on the Role of Lawyers (1990)

Article 23	Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Article 23 specifically emphasizes the rights to freedom of association and assembly for lawyers, further mentioning lawyers' right to participate in public discussion relating to human rights, administration of justice and the law generally.	www.ohchr.org/english/law/lawyers.htm

9.11. References

Hamilton, Michael, Neil Jarman, Dominic Bryan, *Parades, Protests and Policing, A Human Rights Framework*. (Northern Ireland Human Rights Commission, Belfast, March 2001). Available online at: http://www.osce.org/odihr/documents.html?lsi=true&limit=10&grp=240

Although this article was written specifically related to the situation in Northern Ireland, it nonetheless is very useful for legal practitioners seeking more information related to freedom of assembly. It describes the international human rights law angle particularly the ICCPR and the European Convention for Human Rights, and systematically reviews relevant case law.

McBride, Jeremy, *NGO Rights and their Protection under International Human Rights Law*. Available online at: http://www.osce.org/odihr/documents.html?lsi=true&limit=10&grp=240

This article is useful in particular for those interested in getting a detailed overview of NGO rights under international law, and a sense of the current issues in the field. It also contains a great number of case law references.

Public Interest Law Initiative, *Enabling Civil Society. Principal Aspects of Freedom of Association*. (Budapest Law Center). Available online at: www.pili.org/publications

This is a compilation of international laws, norms and procedures regulating freedom of association. Of particular interest is a chapter on the international law of freedom of association, detailing European Court of Human Rights case law, written by international human rights scholar Jeremy McBride. Furthermore there is a chapter on current challenges to the freedom of association for civil society.

Electronic Resources

www.ilo.org/public/english/standards/norm

This web site contains the International Labour Organizations' Conventions, Recommendations, a national labour law base, the Committee on Freedom of Association Digest of Decisions, and a case database.

www.ochchr.org/english/library/index

This is the web site of the UN High Commission of Human Rights. It contains all the major UN Conventions, declarations, guidelines, and links to monitoring bodies, the OHCHR library and catalogue, as well as related material.

www.osce.org/odihr/13436/html

This web site is the OSCE's Office of Democracy and Human Rights Freedom of Assembly and Association page, and contains links to its library, including documents and publications. There is a special link to its document collection on Freedom of Assembly and Association.

CHAPTER 10

RIGHT TO PROPERTY

The right to property is essential in a democratic society based on a free-market economy. Social progress and development require acknowledgement of the social function of property, of forms of ownership of land, and of an equal right to property for all. The State shall respect and protect this against any unjustified interference. An interference with the right to property may also constitute an interference with the right to a home or privacy.

The right to a fair trial, e.g. to speedy and effective proceedings, also has a bearing upon the enjoyment of one's property. If individuals or private companies cannot expect efficient and fair judicial procedures with adequate procedural guarantees, the protection of property might become illusionary. This means that the States shall ensure that the domestic courts work efficiently, and that the necessary procedural guarantees are in place, also in disputes between private persons.[1]

The State shall also ensure an equal access to acquire property and regulate the use of it in the interest of the general public.

10.1. Definition

The concept of property or possession[2] is very wide. It is not restricted to ownership of physical goods. Property may also include other rights and interests if they constitute an asset;[3] including claims, if the claimant can argue that he at least has a legitimate expectation of obtaining effective enjoyment of a property right.

But the mere hope of recognition of the survival of an old property right falls outside the scope of possession, if it has not been possible to exercise the right effectively for a long time. Likewise, a conditional

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[1] See the case of *Sovtransavto Holding v. Ukraine*, Judgment of 25 July 2002.

[2] ECHR Protocol 1 Article 1 does not mention the term property, but the ECtHR's case law has emphasized that Article 1 in substance guarantees the right to property.

[3] See ECtHR in the case of *Iatridis v. Greece*, Judgment of 25 March 1999, para. 53.

claim, which lapses as a result of the non-fulfilment of a condition, cannot be regarded as a possession.[4]

Finally, the right to property does not include a right to acquire property in the future. It is existing rights only that are protected.

Physical persons as well as non-physical entities (e.g. companies) may invoke the right to property. Shareholders in a company are not generally considered victims in relation to interference with the property of the company. Instead, the company as a legal entity is regarded as the victim, and the board or other competent organ of the company is entitled to invoke the right to property. If not, the shareholders may have an individual right.[5]

10.2. Legally Binding Standards

The right to property was included in the Universal Declaration on Human Rights, but not directly mentioned in the International Covenant for Civil and Political Rights (ICCPR) or the International Covenant for Economic, Social and Cultural Rights (ICESCR) as a specific right. The protection of property is sometimes derived from other provisions. ICESCR Article 9 calls for social security for all and Article 15 protects intellectual property. All the major regional human rights conventions recognize the right to property as a human right.[6]

Box 10.1. Key Provisions on the Right to Property

Universal Declaration on Human Rights, Article 17:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Protocol 1, Article 1:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest, or to secure the payment of taxes or other contributions or penalties.

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[4] See *Stretch v. United Kingdom*, Judgment 24 of June 2003, para. 32.

[5] See ECtHR case of *Agrotexim v. Greece*, Judgment of 24 October 1995.

[6] See ECHR Protocol 1, Article 1, African Charter for Human and Peoples Rights, Article 14, and Article 21 of American Convention on Human Rights.

The general protection of the right to property contained in the various human rights instruments is complemented by a number of special human rights conventions and other international instruments, cf. the List of Instruments. ICCPR prohibits discrimination based on the ground of property and protects the right of minorities to use their own land.[7] A similar anti-discrimination clause is also found in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

The right to intellectual property is an essential part of the right to property. Consequently, the protection of property is also complemented by conventions such as the European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite; the European Convention relating to the Formalities required for Patent Applications; and the various EU directives and regulations covering areas such as trade marks and designs, protection of inventions and copyright, and ancillary rights. The European Court of Justice has in a couple of cases referred to the ECtHR case law and to ECHR.[8]

In most European countries, the right to property is similarly recognized at constitutional level.[9] The protection and regulation of the right to property is further regulated in domestic acts covering areas such as expropriation, use of property (e.g. licenses), business, practise of professions, taxation, heritage, registration of property and land, and intellectual rights.

10.3. Permissible Limitations

The right to property is not an absolute right. Actually, the right to property is subject to numerous restrictions due to its complexity. But the limitation or interference shall comply with certain requirements in order to be permissible.

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[7] See Human Rights Committee General Comment No. 23.

[8] See *Hauer v Land Rheinland-Pfalz*, 13 December 1979, Case 44/79.

[9] See for instance the Constitutions of Belgium; the Czech Republic; Denmark; Germany; Estonia; the Hellenic Republic, Spain, France; Ireland; Italy; Cyprus; Russia; Georgia; Armenia; Ukraine; Latvia; Lithuania; Luxembourg; Hungary; Malta; the Netherlands; Austria; Poland; Portugal; Slovenia; the Slovak Republic; Finland, Sweden, and the Human Rights Act of the United Kingdom.

The first step is to consider whether the right in question falls under the scope of a property right. If so, the ECtHR has concluded that the ECHR Protocol 1, Article 1 comprises three basic rules:[10]

- A general rule, enouncing the principle of peaceful enjoyment of property;
- A second rule, encompassing deprivation of possessions and subjecting it to certain conditions;
- A third rule that recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.

The two special rules are both connected to the general rule in the sense that the second and third rule are special instances of interference with the general principle safeguarding peaceful enjoyment of property.[11]

If the interference is neither a deprivation of possession nor the exercise of right of the State to control the use of property in the interest of the general good, the interference has to be examined in the light of the general rule. In all cases, such interference shall comply with the principle of legality (it must be regulated by law); serve a legitimate aim (in the public or general interest); and be proportionate (strike a fair balance between the interest of the individual and society as a whole).

The European Court of Justice has to a large extent adopted the approach of the ECtHR by observing that "[t]he right to property is one of the fundamental rights protected by the Court. However, fundamental rights are not absolute rights, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights."[12]

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[10] See *Lönnroth v. Sweden*, Judgment of 23 September 1982, para. 61.

[11] See ECtHR in the case of *James and Others v. United Kingdom*, Judgment of 21 February 1986, para. 37.

[12] See the case of *Booker Aquacultur and Hydro Seafood*, 10 July 2003, Joined Cases C-20/00 and 64/00.

10.4. Derogation of the Right to Property

ECHR permits derogation of the right to property.[13] Derogation is permissible during a public emergency that threatens the life of the nation[14] or in wartime.[15] Derogations shall be applied only to the "extent strictly required by the exigencies of the situation"[16] and only for a limited period of time.

ICCPR Article 4(1) emphasizes that derogation cannot be permissible if it involves discrimination on the grounds of sex, language, religion, or social origin. Yet differential treatment based on the grounds of property appears to be permissible

10.5. Current Interpretation (Key Case Law)

The scope of the right to property and contents of permissible limitations is defined through numerous decisions, mainly from the ECtHR.

Property

The concept of property includes different economic interests arising out of private law relationships. The ECtHR has again and again stated that it is an autonomous concept, which is not necessarily equivalent to the terminology applied at national level.

The concept includes immovable and movable property as well as tangible (property that has physical form or characteristics) and intangible (property that lacks physical existence, e.g. shares, bank accounts, and business goodwill) rights.

The Inter-American Court for Human Rights has defined property as "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements, and any other intangible object capable of having value."[17]

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[13] ECHR Article 15.
[14] ECHR Article 15(1).
[15] ECHR Article 15(1).
[16] ECHR Article 15(1).
[17] In the case of *Mayagna Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, para. 144.

Since the ECHR Commission has found that ownership of a patent constitutes a possession, intellectual rights are consequently a possession.[18]

The right **to use or control the use** of something has in a number of cases been considered as possession. In the case of *Mellacher v. Austria*,[19] the right of the landlord to control the use of his possession and his entitlement to rent was considered to be possessions. But the right to use something has to have some certainty. The mere expectation is not enough.

In the case of *J.L.S. v. Spain*,[20] the Court held that "the applicant's mere expectation that the regulations governing the use of military quarters would not be modified cannot be considered a right of property." It notes that the applicant was given the use of the housing "in his capacity as a serviceman" at a rent that was much lower than it would have been under a private lease. He did not sign a lease agreement … but an "administrative special-quarters-allocation form" supplied by the Army Quartermaster-General. Nor did he seek to suggest that use of the quarters could be equated to an agreement under private law. The Court notes that the policy regarding the provision of military quarters was established in response to the need for servicemen to be given appropriate accommodation as they were subject to frequent transfers while in service. It points out that a right to live in a particular property not owned by the applicant does not constitute a "possession". Furthermore, allowing a "user", such as the applicant (who was not even a tenant), to remain indefinitely in premises belonging to the State would prevent the authorities from performing their obligation to administer State property in accordance with their statutory and constitutional duties.

In the case of *Stretch v. United Kingdom*,[21] the applicant had entered into a lease agreement with the local authorities on the understanding that he would have the possibility of extending the term of the lease. The applicant had at least a legitimate expectation to exercise the option to renew the contract, and consequently the option was a possession within the realm of ECHR nomenclature.

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[18] See Application No. 12633/87 case *Smith Kline and French Laboratories Ltd v. the Netherlands*.

[19] See ECtHR Judgment of 19 December 1989.

[20] ECtHR decision of 27 January 1999.

[21] *Stretch v. United Kingdom*, Judgment of 24 June 2003.

In the case of *Pine Valley Developments Ltd. and Others v. Ireland*, the applicants bought a plot of land relying on an outline planning permission duly registered. Therefore the applicants had at least a legitimate expectation of being able to carry out their proposed land development and this constituted a possession.[22]

In the case of *Beyeler v. Italy*,[23] the applicant, Beyeler, had purchased a painting through an indirect agent. However, the State wanted to exercise its right of pre-emption, because the painting was of artistic or cultural interest to the Italian State. The ECtHR concluded that Beyeler had a proprietary interest recognized under Italian law from the time the work was purchased until the right of pre-emption was exercised by the Italian State and he was paid compensation. This propriety interest was therefore considered a 'possession' in the sense of the ECHR (para. 105).

The **ownership of shares** is also a possession. In the case of *Bramelid and Malmström v. Sweden*, the applicants were minority shareholders. After the enactment of a new Company Act, they were forced to sell the shares to the majority shareholder, holding more than 90 per cent of the shares. The Commission observed that the shares gave the holder rights in relation to the company—voting rights—and that the holders had an indirect claim on the company's assets. Consequently, shares were possessions. But the Commission did not find a violation of the right to property, because the Act did not create any unjustifiable inequality between the two private parties and the Act was essential in a liberal society.[24]

Claims arising from private law relationships may also constitute an asset and amount to a possession. The claim, however, has to be sufficiently established to be enforceable. In the case of *Stran Greek Refineries and Stratis Andreadis v. Greece*,[25] an arbitration award was final and binding. It did not require any further enforcement measure and no ordinary or special appeal laid against it. Accordingly, the ECtHR held that the arbitration award constituted a 'possession', and a law annulling the arbitration award was consequently an unjustifiable interference with the right to property and a violation of ECHR.

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[22] See ECtHR Judgment of 29 November 1999, para. 51.
[23] *Beyeler v. Italy* Judgment of 5 January 2001.
[24] See European Commission for Human Rights Appl. Nos. 8588/79 and 8589/79.
[25] *Stran Greek Refineries and Stratis Andreadis v. Greece*, Judgment of 9 December 1994.

In the case of *Pressos Compania Naviera SA v. Belgium*,[26] the applicants—ship owners—alleged that the collision in Belgian territorial waters involving their ships was due to negligence on part of the Belgian pilots. Accordingly, Belgian law recognized that the Belgian State was responsible for the acts of the pilots. Yet the Belgian legislature—after the applicants had initiated proceeding against the State—changed the law excluding liability for damages in the applicants' cases. The ECtHR held that, "[t]he rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs. A claim of this nature 'constituted an asset' and therefore amounted to 'a possession'." (para. 31).

Salary or honorarium is likewise possessions if they can be considered legal claims and the recipients could have legitimate expectations to receive the salary or honorarium.[27]

But tips given to the waiter and reduced from the salary/remuneration of the waiter were not considered a possession in the case of *Nerva and Others v. United Kingdom*. ECtHR observed that the waiters cannot claim that they had a legitimate expectation that the tips at issue would not count towards remuneration. Such a view assumes that the patron intended that this would not be the case. However, this is too imprecise a basis on which to found a legitimate expectation that could give rise to 'possessions.' The tips belonged to the employer, and were part of the salary paid to the waiters by the employer.[28]

Similarly, **future income or the right to acquire property in the future** is not protected. In the case of *Ambruosi v. Italy*, ECtHR recalled "that future income constitutes a 'possession' (…) only if it has been earned or where an enforceable claim to it exists."[29]

The potential **right to inherit property in the future** is not protected. On the other hand, if the person concerned has already acquired by inheritance a right to a share of the deceased's estate, the right will be considered a possession.[30]

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[26] *Pressos Compania Naviera SA v. Belgium*, Judgment of 20 November 1995.

[27] See the case of *Smokovitis and Others v. Greece*, Judgment of 11 April 2002.

[28] Judgment of 24 September 2002, para. 43.

[29] Judgment of 19 October 2000, para. 20.

[30] See *Inze v. Austria*, ECtHR Judgment of 28 October 1987, para. 38 and 39; or the case of *Mazurek v. France*, Judgment of 1 February 2000, para. 41 and 42.

Goodwill may also fall within the scope of property. In the case of *Van Marle v. the Netherlands*,[31] ECtHR examined whether or not a professional clientele could be protected under the ECHR.

The applicants—accountants—were required by a new law to register under a Board of Admission, but were rejected by that Board. The refusal resulted in reduced income and a diminished value of their goodwill. The Court held that "the right relied upon by the applicants may be likened to the right of property (…): by dint of their work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset."[32] The economic interests of companies were also discussed in the case of *Tre Traktörer Aktiebolag v. Sweden*. The local authorities decided to revoke the licence to serve alcohol with immediate effect. The applicant—a restaurant—had to close the following day. The ECtHR found that, "the economic interests connected with the running of the restaurant were possessions."

The right to property may in some cases also include claims that are arising from public law relationships such as **social benefits, pensions, licences or authorizations**.[33] In the case of *Gaygusuz v. Austria*,[34] ECtHR considered whether social benefits were protected under the ECHR. The Court concluded that the right to emergency assistance—in so far as provided for in the applicable legislation—is a pecuniary right within the meaning of Article 1 of Protocol No. 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay 'taxes or other contributions'. The case concerned the social benefit 'emergency assistance' granted to persons who had exhausted their entitlement to unemployment benefits and who satisfied the other statutory conditions laid down in the national legislation. Entitlement to this social benefit was linked to the payment of contributions to the unemployment insurance fund, which was a precondition for the payment of unemployment benefit. In a more recent case, concerning 'allowance for disabled adults' (AAH in French), the ECtHR held that a non-contributory social benefit such as the AAH could also give rise to a pecuniary right for the purposes of Article 1 of Protocol

[31] See Judgment of 26 June 1996.

[32] See also *Iatridis v. Greece*, Judgment of 25 March 1999.

[33] ECtHR in the case of *Tre Traktörer Aktiebolag v. Sweden*, Judgment of 7 July 1989, para. 53; or the case of *Fredin v. Sweden*, Judgment of 18 February 1991, para. 40.

[34] ECtHR Judgment of 16 September 1996.

No. 1. The protection granted in ECHR does not necessarily depend on whether a person has contributed to a social benefit scheme.[35]

The entitlement to pension may also be protected if the contribution to the pension fund is compulsory.[36]

Unregistered property has in some cases been protected as well. In the case of *Holy Monasteries v. Greece*,[37] the ECtHR held that the applicants had controlled and used the land for so long that it was considered possessions in terms of the ECHR even without a legal title.

In another case involving unregistered property, the applicants complained of their **compulsory eviction** from their village by the security forces and of the refusal of the authorities to allow them to return to their homes and land (para. 89). The ECtHR held:[38] it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted 'possessions' (…) In this regard, the Court notes that it is undisputed that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes, that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as 'possessions'.

In the recent case of *Broniowski v. Poland*,[39] the applicant was member of a polish family that had been repatriated from the territories beyond the Bug River and had to abandon their property there. Poland had originally recognized the obligation to compensate repatriated persons. The applicant claimed that his entitlement constituted a property right. "That obligation had later been incorporated into domestic law, which

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[35] See the ECtHR case *Poirrez v. France*, Judgment of 30 September 2003.

[36] See European Human Rights Commission Appl. No. 5849/72 *Muller v. Austria*, cf. "A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights" by Monica Carss-Frisk, published by Council of Europe 2001, Strasbourg, France, p. 17.

[37] Judgment of 9 December 1994.

[38] The case of *Dogan and Others v. Turkey*, Judgment of 29 June 2004, para. 139.

[39] ECtHR Judgment of 22 June 2004.

vested in him, as the heir of his repatriated grandmother, a specific right to offset the value of the property abandoned by his family beyond the Bug River against the price, or the fee for perpetual use, of immovable property purchased from the State. That right (…) had recently been defined by the Constitutional Court as the 'right to credit'."[40] The ECtHR held that the applicant's possessions comprised the entitlement to obtain compensatory property of the kind listed in the relevant domestic Ordinance. "While that right was created in a somewhat inchoate form, as its materialization was to be effected by an administrative decision allocating State property to him, section 81(of the relevant domestic law, *inclusion added*) (…) clearly constituted a legal basis for the State's obligation to implement it."[41]

Communal Property Rights

Common property can be defined as "a form of limited-access co-ownership, or tenancy in common whereby each of the well-defined number of individuals is regarded as owning an individual, undivided share in a property. But that share has not positively been marked by separate and measurable boundaries. The co-ownership is enjoyed in association according to explicitly or implicitly voluntarily accepted and understood rules."[42]

The ECtHR have not yet examined the matter directly, but in a case from the Inter-American Court for the Human Rights, the Inter-American Commission for Human Rights observed: "the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. Their rights 'exist even without State actions which specify them.' Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries. The overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation (…) traditional patterns of use and occupation of territory by the indigenous communities (…) generate customary law property systems; they are property rights created by indige-

[40] Para. 126.
[41] Para. 133.
[42] See Theo R.G. van Banning in *The Human Right to Property*, published by INTERSENTIA 2002, Antwerp-Oxford-New York, p. 297.

nous customary law norms and practices which must be protected; and they qualify as property rights." (para. 140).[43]

In the case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court for Human Rights concluded that, "the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua." Consequently, the Mayagna Community had the right that the State should "carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities."

The European Commission for Human Rights observed in a decision on admissibility[44] that a group of Saami villages were responsible for the herding within their respective areas and represented their members in such matters. The Commission further observed that the exclusive hunting and fishing rights claimed by the applicant Saami villages in the present case could be regarded as possessions. The application was nevertheless declared inadmissible because the applicants had not complied with the six months time limit.

Communal property has been recognized in the ILO Convention 169 on Indigenous and Tribal People Articles 13–19 and in the previous Convention 107 part II. The ICCPR does not protect the right to property, but the common rights of persons belonging to minorities had in a couple of cases been discussed by the UN Human Rights Committee under examination of Article 27 of ICCPR.[45] In its General Comment No. 23, the Committee observes that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting

[43] See Judgment of 31 August 2001, Series C No. 79, para 148; para 153.

[44] *Könkämä and 38 Other SaamiVillages v. Sweden*. Appl. No. 27033/95, Decision of 25 November 1996.

[45] See Communication No. 167/1984 *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, and Communication No. 197/1985, *Kitok v. Sweden*.

and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."

In a more recent case from HRC, the applicants—Saami villages—claimed that "the ongoing and increasing logging of fine lichen forests increases the necessity of providing fodder and threatens the economic self-sustainability of reindeer husbandry, as husbandry depends on the reindeer being able to sustain themselves." The HRC did not find any violation of Article 27, but noted that "it is undisputed that the authors are members of a minority within the meaning of Article 27 (…) and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of Article 27, if they are an essential element of the culture of an ethnic community (…) Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under Article 27 (…) however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27."[46]

Deprivation of Property

The deprivation of property covers the normal expropriation. In the absence of a formal expropriation in the sense of transfer of ownership, the measures undertaken shall be examined in order to determine whether the situation in question amounts to a *de facto* expropriation.

In the case of *Brumarescu v. Romania*, the ECtHR recalled (para. 76) that, "in determining whether there has been a deprivation of possessions (…), it is necessary not only to consider whether there has been a formal taking or expropriation of property, but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether the situation amounted to a *de facto* expropriation."[47]

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[46] See Communication No. 1023/2001 *Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland* para. 10(1).

[47] See also *Sporrong and Löennroth v. Sweden*, Judgment of 23 September 1982.

Controlling the Use of Property

The State may adopt different measures through legislation, regulations, or decisions to control the use of property.

Regulations imposing standards upon **the use of property** (for instance land or buildings) may be considered an attempt to control and interfere with the right to property. A prohibition of construction could be considered an improper interference.[48] And in the case of *Chassagnou and Others v. France*,[49] a law obliging landowners to transfer to municipal hunters' associations the right to hunt on their land was unjustifiable and a violation of ECHR.

In the case of *Spadea and Scalabrino v. Italy*,[50] legislation suspending the right of a landlord to obtain the enforcement of a decision evicting a tenant was not contrary to the ECHR; as a fair balance between the interest of the landlord and the community at large was struck. In the case of *Jahn and Others v. Germany*,[51] the applicants had to hand over their land to the tax authorities without any compensation, because they had not themselves farmed the land for more than 10 years. The ECtHR found ECHR applicable, but no violation was found. The lack of any compensation did not upset the 'fair balance', which had to be struck between the protection of property and the requirements of the general interest.

In the case of *Hauer v. Land Rheinland-Pfalz*, the European Court of Justice, referring to ECHR,[52] examined the German authorities' refusal to authorize the new planting of vines on a plot of land owned by the applicant. The decision was based on a Community regulation prohibiting such plantings for a period of three years, within the framework of the common organization of the market in wine. The matter was examined as an attempt to control the use of the land. Nevertheless, the Court did not find a violation of the right to property because the prohibition was for a limited period and "justified by the objectives of general interest pursued by the Community, consisting in the immediate reduction of production surpluses and in the preparation, in the longer term, of a restructuring of the European wine industry."

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[48] See for instance *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982.
[49] Judgment of 29 April 1999.
[50] Judgment of 28 September 1995.
[51] Judgment of 30 June 2005.
[52] See Judgment of 13 December 1979, Case 44/79.

Regulations and decisions **controlling trade and practices of companies, businesses or professions** may also be regarded as interference. In the case of *Van Marle v. the Netherlands*, the applicants—accountants—were by a new law required to register under a Board of Admission, but were rejected by that Board.[53] But after examining the matter, the ECtHR concluded that the limitation was justified and fair, as its purpose was to structure a profession that is important to the entire economic sector by providing the public with guarantees of the competence of those who engage in that profession. In the case of *Luordo v. Italy*,[54] the applicant, subsequent to a bankruptcy order, could not administer and deal with his possessions, as the responsibility for administering them was assigned to the bankruptcy trustee. In particular, with reference to the length of the proceedings before the national courts (more than 6 years), the ECtHR found that the interference was disproportionate.

Seizure or confiscation of property may also be regarded as a limitation on the use or control of property. In the case of *Handyside v. United Kingdom*,[55] the applicant had some hundred copies of schoolbooks seized and subsequently destroyed. The ECtHR held that the seizure did relate to the use of property, and the subsequent forfeiture and destruction "permanently deprived the applicant of the ownership of certain possessions."[56]

Peaceful Possession of Property—the General Rule

If the interference cannot be classified in a precise category, often because of the complexity of the legal and factual issues involved in the case, the interference may be examined in the light of the general rule.[57]

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[53] See ECtHR Judgment of 26 June 1996.

[54] See ECtHR Judgment of 17 July 2003.

[55] Judgment of 7 December 1976.

[56] See also *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, Judgment of 23 February 1995, para. 62–63.

[57] See *Broniowski v. Poland*, Judgment of 22 June 2004, para. 136; or *Beyeler v. Italy*, Judgment of 5 January 2001, para. 106—both cited above.

Was the Interference a Violation of the Right to Property?

The interference shall fulfil the requirement of legality, be in public or general interest of the community, and strike a fair balance between the interests at stake—proportionality.[58]

Lawfulness

The ECtHR will not examine the compliance with national law very closely if there is no indication that the State has manifestly applied the legal provisions in question erroneously or arbitrarily. "The principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable."[59]

Legitimate Aim

The aim of the interference shall be in the public or general interest ("eminent domain"). Yet the national authorities do enjoy a certain margin of appreciation, "[B]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'."[60] In cases concerning taxation, the margin of appreciation is even wider, but the requirement of proportionality also applies to taxation measures.

Consequently, the notion **general interest** is wide. In a number of cases, the ECtHR has concluded that "it is natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one; it will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation."[61]

In the case of *James and Others v. United Kingdom*, the ECtHR also observed (para. 40–41) that "a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be 'in the public interest', nonetheless, the compulsory transfer of property from one individual to another may, depending upon

[58] See *Beyeler v. Italy*, Judgment of 5. January 2001.
[59] *Beyeler v. Italy*, Judgment of 5 January 2001, para. 108 and 109.
[60] See *Broniowski v Poland*, Judgment of 22 June 2004 para. 149.
[61] See *Broniowski v Poland*, Judgment of 22 June 2004, para. 149, or *James and Others v. United Kingdom*, Judgment of 21 February 1986, para. 46.

the circumstances, constitute a legitimate means for promoting the public interest. (…) Nor can it be read into the English expression 'in the public interest' that property transferred should be placed at the disposal of the general public; nor that the community generally, or even a substantial proportion of it, should directly benefit from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'. In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern, and therefore legislative measures intended to bring about such fairness are capable of being 'in the public interest', even if they involve the compulsory transfer of property from one individual to another."

If it has discriminatory effects, the aim cannot be regarded as being legitimate. In the case of *Darby v. Sweden*,[62] the State refused to grant the applicant a church tax exemption on the ground that he was not formally registered as a resident in Sweden. This amounted to differential treatment on the grounds of residency. The ECtHR held that no legitimate aim under the right to property was showed to justify such differentiation.

The UN Human Rights Committee under ICCPR has in a couple of instances stated that "confiscation of private property or the failure by a State Party to pay compensation for such confiscation could (…) entail a breach of the Covenant, if the relevant act or omission was based on discriminatory grounds in violation of Article 26 of the Covenant."[63]

Fair Balance

In *Broniowski v. Poland*, the ECtHR held that "[i]n assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests at issue, bearing in mind that the Convention is intended to safeguard rights that are 'practical and effective'. It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms—if the situation is akin to the taking of property—but also the conduct of the parties, including the means

[62] Judgment of 23 October 1990.

[63] See for instance *Simunek, Hastings et al. v. the Chech Republic*, comm. 516/1992, para. 11(3).

employed by the State and their implementation. In that context, it should be stressed that uncertainty—be it legislative, administrative or arising from practices applied by the authorities—is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner."

The proportionality test is often the key point in order to determine whether there has been a violation of the right to property. One of the elements to take into account is whether the interference will impose an excessive burden upon the individual. For instance, in the case *Hentrich v. France*,[64] where Hentrich was subjected to the State's right to pre-emption. But as she was not rendered the possibility to effectively challenge the measures taken against her, the fair balance "which should be struck between the protection of the right of property and the requirements of the general interest was therefore upset." The behaviour and expectations of the individual may also be taken into account.[65] In the case of *Scollo v. Italy*, a landlord was restricted from making use of his property, because the police ignored his application for eviction of tenants. The ECtHR found a violation, because the State failed to comply with its own legislation.[66] Likewise in the case of *Sovtransavto Holding v. Ukraine*[67] where the State failed to secure a company the necessary guarantees for effective protection of its property. The lengthy and uncertain administrative and legal procedures contributed to a violation of the ECHR. Lengthy procedures also resulted in a violation in the case of *Erkner and Hofauer v. Austria*.[68] The applicants, Erkner and Hofauer, had for 16 years been subject to provisional transfer of their land, without having received, under a final consolidation plan, the compensation in land prescribed by law.

The right to **compensation** for deprivation of property is not explicitly mentioned in the ECHR. On the other hand, the American Convention on Human Rights Article 21(2) states that no one shall be deprived of his property except upon the payment of just compensation.

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[64] See Judgment of 22 September 1994.

[65] See *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, Judgment of 23 February 1995, described above where the ECtHR did not find any violation.

[66] See ECtHR Judgment of 28 September 1995.

[67] ECtHR Judgment of 25 July 2002.

[68] Judgment of 23 April 1987.

In the case of *James and Others v. United Kingdom*,[69] the ECtHR held that "the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable (…). Article 1 (…) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (para. 55)."

If the State fails to pay the compensation or if the payment is delayed (e.g. excessive time elapsed between the valuation and the payment), this may constitute a violation of the right to property.[70] In the case of *Guillemin v. France*,[71] the applicant had her land unlawfully expropriated. 15 years later, she still had not received any compensation. ECtHR held that the failure to pay and the lengthy proceedings constituted a violation. In the case of *Aka v. Turkey*,[72] the ECtHR observed (para. 49 and 50) that "abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for the person whose land has been expropriated, putting him in a position of uncertainty, especially when the monetary depreciation which occurs in certain States is taken into account (…) The same applies to abnormally lengthy delays in administrative or judicial proceedings in which such compensation is determined, especially when people whose land has been expropriated are obliged to resort to such proceedings in order to obtain the compensation to which they are entitled (…) The Court considers that the difference between the value of the amounts due to Mr Aka when his land was expropriated and when actually paid—a difference which was due solely to failings on the part of the expropriating authority—caused him to sustain a separate loss which, coupled with the loss of his land, upset the fair balance."

In a number of cases, the ECtHR has examined instances where the State has reduced the compensation for expropriation of land for the purpose of road construction. The State's argument has been that the value of the owners' properties had been increased by the building of

[69] Judgment of 21 February 1986.
[70] See *James and Others v. United Kingdom*, para. 57.
[71] Judgment of 21 February 1997.
[72] Judgment of 23 September 1998.

the new thoroughfare. In *Katikaridis and Others v. Greece*,[73] the ECtHR recognized that "when compensation due to the owners of properties expropriated for roadworks to be carried out is being assessed, it is legitimate to take into account the benefit derived from the works by adjoining owners (…) however, that in the system applied in this instance the compensation is in every case reduced by an amount equal to the value of an area fifteen metres wide, without the owners concerned being allowed to argue that in reality the effect of the works concerned either has been of no benefit—or less benefit—to them; or has caused them to sustain varying degrees of loss. This system, which is too inflexible, takes no account of the diversity of situations, ignoring as it does the differences due in particular to the nature of the works and the layout of the site. It is 'manifestly without reasonable foundation' (…) In the case of a large number of owners, it necessarily upsets the fair balance between the protection of the right to property and the requirements of the general interest."

When considering the standards for compensation in the case of *Lithgow v. United Kingdom*,[74] the ECtHR introduced an important differentiation between compensation paid in a **naturalization** case and in **other deprivation** cases: "Both the nature of the property taken and the circumstances of the taking in these two categories of cases give rise to different considerations which may legitimately be taken into account in determining a fair balance between the public interest and the private interests concerned. The valuation of major industrial enterprises for the purpose of nationalizing a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation which can be applied across the board to all the undertakings involved."[75] The ECtHR further observed that nationalization "is a measure of a general economic nature in regard to which the State must be allowed a wide margin of appreciation (…) and that it requires the adoption of legislation laying down a common compensation formula."[76] The ECtHR did not find it contrary to ECHR that the most favourable valuation date for each individual company was not chosen in determining the amount of compensation.

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[73] Judgment of 15 November 1996, para. 49; see also *Papachelas v. Greece*, Judgment of 25 March 1999.

[74] Judgment of 8 July 1986.

[75] Judgment of 8 July 1986, para. 121.

[76] Judgment of 8 July 1986, para. 143.

General Principles of International Law

The general principles of international law require that compensation shall be adequate, prompt, and effective. Nonetheless, these general principles are only applicable to deprivation of property belonging to non-nationals.[77]

10.6. Additional Sources, Including OSCE Standards

The contents of the right to property have mainly been explored through the immense case law of the ECtHR. Yet OSCE has adopted a number of documents confirming the right to property and elaborating the concept.

The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE includes a commitment on the part of the States to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility, or violence as a result of their racial, ethnic, cultural, linguistic, or religious identity; and to protect their property. The OSCE 1990 Bonn Conference on Economic Co-operation in Europe on the promotion of social justice and the improvement of living and working conditions made reference to the right of citizens to own and use property as well as the protection of intellectual property rights. The right to prompt, just, and effective compensation in the event that private property is appropriated for public use was equally emphasized.

In 2003, OSCE adopted the action plan on 'Improving the Situation of Roma and Sinti within the OSCE Area' (the Maastricht document), calling for "mechanisms and institutional procedures to clarify property rights, resolve questions of ownership and regularize the legal status of Roma and Sinti people living in circumstances of unsettled legality (e.g. Roma neighbourhoods lacking land rights, or which are not included in the urban plans of the main locality; families and houses without legal residence status in settlements where the people have been living *de facto* for decades)."

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[77] See *James and Others v. United Kingdom*, Judgment of 21 February 1986, para. 58–66.

The compliance with OSCE standards is mainly monitored through the Vienna Mechanism[78] and the Moscow Mechanism.[79] The mechanisms provide the States with a procedure for inter-State complaints and *ad hoc* missions of independent experts established to assist in the resolution of a specific human dimension problem. This includes the right to investigate alleged violations of human dimension commitments, in exceptional circumstances even without the consent of the accused State. The two mechanisms are, however, rarely used.[80]

The Office for Democratic Institutions and Human Rights (ODIHR) is mandated to "ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy." Consequently, the ODIHR monitors the implementation of the human dimension commitments, including being the OSCE Contact Point for Roma and Sinti Issues.

In addition to the activities of OSCE and the Council of Europe, property rights are protected through various specialized mechanisms (cf. the List of Instruments to this chapter). Although none of the two UN Covenants has included an explicit right to property, the UN system has produced several declarations on the right to property. The Commission for Social Development, a functional commission of the ECOSOC, monitors the compliance of the UN Declaration on Social Progress and Development, which emphasizes that "social progress and development require acknowledgement of the social function of property, of forms of ownership of land and equal rights to property for all".[81] And the UN Human Rights Commission has urged States "to provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others, and the right not to be arbitrarily deprived of one's property."[82]

The EU charter of fundamental rights includes a right to property (Article 17). Its background, reference to case law from EU and ECHR, constitutions of the member States as well as links to conventions and website of other organizations in the field of property rights are available at the website of the European Union Parliament.

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[78] Established in the Vienna Concluding Document of 1989.

[79] Adopted at the 1991 Conference on the Human Dimension of the OSCE in Moscow.

[80] See OSCE Human Dimension Commitment, Volume 1, 2nd edition, published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2005.

[81] Cf. Article 6.

[82] Cf. UN Commission on Human Rights resolution 1987/18 of 10 March 1987.

10.7. Monitoring Checklist on the Right to Property

Checklist – The Right to Property

1. Legislation and Regulation check
   - Which relevant international human rights instruments has the state ratified, and what reservations were made upon ratification?
   - Has the state declared any state of emergency, security threat, or other condition that it regards as a restriction or limitation on the right to property?
   - Are all national regulations and legislation related to registration of immoveable or tangible property, protection of intellectual rights; land development and land-use zoning; expropriation and compensation; tort; taxation; remuneration and social benefits; heritage; foreign companies, migrants workers' and women's property rights; indigenous and tribal people's ownership, possession, access and use of land, which they traditionally occupy easily available?
   - Has the monitor undertaken a critical review of legislative requirements for expropriation and deprivation of property procedures? Are there mechanisms and institutional procedures in place to clarify property rights? Does the national legislation provide remedies which enable prompt and effective action against persons who infringe copyright and neighbouring rights?
   - Is there a fair balance between the interest of the individual and the interest of the general public?
   - Are all requirements clear and specific, or vague and permissive of a wide range of discretion?
   - Are all restrictions legally established?
   - Is there a right to appeal established at law?
   - What is the standard of review for an administrative decision related to interference with the right to property?
   - Are there particular exceptions for refugees, stateless persons, or other aliens? Can nationals and foreigners own property in association?

2. Monitoring the Right in Practice
   - Are the procedures for registration of property and their implementation (e.g. land registration) efficient and transparent? Are the public authorities and the judiciary determining the compensation for expropriation speedy, fair and just? Do the judicial proceedings offer the necessary procedural guarantees in order to enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons? Are the administrative or/and the judicial decisions enforced? Are the land development and zoning procedures respected?
   - Are measures introduced to ensure that women, incapable persons and other vulnerable groups have equal access to and protection of

property? Are measures introduced to protect the land of indigenous people? Are there any incidents of internal displaced people or forcible evictions and if so what measures have been introduced to compensate them or to ensure their access to their property?
- Are restrictions imposed on the right to property linked to characteristics that may be discriminatory? Are there any discrimination based on the ground of property?
- Is property expropriated for the purpose of general/public interest or in order to benefit certain groups in society? Have there been any incidents of nationalization of property belonging to foreigners or foreign companies?
- Are there instances of violation of intellectual rights, e.g. copy rights? Are violations investigated and sanctioned?
- What is the length of time taken to receive an administrative decision related to property e.g. registration of land or a patent application?
- Are grounds of refusal to register a property or grant a licence provided in writing, and are they clear?
- Are administrative requirements for registration and obtaining licences reasonable under the circumstances in society?
- Do the authorities exhibit a practice of suspending or revoking licences?

10.8. Instruments on the Right to Property

Legally Binding Instruments

UN Instruments

Universal Declaration on Human Rights

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements[83]
Article 17	(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.	No Treaty Body
Article 27	Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.	No Treaty Body

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements[84]
Article 26	Discrimination based on the ground of property is prohibited	Human Rights Committee General Comment No. 18

[83] The Human Rights Committee's conclusions and recommendations on country reports and decisions on individual cases give the best available picture of the thinking of the Human Rights Committee on the right to life and other rights protected under the ICCPR. Unlike the CoE HUDOC website, it is unfortunately not currently possible to carry out case searches according to articles of the Covenant. The cases of the HRC can, however, to some extent be researched by subject and key word on the website of the Netherlands Institute for Human Rights.

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Article 27	Right of minorities and the use of land and resources.	Human Rights Committee General Comment no. 23

International Covenant on Economic, Social and Cultural Rights

Article 11(1)	The right to adequate housing—forced eviction	ICESCR Human Rights Committee General Comment no. 7

Convention on the Rights of the Child (CRC)

Article 2	Prohibition of discrimination based on the ground of property	Committee on the Rights of the Child and general comments all include reference to non-discrimination

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 5	Non discrimination in relation to specific rights. This includes that, "all such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void"	Committee on the Elimination of Racial Discrimination, General Recommendation XXII

Convention on Elimination of all Discrimination against Women (CEDAW)

Article 15	States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.	The Committee on the Elimination of Discrimination against Women General Recommendation 21

Article 16	1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women… (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration	The Committee on the Elimination of Discrimination against Women General Recommendation 21

International Humanitarian Law Instruments

Geneva Convention relative to the Protection of Civilian Persons in Time of War

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 53	Any destruction of property by the Occupying Power is prohibited, except where such destruction is rendered absolutely necessary by military operations	"The protecting power" appointed by the parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)

Articles 53–55	Concern protection of cultural objects and of places of worship; protection of objects indispensable to the survival of the civilian population and protection of the natural environment	"The protecting power" appointed by the parties to the conflict.

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Prot. 1, Article 1	Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.	Case law as developed through the European Court of Human Rights.
Article 16	"Nothing in Articles 10…and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."	Case law as developed through the European Court of Human Rights.

European Convention on the Legal Status of Migrant Workers

Article 26	Migrant workers shall be entitled, under the same conditions as nationals, to full legal and judicial protection of their persons and property and of their rights and interests.	A Consultative Committee convened by the Secretary General of the Council of Europe

European Convention relating to the Formalities required for Patent Applications, (ETS No.016) of 11 December 1953.

Entirety	Concerns protection of intellectual property	Committee of Experts on Patents of the Council of Europe but not a monitoring body as such.

European Convention on the International Classification of Patents for Invention, (ETS No.017) of 19 December 1954

Entirety	Concerns protection of intellectual property	Committee of Experts on Patents of the Council of Europe but not a monitoring body as such.

Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, (ETS No.047) of 27 November 1963.

Entirety	Concerns protection of intellectual property	No monitoring body

European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, (ETS No.153) of 11 May 1994

Entirety	Concerns protection of intellectual property	Committee of Ministers of the Council of Europe

International Labour Organization (ILO)

ILO Convention 107 on Indigenous and Tribal Populations

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
PART II	The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized. Protection against forcible eviction.	Governing Body of the International Labour Office

ILO Convention 169 on Indigenous and Tribal People

Articles 13–19	Protection of indigenous and tribal people's ownership, possession, access to and use of land, which they traditionally occupy. Protection against forcible eviction	Governing Body of the International Labour Office

Other Relevant Conventions

The EU Amsterdam Treaty article 30

Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. Nevertheless, restrictions may be permissible for the protection of industrial and commercial property	The European Commission and the European Court for Justice

Various European Community legislation related to intellectual property

Directives and regulations covering areas such as: Trade marks, and designs; protection of inventions and copyright and ancillary rights.	The European Commission and the European Court for Justice

CSCE/OSCE Instruments

Concluding Document of Vienna, 1989, OSCE

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
E.g. Paragraphs 13(7) and 63	Prohibition of discrimination on the ground of property	The Vienna Mechanism for monitoring the implementation of human dimension commitments. A mechanism facilitated by the OSCE Office for Democratic Institutions and Human Rights, see the 1992 Helsinki Document.

Charter of Paris for a new Europe 1990, CSCE

Chapter on Human Dimension	The right to own property alone or in association and to exercise individual enterprise	The Vienna Mechanism for monitoring the implementation of human dimension commitments.

Document of the Cracow Symposium on the Cultural Heritage of the OSCE participating States

Preamble	The participating States take note of the definitions of archaeological property, of the cultural heritage and of the architectural heritage in the relevant international documents of the Council of Europe and UNESCO	The Vienna Mechanism for monitoring the implementation of human dimension commitments.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

Paragraphs 9 and 40	Everyone has the right peacefully to enjoy his property either on his own or in common with others. No one may be deprived of his property except in the public interest and subject to the conditions provided for by law and consistent with international commitments and obligations. The states commit themselves to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property.	The Vienna Mechanism for monitoring the implementation of human dimension commitments.

OSCE 1990 Bonn Conference on Economic Co-operation in Europe to the promotion of social justice and the improvement of living and working conditions

Preamble	Full recognition and protection of all types of property including private property, and the right of citizens to own and use them, as well as intellectual property rights. The right to prompt, just and effective compensation in the event private property is taken for public use.	The Vienna Mechanism for monitoring the implementation of human dimension commitments.

OSCE 2003 Maastricht Document (Decisions: Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area).

Charter on housing and living conditions	Recommendation to put in place mechanisms and institutional procedures to clarify property rights, resolve questions of ownership and regularize the legal status of Roma and Sinti people living in circumstances of unsettled legality (e.g., Roma neighbourhoods lacking land rights or which are not included in the urban plans of the main locality; families and houses without legal residence status in settlements where the people have been living *de facto* for decades).	

Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development (Copenhagen, Denmark, March 6–12, 1995)

Chapter 2. Eradication of Poverty. Paragraph B(32)(f)	Rural poverty should be addressed by: Protecting, within the national context, the traditional rights to land and other resources of pastoralists, fishery workers and nomadic and indigenous people.	No monitoring mechanism

Other International Instruments

United Nations Instruments

Draft 1994 United Nations Declaration on the Rights of Indigenous Peoples

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Articles 10 and 26–28	Protection against forcible eviction. Protection of indigenous and tribal people's ownership, possession, access and use of land, which they traditionally occupy.	No monitoring body

UN Declaration on Social Progress and Development

Article 6	Social progress and development require acknowledgement of the social function of property, of forms of ownership of land and equal rights to property for all.	The Commission for Social Development is a functional commission of the ECOSOC

UN General Assembly

Resolution 42/115 of 7 December 1987 and 43/124 of 8 December 1988	The impact of property on the enjoyment of human rights and fundamental freedoms	No monitoring body

UN Commission on Human Rights

Resolution 1987/18 of 10 March 1987	States, in accordance with their respective constitutional systems and in accordance with the Universal Declaration of Human Rights are urged to provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others, and the right not to be arbitrarily deprived of one's property.	UN Commission on Human Rights

Council of Europe (CoE) Instruments

Declaration on neighbouring rights, adopted by the Committee of Ministers on 17 February 1994.

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	Concerns protection of intellectual property	No monitoring body

Recommendation Rec(2001)7 of the Committee of Ministers to member States on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment.

Entirety	Member States should ensure that their national legislation provides remedies which enable prompt and effective action against persons who infringe copyright and neighbouring rights.	CoE Committee of Ministers

Recommendation N° R (99) 4 of the committee of Ministers to member States on principles concerning the legal protection of incapable adults

Principle 8	Property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.	CoE Committee of Ministers

European Union (EU) Instruments

Charter of the Fundamental Rights of the European Union (2000)

Section	Critical Substantive Points
Article 17	(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected.

10.9. References

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A detailed work on the right to property with references to regional and international decisions and standards.

Van Dijk, Pieter, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 2002).
A classic work on the European Convention that describes the case law of all the provisions under the Convention.

Electronic Resources

http://www.europarl.eu.int/comparl/libe/elsj/charter/art17/default_en.htm
EU homepage with reference to international law, EU law, summary of EU actions, international case-law, national laws, links to NGOs working within the field, and European Parliament positions.

http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttoproperty/lawfulness/
The Icelandic Human Rights Centre has collected international decisions and links to the relevant instruments.

http://www.ipjustice.org/
An international civil liberties organization that promotes balanced intellectual property law. The organization's focus is on international treaties, directives, and other trade agreements that address intellectual property rights or impact freedom of expression guarantees.

CHAPTER 11 – PART A

THE RIGHT TO FAMILY LIFE AND PRIVACY

11A.1. The Right to Respect for Family Life

International human rights instruments have chosen not to establish any precise definition of the notion of family and thus not to promote a specific model of family or family life. Hence, they manage to avoid a major problem, because if families exist everywhere in the world they also differ widely. Clearly, the notion of family is a complex one, since a great number of components play a role in its definition: kinship, love, dependency, values, morals, religion, traditions, and culture. Yet, whatever the notion of family may mean, it traditionally comprizes the union—more or less formalized—of a man and a woman and the children they have together. In addition, the notion of family can be extended to the relatives in vertical and horizontal lines and potentially embrace a great number of persons.

11A.2. Definitions

First of all, the family life of an individual covers his/her relationships with other individuals that he/she considers to be family members. The European Court of Human Rights (ECtHR) operates with three criteria: a biological criterion (blood ties), a legal criterion (marriage, legitimate, illegitimate, or adoptive affiliations), and a social and more emotional criterion (*de facto* family life, i.e. cohabitation, financial dependency, participation in the education and the upbringing of a child, and so on). The right to respect for family life protects both the actual family life as well as the potential family life of an individual (for example the relationship between parents and children that are not actually living together).

At the core of family life lies the relationship between a parent and his/her child(ren). This relationship is protected as part of the right to respect for family life, whether it be a legitimate (child born within wedlock), natural (child born outside of wedlock) or adoptive link.

The relationship between spouses also comes under the notion of family life, even in the absence of cohabitation. As far as unmarried couples are concerned, only the evidence of a *de facto* family life (cohabitation, common projects, child(ren)) will permit the application of the right to respect for family life. On the other hand, the relationship between two homosexuals, regardless of its intensity and effectiveness, does not come under the notion of family life, but is a matter that concerns the sphere of private life.

As far as other family members are concerned (siblings, grandparents, aunts and uncles), the ECtHR correlates the biological criterion (degree of kinship) with an appreciation of the relation's effectiveness (cohabitation, financial dependency, etc.) to decide whether the right to respect for family life applies.

The right to respect for family life also covers areas of an individual's personal life other than his/her relatives. For example, the option to change your first name or the parents' choice of their children's surnames is covered by the right to respect for private and family life. The family home can also be protected under this right, for instance in cases concerning pollution or destruction of the family home; in the same way patrimonial rights are protected both under the right to respect for family life and the right to property. Finally, there are also gross cases where a violation of the right to family life is one among many other human rights violations (e.g. in cases of disappearance).

11A.3. Legally Binding Standards

The right to respect for family life is included in the most important international and regional human rights instruments.

International Instruments

The International Convention for Civil and Political Rights (ICCPR) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Moreover, ICCPR stipulates that everyone has the right to respect for family life and that any justified interference with this right should be prescribed by law.[1]

[1] Article 23(1), and Article 17.

Also, the relevant provision of the International Convention on Economic, Social and Cultural Rights (ICESCR) has more specific stipulations, stating that the widest possible protection and assistance should be accorded to the family, particularly for its establishment and responsibility for the care and education of dependent children. The ICESCR also contains a specific disposition concerning the special protection that should be accorded to mothers during a reasonable period before and after childbirth, as well as a disposition concerning special measures for protection and assistance to children and young persons.[2]

ICCPR Article 24 concerns the protection of the child more precisely. It states that the child has the right to the protection that is required by his/her status as a minor, by his/her family, society and the State. It adds two more specific rights: the right to be registered after birth and to have a name, and the right to acquire a nationality. Furthermore, the Convention on the Rights of the Child states in its preamble that the child should grow up in a family environment, in an atmosphere of happiness, love and understanding. It also states that public authorities must respect the responsibilities, rights and duties of parents or, when relevant, the members of the extended family or community, legal guardians or other persons legally responsible for the child.[3]

Concerning migrant workers, the General assembly of the United Nations adopted an International Convention on the Protection of the Rights of All Migrant Workers and their Families in 1990.[4] This convention is a continuation of many older ILO conventions concerning workers with family and migrant workers with family.[5]

Europe

In Europe, the most important, legally binding provision is Article 8 of ECHR, which states that everyone has the right to respect for his private and family life, his home and his correspondence. This article

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[2] Article 10(1–3).

[3] Article 5.

[4] International Convention on the Protection of the Rights of All Migrant Workers and their Families (Res.45158, 18 December 1990).

[5] As for example: ILO Convention No. 55 concerning forced or compulsory labour, 28 June 1930; or ILO Convention No.117 concerning basic aims and standards of social policy, 6 June 1962.

also establishes the conditions under which restrictions to this right are permissible.

Furthermore, a European Convention on the legal status of children born out of wedlock, adopted on 15 October 1975, sets up rules to bring the legal status of children born out of wedlock into line with that of children born in wedlock, thereby contributing to the harmonization of the relevant legislation concerning these parties. The Convention stipulates that maternal affiliation of children born out of wedlock must be established by birth. It also ensures that there are rules in all member States to establish the paternal affiliation of children born out of wedlock (recognition, denial and contesting of paternity). Moreover, it underlines that the duties, the responsibilities and the rights of the unmarried parents concerning their children are the same as if they were married. Finally, it requires that the succession rights of children born out of wedlock are the same as if they had been born in wedlock.[6]

11A.4. Permissible Limitations

The right to family life is not an absolute right; it can be derogated from and it can be restricted according to the specific conditions stated in the international and regional instruments protecting that right.

The right to respect for family life can be derogated from in time of war or other public emergency threatening the nation's existence. However, the implementation of such derogations is subject to strict limitations under international and regional human rights law.[7]

As far as restrictions on the right to family life are concerned, public authorities (tribunals, police, social services, etc.) may interfere with family life, provided that a number of conditions are fulfilled.

First, the interference with family life has to be in accordance with the law. The law must be written with precision in order to enable the persons concerned to foresee its consequences. For example, any decision to place a child in public custody or to forbid contacts between a parent and his/her child has to be based on legislation stipulating the grounds and the conditions for taking such measures. In cases where the public authorities have a margin of appreciation in making their decision (evaluation of the seriousness of the situation by social workers,

[6] ETS No. 85, entered into force on 11 August 1978.

[7] See Chapter 2 of this handbook on derogation, limitation and restriction.

for example), some safeguards against arbitrary intervention have to be provided for in the law (e.g. review of all decisions by a tribunal).

Second, any interference with the family life of an individual has to be necessary, which means that it has to protect the interest of society or the interests (and rights) of other persons.

As far as the protection of the interest of society are concerned, public authorities may interfere with the family life of an individual in order to protect the economic well-being of the country (e.g. restrictive immigration measures in order to protect the labour market) or to prevent disorder and crime (e.g. measures restricting family visits in prison, expulsion of foreign criminals).

With respect to the protection of the rights and interests of others, the public authorities might have to interfere with the family life of an individual in order to protect the rights and interests of his/her children or his/her spouse (removing of parental authority, prohibition of contacts, etc.).

The main issue here is to find out whether there is a balance—proportionality—between the seriousness of the interference (e.g. ruling out contact between a child and his/her parents) and the protection of the various interests at stake (e.g. protecting the well-being of the child). It is also important that the whole decision-making process leading to an interference with the family life of an individual respects all his/her procedural rights (presence of legal counsel, time to prepare for meetings with public authorities, etc.).

11A.5. Current Interpretation (Key Case Law)

From the moment of the child's birth and by the very fact of it, a bond amounting to family life exists between the child and his/her parents, which subsequent events should not break, save in exceptional circumstances.[8] In practice, this means that the fact that a child and a parent might be separated by the placement of the child outside his/her home, the divorce of the parents, or the detention of one of the parents, does not put an end to their family life.

[8] ECtHR *Ahmut v. the Netherlands*, 28 November 1996, 1996-VI, Article 60; ECtHR *Gül v. Switzerland*, 19 February 1996, 1996-I, Article 32; ECtHR *Berrehab v. the Netherlands*, 21 June 1988, A.138, Article 21.

Children Born out of Wedlock

The tie between a parent and a child is also protected when the child is born out of wedlock.[9]

As far as the status of illegitimate children is concerned, the main concern of the ECtHR has been to grant legal protection to children, regardless of the situation of their parents; the idea here is simply that a child should not be held responsible in any way for the circumstances of his or her conception and birth. In other words, the legal protection given to a child cannot depend on the behaviour of the parents. Hence, legitimate and illegitimate children have now to be placed in a similar legal situation.

Concerning the maternal affiliation of a child, the only way of establishing the legal bond between a mother and her child is by the birth. This rule must apply both to married and unmarried mothers, as well as to single mothers, in order to ensure that children born out of wedlock have a legal bond with their mother from the very moment of their birth.[10]

In the same way, the ECtHR has considered that domestic law must always contain a procedure for an unmarried man to attempt to legally recognize his biological child as his son or daughter. However, in cases where the mother of the child is married to another man, the ECtHR considers that the biological father's right to acknowledge his paternity may be limited in order to protect the best interest of the child. As can be seen here, the definition of legitimate paternity and thereby the family based on marriage benefits from a high level of protection. However, national legislation attempting to render it impossible for anyone to contest legitimate paternity violates the ECHR.[11]

The principle according to which legitimate and illegitimate children must be placed in a similar juridical situation also concerns their possibility to inherit from their parents.[12] In 2000, France was condemned by the ECtHR, because its legislation on patrimonial rights was still

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[9] ECtHR *Boughanemi v. France*, 24 April 1996, 1996-II, Article 35; ECtHR *Chorfi v. Belgium*, 7 August 1996, 1996-III, Article 25.

[10] ECtHR *Marckx v. Belgium*, 13 June 1979, A.31.

[11] ECtHR *Kroon v. Netherlands*, 27 October 1994, A.297-C.

[12] ECtHR *Marckx v. Belgium*, 13 June 1979, A.31, Article 52 and ECtHR. *Johnston v. Ireland*, 18 December 1986, Article 112, Articles 70–76.

discriminating between legitimate children and children born from an extra-marital relationship.[13]

Parental Rights and Contacts between Parents and Children

According to ECHR Article 8, the authorities have the obligation not to interfere in the relationship between parents and children. However, in some cases, interferences may be justified in order to protect the physical and mental health of the child, his/her personal development, or well-being. In case of conflicts, the interests of the child always prevail. In such a case, the task of the ECtHR is to assess whether the interference with the family life of the parents is proportionate to the necessity of protecting the child.

Concerning contacts between divorced/separated parents and their children, the Human Rights Committee (HRC) has stated that, although divorce legally ends a marriage, it cannot dissolve the bond uniting parents and children; this bond does not depend on the continuation of the parents' marriage.[14] In case of conflicts between the parents, the authorities have to choose to grant custody of the children to one of the two parents. However, the right to respect for family life also implies that the parent who does not have the custody of the children has the right to maintain contact with them. Only exceptional circumstances can justify the interruption of all contacts between a parent and his/her child. The total absence of contact between a parent and the child during a period of time is not considered a rupture of the family life.[15] In the same way, the HRC has stated that in any case, the opposition of one of the parents to the contact between the other parent and the children cannot be considered an exceptional circumstance in which family life has stopped.[16]

Decisions regarding the custody of children and contacts between parents and children must be made on the basis of objective and precise grounds. For example, the ECtHR has decided that the fact that a

[13] ECtHR *Mazurek v. France*, 1 February 2000.

[14] HRC *Hendriks v. Netherlands*, Communication No. 201, views adopted 27 July 1988, Article 10(3).

[15] ECtHR *Ciliz v. Netherlands*, 11 July 2000, Article 60.

[16] HRC *Hendriks v. Netherlands*, communication No. 201, views adopted 27 July 1988, Article 10(3); Article 10(4); see also: HRC *Sandra Fei v. Colombia*, Communication No. 514, views adopted 4 April 1995.

mother is a member of a specific religious group is not a relevant reason to refuse her the custody of her children.[17]

The decision-making process in cases involving family life must ensure that all parties are being heard. The authorities involved (social services, judges) have a positive obligation to guarantee all the rights (consultation with doctors, experts, psychologists, hearings of all the parties, etc.) of the parents and the child.[18]

The competent authorities have the positive obligation to implement all decisions concerning the contacts between parents and children, in order to avoid that a *de facto* situation ends up being paramount to the final decision; a typical example here is the case where a mother refuses to let her former husband see his children through the course of several years, and they actually end up not wanting to see him. In cases where contacts have stopped or become difficult, the social services have the obligation to take relevant preparatory measures in order to resume the contact.[19]

Finally, concerning transnational custody cases and international kidnapping of children, the ECtHR has stated that the national authorities have to take all relevant measures to ensure that the child be returned.[20]

Placement of Children outside the Home

The family life between parents and children does not stop because the children are taken into public custody, even in the event that this placement takes place right after the birth.[21]

Decisions concerning placement outside the home are always based on concrete and specific facts. The ECtHR has judged that the authorities have the benefit of direct contact with all the persons concerned in such situations. Therefore, the ECtHR considers that it can only control that the reasons presented by the national authorities for reaching

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[17] ECtHR *Hoffmann v. Austria*, 23 June 1993, A 255-C.

[18] ECtHR *Elsholz v. Germany* 13 July 2000; ECtHR *Sommerfeld v. Germany* and *Sahin v. Germany*, 11 October 2001.

[19] ECtHR *Glaser v. UK*, 19 September 2000.

[20] ECtHR *Ignaccolo-Zenide v. Rumania*, 25 January 2000; ECtHR *Couderc v. Czech Republic*, 30 January 2001: these judgements concerned, *inter alia*, the obligations undertaken by European States under the Hague Convention on the Civil Aspects of International Child Abduction from 25 October 1980.

[21] ECtHR *Hokkanen v. Finland*, 23 September 1994; ECtHR *K. and T. v. Finland*, 12 July 2001.

the decision of placement appear relevant and sufficient.[22] However, the control by the ECtHR is more strict when dealing with the removal of a child at birth; because it is an extremely harsh measure, the ECtHR has stated that there must be extraordinarily compelling reasons for making such a decision.[23]

All decisions concerning contacts between parents and the children during the placement have to be reached in conformity with the ultimate goal of such a placement, i.e. the reunion under the same roof of the family members.[24] Accordingly, measures prohibiting all contacts between parents and children are not acceptable,[25] except in very extreme situations (e.g. sexual abuse by the parent of the child).[26] In the same way, the authorities have to take the possibility of continued contacts between parents and children into consideration when they decide on the modalities of the placement (e.g. the children must not be placed in a home too far away from their parents' home).[27]

The decisions to place children in public care or to sever the contacts between parents and children may often prove to be irreversible. Indeed, a child may in the course of time establish new bonds with the persons that are taking care of him/her. After a while, it might not be in the child's interests to disturb or interrupt these bonds by restoring contacts between the child and the parents.[28]

As a consequence of this reality, the ECtHR wants to make sure that all procedural guarantees are respected during the decision-making process. These procedural guarantees include access to legal aid,[29] access to evidence contained in the case file,[30] and access to court in order to contest some of the social authorities' decisions on procedural issues.[31] More generally, the ECtHR has stated that it is important that the parents' interests and opinions be heard by the authorities in order

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[22] ECtHR *Olsson v. Sweden*, 27 November 1992; ECtHR *Johanssen v. Norway*, 7 August 1996; ECtHR *Scozzari and Giunta v. Italy*, 13 July 2000.

[23] ECtHR *K. and T. v. Finland*, 12 July 2001; ECtHR *P., C. and S. v. UK*, 16 July 2002.

[24] ECtHR *Olssen v. Sweden*, 24 March 1988; ECtHR *Johanssen v. Norway*, 7 August 1996; ECtHR *Gnahoré v. France*, 19 September 2000.

[25] ECtHR *E.P. v. Italy*, 16 November 1999.

[26] ECtHR *L. v. Finland*, 27 April 2000.

[27] ECtHR *Olssen v. Sweden*, 24 March 1988.

[28] ECtHR *W. v. UK*, 8 July 1987, Article 62.

[29] ECtHR *A.W. and F.W. v. Finland*, 25 January 2001; ECtHR *N.V. and A.P. v. Finland*, 13 September 2001.

[30] ECtHR *T.P. and K.M. v. UK*, 10 May 2001.

[31] ECtHR *M.C. v. Finland*, 25 January 2001.

for them to get a complete picture of their situation, as well as of the situation of the children placed in care.

Finally, the ECtHR has stated that there is an obligation resting on the authorities to supervize closely the authorities or the persons in charge of the children; these persons have to be competent and exercise their functions in a manner that is best for the child's interests, and the responsibility for maintaining the family lies with the parents.[32]

Family Life of Foreigners

Non-nationals of a country also have a right to family life, and this right has been invoked many times in situations concerning the entry, the stay or the expulsion of foreigners. States have the right to control immigration and introduce measures to prevent disorder or crime. They can therefore limit the entry into their territory or decide to expel individuals that have been convicted of criminal offences by domestic courts. However, when doing so, States have to ensure that they do not interfere with the family life of the individuals concerned in a way that is disproportionate with the aim they want to achieve.

In relation to non-citizens, a sizeable case law has been developed by the ECtHR concerning the following situations:

1. Family reunification (i.e. entry into the territory of a family member: spouse, child, older parent).
2. Expulsion based on illegal immigration (the person concerned has been staying in the territory of the State without permission).
3. Expulsion in connection with a prison sentence (serious and/or repetitive offences).

The compatibility with the right to family life of the removal or expulsion of a family member from a State depends on a number of factors:

- the extent to which family life is effectively ruptured;
- the extent of family and personal affiliations in the State;
- whether there are insurmountable obstacles for one or more of the family members to return to the country of origin;
- whether there are factors of immigration control (e.g. protection of the labour market, breaches of immigration law) or considerations

[32] ECtHR *Scozzari and Giunta v. Italy*, 13 July 2000, Articles 209–216.

> for law and order (prevention of disorder or crime) weighing in favour of expulsion.[33]

In a case concerning the family reunification of a son with his parents that were living in Switzerland, the ECtHR ruled that the father was himself responsible for having left his son behind, when he decided to go to Switzerland. Even though the ECtHR recognized that it would not be easy for the couple to return to their home country (they had lived for many years in Switzerland, the mother was ill, a child born in Switzerland had been placed in a special home for children), there were still no obstacles preventing the whole family from developing their family life in their country of origin.[34]

On the contrary, the ECtHR judged that the expulsion of a criminal from Denmark to his country of origin (Iran) was a breach of Article 8, as his Danish wife and child as well as his wife's daughter from a previous relationship could neither move with him to his country of origin nor to another country. In this case, the ECtHR assessed that because of the applicant's permanent exclusion from Denmark, the family would be separated, since it was *de facto* impossible for them to continue their family life outside Denmark.[35]

The ECtHR has also ruled that the expulsion of a father, which would end his family life with the very young child that he had with a woman living in that country, was a violation of his right to respect for family life. In this case, the man was divorced from his child's mother but had had regular contacts with the child since the divorce. In addition, his expulsion was due to the expiry of his residence permit, not to a criminal sentence.[36]

The HRC found that the deportation of the parents of a child who had acquired the citizenship of the country of immigration after 10 years of residence in the country was a violation of the right to respect for family life.[37]

By contrast, the birth of a child while staying unlawfully in the territory of a State cannot be used as an argument to avoid being

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[33] ECtHR *Amara v. The Netherlands*, 5 October 2004; ECtHR *Solomon v. The Netherlands*, 5 September 2000.

[34] ECtHR *Gül v. Switzerland*, 19 February 1996, 1996-IV.

[35] ECtHR *Amrollahi v. Denmark*, 11 July 2002.

[36] ECtHR *Berrehab v. the Netherlands*, 21 June 1988, A.138.

[37] HRC *Winata et al. v. Australia*, Communication No.930/2000, views adopted 26 July 2001.

subsequently expelled from that territory. The ECtHR has assessed that a woman was well aware of the precariousness of her legal situation when she gave birth to her child. Even though the ECtHR recognizes that the mother has a family life with her child, this cannot prevent her being expelled from the territory as a result of a criminal sentence.[38]

Family Life of Detainees

Individuals who are remanded in police custody, pre-trial detention or in prison also have the right to maintain contact with their family members. However, this right can be restricted in order to prevent disorder or crime. The premise of case law concerning detainees is that the restriction of contacts with their family members is a logical and direct consequence of being in detention. In consequence, these restrictions are not seen as an interference with their family life, except in very exceptional circumstances. In practice, this concerns the situation where the contact between a parent and his/her child is rendered impossible because visits are prohibited, or the detainee is transferred to a prison that is far away from the child's home.[39] However, in all cases, the former European Commission of Human Rights found that the measures restricting contacts between a detainee and his/her family members were justified out of consideration for public order.[40]

More recently, an evolution of ECtHR case law is slowly occurring: In a couple of cases, the ECtHR has stated that the prison authorities have a positive obligation to help the detainee maintain contact with family members.[41]

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[38] ECtHR *Dahlia v. France*, 19 February 1998.

[39] ECtHR *Vargas* 6 April 2000.

[40] For instance: EComHR *Ismail Hacisüleymanglu v. Italy*, 20 October 1994 or EComHR *Ouinas v. France*, 12 March 1990. The European Commission of Human Rights (EComHR) examined the admissibility of all individual applications to the ECtHR and made reports on the merits of the cases. It was abolished by Protocol 11 from 11 May 1994, which created a single full-time European Court of Human Rights. The EComHR ceased to function a couple of years after the entry into force of Protocol 11.

[41] ECtHR *Kalashnikov v. Russia*, 18 September 2001; *Messina (no.2) v. Italy*, 28 September 2000.

Protection of the Family Home

In many instances, the ECtHR combines the right to respect for family life with the right to respect for the home in order to protect the "family home".

Regarding the protection of the home against destruction, there is a well-established case law from the ECtHR concerning the destruction of houses and villages during an operation of Turkish troops in South-East Turkey. In these cases, which also concern massive violations of other human rights (the right to life, prohibition of torture), the ECtHR has judged that these destructions were serious violations of the right to respect for family life, private life and home of the persons concerned.[42]

Heavy noise or pollution can damage the domicile of a person in a manner that has a negative influence on his/her family life, without directly endangering the life of the family members. In this respect, the State has an obligation to protect individuals against that type of interferences.[43] Moreover, the public authorities also have an obligation to inform individuals of the risks they might be running, when living close to an installation that is potentially a source of dangerous pollution.[44]

The ECtHR has examined cases concerning the refusal of permission to station caravans on land privately owned by the applicant. These cases concern both the respect of the home of a family (their caravans) as well as the respect of a lifestyle of a minority. In 1996, the ECtHR acknowledged the vulnerable position of Roma people as a minority in Europe. It underlined that some special consideration should be given to their needs and their different lifestyle.[45] A couple of years later, the ECtHR stated more specifically that even though the fact of belonging to a minority with a traditional lifestyle different from that of the majority did not confer an immunity from general laws, it could, however, be relevant regarding the manner in which such laws should be implemented.[46] In fact, the ECtHR concluded that there

[42] ECtHR *Dulas v. Turkey*, 30 January 2001; ECtHR *Selcuk and Asker v. Turkey*, 24 April 1998; ECtHR *Adkivar and others v. Turkey*, 16 September 1996.

[43] ECtHR *Lopez Ostra v. Spain*, 9 December 1994, A.303-C; ECtHR *Hatton and others v. UK*, 2 October 2001.

[44] ECtHR *Guerra v. Italy*, 19 February 1998.

[45] ECtHR *Buckley v. UK*, 25 September 1996.

[46] ECtHR *Chapman v. UK*, 18 January 2001.

is a positive obligation imposed on States to facilitate the Roma and Sinti way of life.[47] Unfortunately, the ECtHR did not give more precise examples of the implications of this obligation.

The views of the HRC are more expansive than the ones of the ECtHR concerning the application of the right to family life to matters concerning ethnic minorities. According to the HRC, the term "family" should include all the persons comprising the family as understood in the community in question; hence cultural traditions should be taken into account when defining the extent of a family. In a specific case, the HRC accepted that the construction of a hotel complex on ancestral burial grounds did interfere with the right to family life and privacy of the descendants. According to the HRC, it was clear in this case that descendants considered the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.[48]

11A.6. National Implementation Mechanisms

Governments and Parliaments have the responsibility to ensure that there exist equitable framework legislation and regulations in the field of the right to respect for family life (e.g. family law, protection of children, aliens legislation). This includes the adoption of laws and rules that are precise, accessible, and foreseeable as to their effects.

Furthermore, various national and local authorities are responsible for the implementation of the right to respect for family life. They are under an obligation not to interfere with the family life of all individuals arbitrarily or in a disproportionate manner. Moreover, there are a certain number of positive measures which must be taken by public authorities in order to ensure an effective respect for family life.

These implementation mechanisms include:

– All court levels, both as main actors (decisions affecting the family life of individuals, e.g. expulsion, custody of children, etc.), as well as when reviewing decisions of other authorities (e.g. placement of children by the social services, denying inmates visits, etc.).

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[47] ECtHR *Chapman v. UK*, 18 January 2001.

[48] HRC *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, views adopted 29 July 1997.

– Social services (e.g. taking children into public custody; advising and mediating in case of divorce or separation; mediating and supporting contacts between parents and children).
– Local authorities (e.g. their obligation to alert inhabitants of a city to industrial pollution or to the inherent risks thereof).
– Prison authorities or other authorities detaining a person (e.g. decisions concerning family visits, informing the family as to the place of detention).

11A.7. Additional Sources, including OSCE Standards

Many international instruments deal with some aspects of the right to respect for family life; some of the most important ones are described below.

Prisoners

Some minimum standards concerning prisoners have been adopted both at the international and European level.[49]

An untried prisoner shall be allowed to inform his/her family of his/her detention immediately and shall be given every reasonable opportunity to communicate with family and friends, and to receive visits from them, subject only to restrictions and supervision necessary to the interests of the administration of justice and of the security and good order of the institution.[50]

Every prisoner shall have the right to inform his/her family at once of his/her imprisonment or transfer to another institution.[51] Prisoners shall also be informed at once of the death or serious illness of any near relative.[52]

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[49] European Prison Rules, Recommendation No. R(87)3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987; UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[50] UN rule 92, CoE rule 92.

[51] UN rule 37; CoE rule 49(3).

[52] CoE rule 49(2), UN rule 44(3).

Special attention shall be paid to the maintenance and improvement of communication and regular contacts between a prisoner and his family as are desirable in the best interests of both.[53] In this respect, every institution should have social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family.[54]

Additional consideration shall be given to the future of the prisoner after his release; in this respect the prisoner should have the benefit of arrangements designed to assist him in returning to family life.[55]

Foreigners

There exist a number of recommendations and declarations concerning the obligation of States to grant family reunification to spouses and children of aliens lawfully residing on their territory.[56] More recently, the Parliamentary Assembly of the CoE has passed a recommendation calling on member States to facilitate family reunion.[57] Furthermore, a recommendation of the CoE Committee of Ministers asks the member States hosting refugees and other persons in need of international protection, who have no other protection or country than the country of asylum, to help them lead a normal family life together, and to promote family reunion through appropriate measures, taking into account the relevant case law of the European Court of Human Rights.[58]

A number of OSCE instruments also express concerns regarding the situation of migrant workers and their families. Since 1973, the Helsinki process has dealt with issues concerning family life and the movement of persons, such as contacts and regular meetings based on family ties, and the reunification of families and marriage between nationals of different States.[59]

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[53] CoE rule 43, UN rule 37 and 79.

[54] UN rule 60(2).

[55] CoE Rule 87; UN Rule 80.

[56] For example: Declaration on the human rights of individuals who are not nationals of the country in which they live, UN General Assembly, Res. 40.144, 13 December 1985, Article 5(4).

[57] Recommendation 1625 (2003): Policies for the integration of immigrants in Council of Europe member States, adopted on 30 September 2003.

[58] Recommendation No. R (99) 23 of the Committee of Ministers to member States on family reunion for refugees and other persons in need of international protection, adopted on 15 December 1999.

[59] Final Recommendation of the Helsinki Consultations, Helsinki 1973.

These concerns are formulated in the Helsinki Final Act (1975) under the headlines "Co-operation in Humanitarian and Other Fields" and "Human Contacts". According to this instrument, the States agree to facilitate contacts and regular meetings of persons on the basis of family ties. They agree that they will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory in order to visit members of their families. The States also make a commitment to deal with the applications of persons who wish to be reunited with members of their family as expeditiously as possible (especially in the case of old or ill persons). They shall also ensure that fees charged in connection with these applications are at a moderate level. Finally, the States undertake to examine favourably requests for exit or entry permits, from persons who have decided to marry a citizen from another participating State.

In 1990, the OSCE States reaffirmed that the protection and promotion of the rights of migrant workers and their families, as well as the implementation of relevant international obligations, are their common concern.[60]

More recently, the Oslo Ministerial Declaration mentions briefly that the policies preventing family reunification are to be addressed by the organization.[61]

Monitoring the Right: the Special Challenges

The right to respect for family life covers a very diverse range of activities, actors, and contexts. Therefore the tasks of the monitor will vary significantly according to the monitoring context, e.g. family, immigration, or prison. In this respect, the monitor has to be in touch with various different authorities in order to get a firm grasp of the various frameworks in which the right to family life plays a role. It is important that the monitor is acquainted with the administrative routines, as well as the interests looked after by these authorities.

It is crucial for the monitor to keep in mind that issues concerning the family life of an individual are extremely sensitive for two reasons. First of all, interfering with the family life of an individual always concerns a very intimate part of the personal life of one or several persons; secondly, any interference with the family life of an individual

[60] Charter of Paris for a New Europe, 1990, p. 11.
[61] Seventh Meeting of the Ministerial Council, 2–3 December 1998.

potentially carries the risk of ending with a total rupture of family life. In cases where family members are forced to be apart, and in the absence of regular contacts, it is important to understand that time is working against the restoration of a normal family life.

Therefore, it is important that the monitor always checks that even in the case of a permitted restriction on the right to respect for family life (placement, restrictions on visits, etc), the authorities undertake all necessary measures to ensure that the interference remains as limited as possible. In this respect, the monitor will have to pay particular attention to the positive obligations that have been imposed on authorities, in order to avoid the total destruction of the bonds between parents and children in cases where there is a conflict between the parents.

Similarly, the monitor will have to be particularly aware of all the positive obligations that have been imposed on the authorities in terms of investigation, information, and procedural guarantees.

11A.8. Monitoring Checklist on the Right to Family life

Checklist – The Right to Family Life

1. Legislation and Regulation check
   - Relevant international human rights instruments ratified by the state and reservations or declarations made upon ratification
   - Conformity of national regulations and legislation related to family life with international and regional standards (critical review by the monitor)
   - Legal basis for restrictions to the right to family life
   - Requirements for an interference with family life (e.g. requirement for taking of children in public custody): are the requirements clear, understandable and specific, or do they allow for a wide range of discretion for the authorities concerned?
   - Provision in legislation and/or regulations for counselling by experts (doctors, psychologists, social workers) in cases concerning parents and children
   - Direct or indirect discriminatory effects of some aspects of legislation or regulations restricting family life
   - Right to appeal established by law
   - Effective and accessible remedies in case of interference with the family life of an individual (administrative or judiciary remedy)

2. Monitoring the Right in Practice
   - Length of decision-making process in cases concerning children
   - Information to the parents concerning their rights and duties
   - Effective access to the children when access is permitted (after a divorce or a separation or during placement of children by public authorities)
   - Control by the social services and the judiciary on children foster institutions and families
   - Discriminatory practices by relevant authorities (social services, prison authorities, etc.)
   - Protection of the interests of the child in proceedings concerning him-/herself: which authorities are safeguarding the interests of the children? To what extent can the child be heard in the proceedings? What type of help can the child receive?

11A.9. Instruments on the Right to Family Life

Relevant Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 17	Prohibition of arbitrary or unlawful interference with the family of a person.	HRC General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17), 08/04/88
Article 23	The family is the natural and fundamental group unit of society and is protected by society and the State.	HRC General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Article 23), 27/07/90

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 10	Widest possible protection and assistance should be accorded to the family.	

Convention on the Rights of the Child

Article 5	Public authorities must respect the responsibilities, rights and duties of parents.	

International Convention on the Protection of the Rights of All Migrant Workers and their Families, 18 December 1990

Entirety	Protection of the rights of migrant workers and their families.	

Council of Europe (CoE)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 8	Right to respect for family life. Interference by a public authority must be prescribed by law, pursue a legitimate aim and be necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.	Case law as developed by the European Court of Human Rights

European Convention on the Legal Status of Children Born Out of Wedlock, 15 October 1975

Entirety	Rules to bring the legal status of children born out of wedlock into line with that of children born in wedlock (maternal affiliation, paternal affiliation, responsibilities and rights of the unmarried parents towards their children and succession rights of children born out of wedlock).	

CSCE/OSCE Instruments

Final Recommendation of the Helsinki Consultations, Helsinki 1973

Critical Substantive Points
Contacts and regular meetings on the basis of family ties, and reunification of families and marriage between nationals of different States.

Helsinki Final Act (1975), "Co-operation in Humanitarian and Other Fields" and "Human Contacts"

The States agree to facilitate contacts and regular meetings of persons on the basis of family ties.

Other International Instruments

European Prison Rules, Recommendation No. R(87)3 adopted by the Committee of Ministers of the CoE, 12 February 1987

Section	Critical Substantive Points
Rule 92	An untried prisoner shall be allowed to immediately inform his/her family of his/her detention and shall be given all reasonable facilities for communicating with family and friends, and for receiving visits from them.
Rule 49(3)	Every prisoner shall have the right to inform his family at once of his/her imprisonment or transfer to another institution.
Rule 49(2)	Prisoners shall also be informed at once of the death or serious illness of any near relative.
Rule 43	Maintenance and improvement of communication and regular contacts between a prisoner and his family.
Rule 87	Arrangements designed to assist the prisoner in returning to family life after release from prison.

UN Standard Minimum Rules for the Treatment of Prisoners, approved by the ECOSOC by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Rule 92	An untried prisoner shall be allowed to immediately inform his/her family of his/her detention and shall be given all reasonable facilities for communicating with family and friends, and for receiving visits from them.
Rule 37	Every prisoner shall have the right to inform his/her family at once of his/her imprisonment or transfer to another institution.
Rule 44(3)	Prisoners shall also be informed at once of the death or serious illness of any near relative.
Rules 37 and 79	Maintenance and improvement of communication and regular contacts between a prisoner and his family.
Rule 80	Arrangements designed to assist the prisoner in returning to family life after release from prison.

Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which they Live, UN General Assembly, Res. 40.144, 13 December 1985

Article 5(4)	Obligation of States to grant family reunification to spouses and children of aliens lawfully residing on their territory.

Recommendation 1625 (2003) Policies for the Integration of Immigrants in Council of Europe Member States, adopted on 30 September 2003

Critical Substantive Points
Recommendation calling on CoE member States to facilitate family reunion on their territory.

Recommendation no. R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection, adopted on 15 December 1999

Promote family reunion through appropriate measures for refugees and other persons in need of international protection, who have no other country than the country of asylum or protection in order to lead a normal family life together.

11A.10. References

Coyle, Andrew, *A Human Rights Approach to Prison Management. Handbook for prison staff*. International Centre for Prison Studies. http://www.fco.gov.uk/Files/kfile/fcohandbook1,0.pdf
This handbook deals with the human rights of persons in detention. Some chapters review how their right to family life has developed.

Hanski, Raija and Scheinin, Martin (eds), *Leading Cases of the Human Rights Committee*. (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003, pp. 224–254).
Thirty pages on the case law of the Human Rights Committee concerning the right to privacy and family life. There is both a summing-up of the practice of the HRC as well as abstracts of the leading cases in this field.

Kilkelly, Ursula, *The Child and the European Convention on Human Rights*. (Aldershot: Ashgate, 1999).
This book deals comprehensively with the protection of children under the ECHR. Many chapters of the book deal directly with the right to respect for family life: chapter 5 on the identity of the child; chapter 9 on the definition and the treatment of the family; chapter 10 on immigrant and refugee children; chapter 11 on custody and contact; chapter 12 on alternative care; and chapter 13 on adoption.

Kilkelly, Ursula, *The Right to Respect for Private and Family Life. A guide to the implementation of Article 8 of the European Convention on Human Rights*. Human Rights Handbooks, No. 1 (Strasbourg: Council of Europe, 2001).
This guide analyzes the methodology and reasoning of the European Human Rights Court when establishing whether an interference with the right to respect for private and family life can be considered to be an acceptable limitation by the public authorities of an individual's right to respect for private and family life. It is intended as a very practical guide to how the right to respect for private and family life has been applied and interpreted by the European Human Rights Court. Also available from: http://www.coe.int/T/E/Human_rights/hrhb1.pdf.

Lagoutte, Stéphanie, "Surrounding and Extending Family Life: Study of the Notion of Family Life in the Case Law of the European Court of Human Rights", *Nordic Journal for Human Rights (Menneske og Rettigheter)*, 2003, pp. 292–306.
This article maps out all the fields of application of the right to respect for family life and shows how this right has come to play an increasing role in the protection of all individuals' human rights in Europe.

Lambert, Hélène, "The European Convention on Human Rights and the right of refugees and other persons in need of protection to family reunification". *International Journal of Refugee Law*, Vol. 11, No. 3 (1999), pp. 427–450
This article deals with the obligations of the State in immigration matters under ECHR Article 8. It shows how the ECtHR balances the various interests at stake when dealing with family reunification.

CHAPTER 11 – PART B

THE RIGHT TO RESPECT FOR PRIVACY, HOME AND CORRESPONDENCE

The right to privacy is embedded in the liberal, Western concept of liberty introduced and developed throughout the 18th and 19th Centuries and is closely linked to the notion of the human being as an autonomous subject.

The right to privacy should be seen in conjunction with other civil rights such as the right to freedom of expression, the right to manifest your religion, to move and choose your place of residence and to assemble and associate with others.

11B.1. Definitions

The right to privacy provides the individual with a fundamental right to physical and mental integrity as well as a physical and social identity.[1]

The core of the right to privacy has been identified as a right to be left alone[2] and to isolate oneself from your fellow human beings; i.e. to withdraw from public life into a private sphere in order to live free from unwanted attention[3] and to pursue the development and fulfilment of your own personality.[4]

The European Court of Human Rights (ECtHR) has held that the right to privacy builds on the principle of personal autonomy. In the case of *Pretty v. the United Kingdom*,[5] the Court "considers that the notion of personal autonomy is an important principle underlying the interpretation of [the right to privacy]." On this basis, the Court held that the "ability to conduct one's life in a manner of one's own choosing

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[1] See ECtHR, *Mikulic v. Croatia*, Judgment of 7 February 2002, para. 53.

[2] See Warren and Brandeis: *The Right to Privacy*, Harvard Law Review, 1890–1891, p. 193–200.

[3] See *Smirnova v. Russia*, Judgment of 24 July 2003, para. 95.

[4] See *Brüggeman and Scheuten v. Germany*, No. 6959/75, Commission's report of 12 July 1977, para. 55.

[5] Judgment of 29 April 2002, para. 61.

may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."[6]

The expression "private life" must not be interpreted restrictively; it includes the right to establish and develop relationships with other human beings as well as activities of a professional or business nature. Such a broad interpretation corresponds to existing Council of Europe standards and is consolidated in jurisprudence.[7]

The right to privacy is not unlimited, but restrictions must adhere to specific criteria stated in the international legal provisions on privacy (more below). The legitimate aim of restricting the right to privacy stems from societal needs of general interest. Such restrictions are permissible under certain circumstances if they meet a set of requirements, and if it is thoroughly substantiated that the interests of society outweigh the interests of the individual. The point of departure is the protection of the individual's privacy and any restriction has to be qualified.[8]

Regarding the scope of protection, both the UN Human Rights Committee (HRC) and the ECtHR have stated that the State has a positive obligation to protect the privacy of a person against interferences from other private persons.[9]

Today, the concept of privacy or private life serves as an overarching principle covering a broad spectrum of interests of the individual. It encompasses the right to private life and family life (see Chapter 11A), as well as the right to respect for home and for personal information and communication. The protection of privacy in relation to information and communication is often referred to as information privacy.

The right to private life, in its narrow sense, includes protection of individual existence and autonomy, mental and moral integrity, as well as bodily privacy.

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[6] *Pretty v. the United Kingdom*, para. 62.

[7] See, among others, *Amann v. Switzerland*, 16 February 2000, para. 65; and *Rotaru v. Romania*, 4 May 2000, para. 43. In both cases, the Court explicitly recalled the CoE Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

[8] See HRC General Comment No. 16 (32) on Article 17(4).

[9] See Manfred Nowak: ICCPR Commentary, 2005, p. 379f. and ECtHR, *X and Y v. the Netherlands*, Judgment of 26 March 1985.

11B.2. Legally Binding Standards

The right to privacy is enshrined in Article 12 of the Universal Declaration of Human Rights (UDHR) and in Article 17 of the UN Covenant on Civil and Political Rights (ICCPR), in the form of a prohibition against arbitrary or unlawful interference with privacy, family life, home, and correspondence.

The ICCPR article reads:

> 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.

In Europe, the right to privacy is established in the European Convention of Human Rights (ECHR). Article 8 of ECHR reads:

> 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 well-being 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.

The wording of Article 8 of ECHR differs slightly from Article 17 of ICCPR, as it does not contain an explicit prohibition of unlawful interference. The obligation of the State to qualify any interference as stated in Article 8(2) does, however, lead to the same result. The ICCPR's scope of application seems to be broader than the ECHR's, as it explicitly encompasses honour and reputation[10] and restricts encroachments on privacy and attacks on honour.

Moreover, the wording "unlawful" in Article 17 of ICCPR refers to the national legal system rather than to legislation in its narrow sense. Violation of privacy by the State may be in conflict with Article 17,

[10] The adverse effect on the applicant's reputation of a search of his business premises was made part of the Court's rationale in ECtHR, *Busk v. Germany*, Judgment of 28 June 2005, para. 51and led to the conclusion that Article 8 had been violated. See also *Peck v. the United Kingdom*, Judgment of 28 January 2003, para. 84 on CCTV surveillance.

irrespective of compliance with the national legal system. Also, the lack of, say, relevant protection in national regulation concerning privacy violations by private parties may lead to violation of the State duties pursuant to Article 17.

A similar horizontal application toward private parties is not explicitly addressed in ECHR Article 8. Nevertheless, the ECtHR has stated that the Convention may give rise to a positive obligation to take measures ensuring the right to privacy among private parties.[11]

Protection of Personal Data

The first legally binding international instrument to set up safeguards for the handling of personal data by public authorities and the private sector was the *Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data* (Data Protection Convention)[12] adopted by the Council of Europe. The Convention entered into force on 1 October 1981 and has recently been amended by an Additional Protocol regarding Supervisory Authorities and Transborder Data Flows.[13]

At the European Union level, relevant instruments are Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. Concerning intergovernmental co-operation on criminal matters, there is a recent Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, MEMO/05/349, Brussels, 4 October 2005.

One area of specific importance since the attacks on the World Trade Center in New York on 11 September 2001 is the fight against terrorism. Measures taken as part of this effort often have a direct influence on the right to privacy, e.g. related to surveillance of tele and data communication, data retention schemes, and identification

[11] Cf. ECtHR, *X and Y v. the Netherlands*, Judgment of 26 March 1985, para. 23.
[12] CETS No. 108.
[13] ETS No. 181.

of travellers. Binding regulations related to counter-terror measures have been adopted by the UN,[14] and by the Council of Europe in the Convention on the Prevention of Terrorism.[15] Neither instruments from the UN Security Council or the Council of Europe nor the subsequent measures taken by the member States explicitly address protection of privacy; nor do they refer to ICCPR Article 17 or to ECHR Article 8. The instruments do, however, contain references to international human rights and fundamental freedoms in general and to the conventions, as well as to basic principles such as the rule of law and democratic values.[16]

Also, the EU has taken regulatory steps to counter terrorism. A newly adopted amendment to EU directive 2002/58/EC on data retention creates the legal basis for retaining data on tele and data communication traffic, the so-called traffic data containing information about the EU citizens' communications' origin, destination, time, date, size, duration, etc.

Similar traffic data may be collected, retained, and submitted; and other data may be searched and seized according to the Council of Europe Convention on Cybercrime.[17] Article 15 of the Convention sets up conditions and safeguards, but refers only in general terms to the human rights and freedoms enshrined in the ECHR, ICCPR, and other international human rights instruments. Only the preamble refers specifically to the right to privacy.

Recently, new measures have been introduced in order to identify and verify persons accessing countries, buildings, specific areas, etc. As part of these measures, so-called biometric information revealing individual physiological characteristics such as fingerprints and retinal patterns of the eye are combined with personal data found in passports or other travel documents. In 2003, ILO adopted binding regulations concerning seafarers' identity documents as part of security schemes for travel documents. The ILO convention states that the biometric data shall be captured without any invasion of privacy of the persons concerned and without discomfort, risk to their health, or offence

[14] See http://www.un.org/terrorism/sc.htm for a list of UN resolutions related to terrorism.

[15] The Convention was opened for signature 15 May 2005.

[16] See the Preamble of UNSC Res. 1456/2003, PP 6, the Preamble of 2005 CoE Convention, ibid.

[17] CETS No. 185. Entered into force 1 July 2004.

against their dignity.[18] This may serve as a guideline for application of biometrics in other areas, as well.

Privacy Protection of Trafficked Persons

Trafficking is severely impacting fundamental rights of the trafficked person (see Chapter 15). Violations of the right to privacy may arise related to the handling of victim data and is covered e.g. by the UN Convention on Trafficking in Human Beings (Palermo Protocol) and the Council of Europe Convention on Action against Trafficking in Human Beings.[19] The latter affords protection of the private life and identity of victims by stating that their personal data shall be stored and used in conformity with the conditions provided by the Data Protection Convention.[20] The convention also stipulates that States shall adopt measures to ensure that the identity of a child subject to trafficking is not made publicly known, e.g. through the media.

Protection of Health Data

Health data requires special attention as it may reveal sensitive information about actual health or information predicting genetic diseases. In 1997, the Council of Europe adopted the Biomedicine Convention, a convention on human rights and biomedicine.[21] Article 10 of this convention contains specific provisions related to health information.

11B.3. Limitations

Similar to a number of other civil rights, the right to privacy does not provide the individual with absolute protection, yet it does allow for certain restrictions introduced by the State. A qualification clause for restricting the right to privacy is contained in Article 8(2) of ECHR, which reads:

[18] See ILO Convention No. 185, Article 3(8).
[19] CETS No. 197. Opened for signature 16 May 2005.
[20] CETS No. 108.
[21] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, CETS No. 164.

> 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 well-being 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.

Permissible restrictions presuppose the existence of a legal basis, a legitimate aim and necessity in a democratic society. The list of legitimate aims in ECHR Article 8 is exhaustive, but phrased in broad terms. This opens for a wide interpretation of the legitimate grounds for States' interference,[22] and the limitations must therefore be narrowly interpreted.[23]

A similar provision on permissible limitations is not contained in ICCPR Article 17. Be that as it may, it is clear from the decisions from the Human Rights Committee that interference with the rights to privacy must be assessed along the same lines as those contained in ECHR Article 8(2). Thus, the prohibition in Article 17(1) of unlawful and arbitrary interference and attacks requires a legal basis for interference with the right to privacy. Even if national legislation exists, a violation may occur, if it does not comply with the obligations imposed by the Covenant. Such was the conclusion reached by the HRC in the case of *Mauritian Woman*,[24] in which the Committee stated that the interference was unlawful within the meaning of Article 17, despite the fact that there was a legal basis for the interference in question.

The requirement for a legal basis is a demand for legislation, regulation or case law to specify the powers of the State to limit a given right. The purpose of this is to secure specific and transparent regulation governing the relationship between the State and the individual, as well as foreseeability as to the consequences of the provisions. The latter requires, for instance, that a rule is formulated with sufficient precision to enable an individual to adjust his or her behaviour accordingly.[25] Thus the requirement for a legal basis goes beyond the mere existence of national law and implies that interference with the right to privacy is conditioned upon national regulation of a certain standard. Moreover,

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[22] D.J. Harris et al: *Law of the European Convention*, 1995, p. 290.

[23] *Rotaru v. Romania*, para. 47; in the same vein *Klass v. Germany*, 6 September 1978, para. 42.

[24] HRC, Title, Application No. 35/1978, para. 9.

[25] *Malone v. the United Kingdom*, Judgment of 2 August 1984, para. 66.

these quality standards become more rigorous along with the intensity of the interference; the higher the intensity, the higher the demand for a clear and precise legal provision authorizing said interference. This is especially relevant when the State is given wider powers with reference to national security.[26]

In the case of *Amann v. Switzerland*,[27] for example, the ECtHR stated that Swiss law did not indicate "with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power in the area under consideration."

The assessment of whether a specific interference is "necessary in a democratic society" may take its point of departure in the ECtHR case of *Handyside v. the United Kingdom*.[28] This judgment stressed that interference must fulfil *a pressing social need*. The assessment of such a need must not only consider the facts in isolation, but must evaluate the conditions and interests of the case as a whole.[29] Also, the specific circumstances prevalent in the State must be taken into consideration as part of the national margin of appreciation.

The doctrine of leaving a margin of appreciation to the State is based on the assumption that national authorities are better placed to assess whether interference is necessary in the domestic context. The ECtHR does have the power, however, to supervise the national assessment and may reach the conclusion that the margin of appreciation must be limited in certain contexts.

As a counterweight to the margin of appreciation, a proportionality test is conducted to assess the necessity of a given restriction in a democratic society. Whereas the margin of appreciation leaves room for the State to apply specific considerations, the principle of proportionality sets up limitations for the State to interfere with human rights.[30]

The principle of proportionality is crucial when balancing State interests against individual interests.[31] The principle is not mentioned in the human rights treaties, but it is the dominant theme in the application of human rights law. Proportionality requires that there is a

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[26] See, *inter alia*, *Kruslin v. France*, Judgment of 24 April 1990, *Huvig v. France*, Judgment of 24 April 1990, and *Malone v. the United Kingdom*, Judgment of 2 August 1984.

[27] Judgment of 16 February 2000.

[28] Judgment of 7 December 1976.

[29] See e.g. *Ploski v. Poland*, Judgment of 12 November 2002, para. 35.

[30] See e.g. *Lingens v. Austria*, Judgment of 8 July 1986.

[31] See Manfred Nowak: *ICCPR Commentary*, 2005, p. 383.

reasonable relationship between the means employed and the intended aims, cf. Box 1.

Box 11B.1. Determining Proportionality

Testing proportionality forms a substantial part of the legal assessment made by judicial and other decision-making bodies regarding the justification of any given measure of interference.

It should be demonstrated that:

- The need for interference in a given case is convincingly established.
- The measure of interference corresponds to a pressing social need.
- It is reasonable and suited towards achieving the legitimate aim being pursued.

Any decision taking proportionality principles into account should:

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

Factors to consider when assessing whether or not an action is disproportionate are:

- Have relevant and sufficient reasons been advanced in support of it?
- Was a less restrictive measure viable?
- Does the restriction proposed destroy the very substance of the right in question?
- Has there been adequate procedural fairness in the decision-making process?
- Do safeguards against abuse exist?

11B.4. Current Interpretation (Key Case Law)

Protection of the Body

The right to protection of bodily autonomy comprises the right to decide what to do with and to one's own body; including comportment which may be harmful to one's health, such as consuming alcohol, nicotine or drugs; or injurious or lethal behaviour, such as self-mutilation[32] and suicide. The right to self-determination and self-realization is a core element of this right.[33] Prohibitions, requirements and practices that are established in order to pursue societal interests, e.g. public order, common good or limiting social expenditure, may undermine the sphere of individual privacy and their justifications must therefore be assessed following the criteria of permissible restrictions.

[32] See ECtHR, *Laskey, Jaggard and Brown v. the United Kingdom*, Judgment of 19 February 1997 concerning interference with sadomasochistic activities, para. 36 and 38.

[33] See ECtHR, *Pretty v. the United Kingdom*, Judgment of 29 April 2002, para. 61.

Interference with bodily privacy may be imposed by State authorities or by others. Some intentional or trivial insults—such as slapping or ear-boxing—may represent unlawful interferences with privacy, insofar as the incidences do not fall within the scope of the prohibition against torture, inhuman or degrading treatment or punishment. In a case concerning corporal punishment in a private school, the Court did, however, reach the conclusion that corporal punishment as part of a disciplinary regime of a school did not violate the privacy of the pupil, since it did not entail an adverse effect on his physical and moral integrity.[34]

Medical Interventions

Compulsory medical intervention, including forced psychiatric treatment or examination, may interfere with the right to respect for physical integrity.[35] Even minor interventions, such as forced vaccination and obtaining of blood samples, may interfere with physical integrity.[36] In any case, these interventions generally serve a legitimate purpose; and if conducted with respect for the dignity of the person involved and observing the principle of proportionality, they do not violate the right to privacy.

Obtaining other bodily samples such as urine testing for security purposes in a workplace may also constitute interference. If procured in connection with control of substance abuse among employees, they may be justified and seen as reasonable in the specific case. In the case of *Wretlund v. Sweden*,[37] the urine testing of an office cleaner in a nuclear plant was seen as justified in the light of public safety and the protection of the rights and freedoms of other employees.

In many cases, medical interventions may also interfere with an individual's mental or moral integrity. In the case *Bensaid v. the United Kingdom*,[38] the applicant argued that returning to his country of origin would mean withdrawal of treatment whereby his serious mental illness would be at risk of deteriorating. The ECtHR stated that preservation of men-

[34] See *Costello-Roberts v. the United Kingdom*, Judgment of 25 March 1993, para. 36. See also *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, and *Campbell and Cosans v. the United Kingdom*, Judgment of 25 February 1985.

[35] See e.g. *Matter v. Slovakia*, ECtHR, Judgment of 5 July 1999.

[36] See *Matter v. Slovakia*, Judgment of 5 July 1999, para. 64, and *X v. the Netherlands*, case No. 8239/1978.

[37] See Inadmissibility Decision of 9 March 2003 in case No. 46219/1999.

[38] Judgment of 6 February 2001, para. 47.

tal stability is an indispensable precondition for effective enjoyment of the right to respect for private life, but did not find any violation of Article 8. Hence, if it is stated that there are in fact adverse effects on physical and moral integrity, an intervention or measure may constitute a breach of Article 8.

Within the ambit of privacy protection, the protection of the genetic code of a person should be mentioned. Protection is found in the non-binding EU Charter,[39] but may also be inferred from the Council of Europe Biomedicine Convention. The protection of the individual genetic code is relevant in connection with biomedical interventions and genetic screening. In most cases, the consent of the person involved in biomedical treatment is enough to justify the interference. Still, the requirements of necessity and proportionality must also be fulfilled.

Personal Appearance

The protection of a person's appearance covers, *inter alia*, clothing, beard and hairstyle. Hence, a prohibition against a Muslim prisoner growing a beard was seen as a violation of Article 17 by the Human Rights Committee in the case of *Boodoo v. Trinidad and Tobago*.[40] On the other hand, the ECtHR has in two recent cases on religious headscarves held that the State may legitimately restrict the right to manifest religion in this way.[41]

As part of the protection of appearance and personal integrity, the protection of a person's name[42] and gender requires special attention. A person's name is a means of personal identification and establishes the relation to a specific family and community.

The authorities' refusal of registering a specific surname[43] or forename[44] may be perceived as inconvenient, but does not in itself constitute interference.

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[39] The EU European Charter of Fundamental Rights contains an explicit protection of integrity in the fields of medicine and biology in Article 3; genetic features are included as grounds of discrimination in Article 21 on non-discrimination.

[40] ICCPR, Appl. No. 721/1996, para. 2(7), 6(5), and 6(7).

[41] See *Sahin v. Turkey*, Judgment of 10 November 2005 and *Dahlab v. Switzerland*, Decision of 15 Febrary 2001.

[42] See *Coeriel and Aurik v. the Netherlands*, ICCPR No. 453/1991, para. 19 and *Guillot v. France*, ECtHR Judgment of 24 October 1996, para. 21.

[43] See ECtHR in *Stjerna v. Finland*, Judgment of 25 November 1994 and *Burgharz v. Switzerland*, Judgment of 22 February 1994, para. 24.

[44] See *Guillot v. France*, Judgment of 24 October 1996, para. 21.

A combined name and gender issue was raised before the ECtHR in the case of *Goodwin v. the United Kingdom* concerning right to recognition by the State of a transsexual person's sex change. The court reached the conclusion that such a demand can be based on Article 8 and found the lack of recognition in violation of the right to privacy.[45]

Invasion of the private sphere of a person against his or her will may also constitute an unjustified interference with the right to privacy. If information such as photos depicting a person's intimate life is conveyed or published without consent, this may constitute interference with the right to privacy. This may also be the case if the person is ridiculed or if published material has an impact on the image of the person concerned.[46]

Sexual Activities

A person's sexuality and sexual life enjoy the protection of privacy.[47] Regulation of say, the sexual behaviour of heterosexuals and homosexuals interferes with the right to privacy. A general prohibition of homosexual activities between adults would amount to a violation of the right to privacy.[48]

Prohibition of prostitution or the private consumption of pornography may constitute interferences with privacy.[49] In most situations, such limitations may be seen as permissible with reference to the prevention of disorder or crime and the protection of health, or morals.

The criminalization of violent sexual activities was assessed by the ECtHR in the case of *Laskey, Jaggard and Brown v. the United Kingdom*,[50] in which homosexual activities in a sadomasochistic context led to the imprisonment of the persons involved. The interference was seen as legitimate and proportionate in light of the purpose of protecting health.

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[45] ECtHR Judgment of 11 July 2002.

[46] See Manfred Nowak: *ICCPR Commentary*, 2005, p. 387 and e.g. *Von Hannover v. Germany*, Judgment of 24 September 2004.

[47] See *Dudgeon v. the United Kingdom*, ECtHR, Judgment of 22 October 1981 and *Norris v. Ireland*, ECtHR, Judgment of 26 October 1988 and *A.D.T. v. the United Kingdom*, ECtHR, Judgment of 31 July 2000. See also *Toonen v. Australia*, ICCPR No. 488/1992.

[48] See *Dudgeon v. the United Kingdom*, Judgment of 22 October 1981 and *Toonen v. Australia*, ICCPR No. 488/1992.

[49] See Manfred Nowak: *ICCPR Commentary*, 2005, p. 386.

[50] Judgment of 19 February 1997.

The Private Life of Prisoners

When applied to prisoners, the right to privacy plays a special role in combination with the prohibition against torture, and the right for prisoners and others deprived of their liberty to be treated with humanity and dignity. For instance, in the case of *Boodoo v. Trinidad and Tobago*,[51] the Human Rights Committee stated that the requirement of a prisoner to urinate and strip naked in front of the prison guards amounted to a violation of the right to privacy.

The Right to Privacy of National and Ethnic Minorities

The protection of privacy has a certain impact on the obligations of the State to refrain from interfering with the rights of national or ethnic minorities and the obligation to ensure that these rights can be enjoyed by the members of minorities. The life style of minorities and especially their choice of residence are related to the right to respect for privacy and the home.

In the case of *Noack v. Germany*,[52] the Court assessed the transfer of a Sorbian minority population to another town due to an expansion of lignite mining operations in the original village of the Sorbs. The Court considered the interference proportionate and stressed that the Sorbian minority had the possibility of continuing to live in the same region and the same cultural environment. They would thus be able to enjoy their minority rights, including the use of their language in schools and *vis-à-vis* the administrative authorities, and to practise their customs, including attendance to religious services in the Sorbian language.

Also, the Court has stated that when Roma families choose mobile homes as permanent housing this is covered by the privacy protection enshrined in Article 8 of the ECHR.[53]

Persons with Disabilities

The right of persons with disabilities to participate in society on equal terms with other citizens raises the question of whether a requirement

[51] ICCPR No. 721/1996.

[52] See ECtHR Decision No. 46346/99 of 25 May 2000, para. 1.

[53] See *Chapman v. the United Kingdom*, Judgment of 18 January 2001, para. 73, *Jane Smith v. the United Kingdom*, Judgment of 18 January 2001, para. 80, and *Buckley v. the United Kingdom*, Judgment of 25 September 1996, para. 54.

for accessibility to areas and buildings can be linked to the right to privacy. The issue has been reviewed by the ECtHR in two cases concerning access to the beach and sea and access to public buildings such as post offices, police stations, etc.

In the case of *Botta v. Italy*,[54] the Court held that there was no direct link between the responsibility of the State to facilitate access to private bathing establishments and the complainant's personal interest in gaining access to the beach and sea during his holidays. Likewise, in the case of *Zehnalovà and Zehnal v. the Czeck Republic*,[55] the Court stated that the needs of their private life did not entail the right to access to a specific building.

The consequences of lack of accessibility for persons with disabilities should be considered when implementing the right to privacy. This is relevant due to the political priority given to integrating persons with disabilities[56] and to building an inclusive society,[57] to reducing structural disadvantages, and to giving appropriate preferential treatment in order to achieve full participation and equality within society.[58]

Surveillance

The issue at stake is whether a person can claim a right to privacy within the public space. Some argue that the right to privacy covers protection against secret monitoring practices, e.g. during demonstrations.[59] However, in the cases *Peck v. the United Kingdom* and *Perry v. the United Kingdom*,[60] the Court held that monitoring the actions of an individual in a public place using photographic equipment which does not record the visual data does not, as such, interfere unlawfully with said individual's right to privacy. The Court supplemented this view by stating that recording such data in a systematic or permanent manner may give rise to privacy considerations. Also, in a case where the police took

[54] ECtHR Judgment of 24 February 1998.
[55] ECtHR Decision of 14 May 1999.
[56] See the EU Charter, Article 26.
[57] See Draft UN Convention on the Rights and Dignity of Persons with Disabilities, Article 9.
[58] See UN Committee on Economic, Social and Cultural Rights, General Comment No. 5, para. 9.
[59] See Manfred Nowak: *ICCPR Commentary*, 2005, p. 388 with references.
[60] Judgment of 28 January 2003, para. 59, and Judgment of 17 July, 2003, para. 38 and 40.

photos during a demonstration in a public place, this was accepted by the Court as a measure that does not interfere with the right to privacy.[61]

Protection of the Home and Environment

In *López Ostra v. Spain*, the ECtHR held that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[62] In this specific case, the assessment of whether Spain had succeeded in striking a fair balance between aspects of the town's economic well-being and the applicant's effective enjoyment of her right to privacy led to the conclusion that Article 8 had indeed been violated.

Information Privacy

Storage of personal information by the State is regarded as interference in ECHR Article 8, whether or not the State subsequently uses that data against the individual concerned. In the case of *Amann v. Switzerland*, ECtHR found Article 8 applicable when State security services kept records indicating that the complainant was a contact of the Soviet Embassy after intercepting a telephone call from the Embassy to the applicant. The Court specifically noted that storage of the information on an index card alone was sufficient to constitute interference with his private life and that the subsequent use of the stored information had no bearing on that finding. Similarly, in the case of *Rotaru v. Romania*, the Court found that the storing of information by the security services on the applicant's past activities as a university student constituted an interference with ECHR Article 8. In both cases, the Court stressed the lack of foreseeability with regard to the State measure.

In the case of *Leander 26/3 1987*, the Court found that storing and transfer of the complainant's personal information constituted interference in ECHR Article 8(1), but decided that this was justified under Article 8(2), since it served the legitimate aim of protecting State security and since the measure was found proportionate to the aim pursued. In its judgment, the Court emphasized the relatively high

[61] See ECtHR Complaint 15226/89 (emended from list).
[62] See ECtHR, *López Ostra v. Spain*, Judgment of 9 December 1994, para. 51.

level of legal safeguards in Sweden, including Ombudsman control. In relation to the individual's access to records concerning his/her private life, the Court has not stipulated a positive State obligation to provide information as such, but has stressed that an independent authority must decide whether access must be granted in cases where a contributor fails to answer or withholds consent. "The interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality, if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent."[63]

The storage and disclosure of health data has been dealt with by the ECtHR in the case of *M.S. v. Sweden*. The Court held that the medical records in question contained highly personal and sensitive data about the applicant, including information relating to an abortion, but reached the conclusion that there were relevant and sufficient reasons for the communication of the applicant's medical records by the clinic to another public authority, and that the measure was not disproportionate to the legitimate aim pursued.[64]

Privacy of Communications

With regard to the privacy of communications, surveillance measures may constitute a violation of the right to privacy. In its General Comment on ICCPR Article 17, the United Nations Human Rights Committee made clear that the protection of said article covers all forms of communications: "Compliance with [ICCPR] Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited."[65]

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[63] *Gaskin 7/7 1989* and *M.G v. the United Kingdom 24/9 2002*.

[64] See Judgment of 27 August 1997, para. 35 and 44.

[65] HRC, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17), CCPR General Comment 16, April 8, 1988.

In the case of *Kruslin v. France*,[68] the ECtHR found that a law authorizing phone tapping lacked the requisite foreseeability because it nowhere defined the categories of people liable to have their phones tapped or the nature of the offences which might justify such surveillance. In the case of *Amann v. Switzerland*,[66] the Court reached the same conclusion with regard to a decree permitting the police to conduct surveillance, because the decree gave no indication of the persons subject to surveillance or the circumstances in which it could be ordered. In the case of *Klass v. Germany*,[67] the Court reasoned that, because a law permitting interception of mail created a "menace of surveillance" for all users of the postal service and because that menace struck at freedom of communication, the law constituted unlawful interference with the right to privacy.

In the case of *Malone v. the United Kingdom*,[68] the Court stated it would be "contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power." Rather, what makes a law foreseeable is the extent to which it distinguishes between different groups of people, thereby barring arbitrary enforcement by the authorities.

A number of cases have concerned privacy of communications for specific groups such as prisoners.[69] In general, the Court has given the State a relatively broad margin of appreciation in these cases, but has also stressed the principle of proportionality; hence there has to be a reasonable suspicion in order to justify State interference with the prisoners' privacy of communications.

11B.5. National Implementation Mechanisms

The obligation resting on the State to ensure an effective protection of privacy entails both negative obligations (to refrain from interferences) and positive obligations (to secure the enjoyment of the right to privacy).

Many countries in the world include a right to privacy in their constitution, which at a minimum level includes rights of inviolability of the

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[66] Judgment of 16 February 2000.
[67] Judgment of 6 September 1978.
[68] Judgment of 2 August 1984.
[69] E.g. *Silver 25/3 1983* and *Boyle and Rice 27/4 1988*.

home and secrecy of communications. Some constitutions also include specific rights to access and control of one's personal information. In countries where the right to privacy is not explicitly recognized in the constitution, the provisions are often found elsewhere in national legislation. Thus acts on administration of justice may contain provisions on coercive measures in criminal procedures, such as body search, the obtaining of fingerprints and bodily samples, interception of communications, search of private premises, and seizure of property and documents; just as acts governing public administration may contain specific provisions on forced medical treatment, health or security enhancing measures, etc.

Typically, the only available remedy affording a judicial review of an alleged violation of privacy is the national court system. Yet in many countries, the official Ombudsman institution has the power to review complaints about maladministration and/or human rights violations and thereby contribute to the system of effective remedies. Moreover, a number of countries have established independent National Human Rights Institutions with the mandate to act as national monitoring mechanisms and, as part of that function, to receive and review individual complaints on human rights violations.

Also, the legislative branch is increasingly involved in enhancing privacy protection. Thus the responsible State bodies preparing privacy related legislation or administrative orders are encouraged to conduct privacy impact assessments as an integral part of preparing new regulation.[70] The aim of privacy impact assessment is to analyze the consequences of a given regulation from a privacy perspective in the early stages of the preparatory process. This may include analysis of how the proposed regulation will comply with national data protection law and with international privacy standards. It may also consider means to enforce privacy protection in administrative systems and practices; e.g. through information, education, guidelines, and review.

In the field of information privacy, many countries supplement legislation with other forms of regulation. The following four models of privacy protection are often seen in relation to information privacy:[71]

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[70] See e.g. the recommendations from the Danish Board of Technology in its Report on Privacy and Public Administration from October 2005.

[71] The model is taken from Electronic Privacy Information Center / Privacy International, *Privacy and Human Rights 2004*, EPIC, Washington 2005, p. 3–5.

- **A general act** that governs the collection, use and dissemination of personal information by both the public and private sectors, typically with a data protection agency to ensure compliance. This is the preferred model for most countries adopting data protection laws and is enforced at EU level through the EU Data Protection Directive.
- **Specific sectoral laws** governing, for example, video rental records and financial privacy. Often sectoral laws are used to complement comprehensive legislation by providing more detailed protective measures for certain categories of information, such as telecommunications, police files, or consumer credit records.
- **Self-regulation** by which companies and industry bodies establish codes of conduct and engage in self-enforcement of these. However, industry codes in many countries have tended to provide only weak protection and often lack enforcement.
- **Privacy protection by individual users**. There are a number of technological tools available that can be used to protect the privacy of users. These technologies, commonly referred to as "Privacy Enhancing Technologies" (PET), aim at eliminating or minimizing the collection of personally identifiable information. Encryption is also an important technical tool for protection against some forms of communications surveillance.[72]

A key concept in the European data protection model is 'oversight'. The data subjects (the persons whom the data concern) have data protection rights established in national legislation, and each State has a data protection commissioner or agency that oversees the law.

Under the EU Data Protection Directive, the national data protection agencies are given the following power: Governments must consult the agency when they draft legislation relating to the processing of personal information; the agencies have the power to conduct investigations and have a right to access information relevant to their investigations; the body may impose remedies such as ordering the destruction of information or ban processing, start legal proceedings, hear complaints, and issue reports. Each agency is also generally responsible for public education and international liaisons in the field of data protection and data transfer.

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[72] See e.g. the section on Threats to Privacy in: Electronic Privacy Information Center / Privacy International, *Privacy and Human Rights 2004*, EPIC, Washington 2005, p. 113.

A problem with many data protection agencies is a lack of resources to adequately conduct oversight and enforcement; and hence an inability to conduct any significant number of investigations. Independence is another challenge. In many countries, the agency is under the control of, or even part of, the Ministry of Justice, which might influence its power and will to criticize the State.

11B.6. Politically Binding Instruments (OSCE Documents)

Reference to protection of privacy is found in a number of politically binding instruments.

The OSCE Human Dimension Commitments, Volume 1, provide that "The participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards. In particular, the participating States will ensure that searches and seizures of persons and private premises and property take place only in accordance with standards that are judicially enforceable" (Moscow 1991, para. 24).

A more recent example is found in OSCE Ministerial Council Decision No. 3/04 on Combating the Use of the Internet for Terrorist Purposes, which states that "participating States will exchange information on the use of the Internet for terrorist purposes and identify possible strategies to combat this threat, while ensuring respect for international human rights obligations and standards, including those concerning the rights to privacy and freedom of opinion and expression." (Sofia 2004, para.1).

Also, the adoption of measures to combat trafficking in human beings has iterated the need for privacy protection of victims of trafficking. In its Ministerial Council Decision No. 2/03 on Combating Trafficking in Human Beings, the OSCE has stressed the need for privacy protection of victims and witnesses during judicial proceedings; as well as privacy protection of victims and personnel in shelters; protection of victims in connection with repatriation, rehabilitation and reintegration; and of alleged perpetrators (Maastricht 2003, para. 4, 7 and 11).

11B.7. Other Instruments

One of the first soft law instruments on information privacy stems from the Organization for Economic Cooperation and Development (OECD). The 1981 OECD Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data[73] sets out specific principles that deal with the handling of electronic data, describing personal information as data that are afforded protection at every step, from collection to storage and dissemination.

The OECD guidelines stress that personal information must be:

- Obtained fairly and lawfully.
- Used only for the purpose originally specified.
- Adequate, relevant, and not excessive towards achieving its purpose.
- Accurate and up-to-date.
- Accessible to the subject.
- Securely stored.
- Destroyed after its purpose has been served.

These basic principles for data protection are similar to the ones found in the Council of Europe's 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data,[74] cf. the section on legally binding standards above.

Furthermore, the 2000 EU Charter on Fundamental Rights and Freedoms contains a general provision on privacy in Article 7 and an explicit protection of personal data in Article 8, which reads:

> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

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[73] OECD, Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data (1981), available at http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM.

[74] CETS No. 108.

11B.8. Monitoring Checklist on the Right to Privacy

Checklist – The Right to Privacy

1. Legislation and Regulation Check
   - Has the State ratified relevant international human rights instruments? Has the State made reservations or declarations upon ratification?
   - Is national legislation and regulation in conformity with international and regional standards (critical review by the monitor).
   - Is there a legal basis for interference with the right to privacy?
   - Regarding specific interference (e.g. surveillance of communication or exchange of personal information): Are the requirements clear, understandable and specific, or do they allow for a wide range of State discretion? Does the interfering measure pursue a legitimate aim? Is the measure the least invasive means to reach a legitimate aim? See also Box 1 on proportionality.
   - Are there direct or indirect discriminatory effects of some aspects of the legislation or regulations restricting the right to privacy?
   - Is the right to appeal established by law?
   - Are there effective and accessible remedies in case of interference with the privacy of an individual (administrative or judiciary remedy)?

2. Monitoring the Right in Practice
   - What is the length of the decision-making process by the data protection agency?
   - Is regular inspection of relevant State bodies carried out by the Ombudsman institution, national human rights institution, or data protection agency?
   - Is there an annual report on cases by the data protection agency?
   - Is there assessable information to citizens concerning their privacy rights?
   - Are public employees aware of data protection rules?
   - Is privacy covered in State reporting to UN treaty bodies?

11B.9. Instruments on the Right to Privacy

Legally Binding Instruments

UN instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 17	Prohibition of arbitrary or unlawful interference with the privacy or correspondence of a person.	HRC General Comment no. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (article 17), 08/04/88

UN Security Council Resolution 1456 (2003) on the issue of combating terrorism

Entirety	No explicit address of the protection of privacy but references to obligations under international human rights law in the Preamble.	

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)

Article 6	The state shall protect the privacy and identity of victims of trafficking in persons. This includes making legal proceedings relating to such trafficking confidential.	

ILO instruments

ILO Convention No. 185

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 3(8)	Biometric data shall be collated without any invasion of privacy of the persons concerned and without discomfort, risk to their health, or offence against their dignity.	

Council of Europe (CoE) instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 8	Right to respect for private life and for correspondence. Interference by a public authority must be prescribed by law, pursue a legitimate aim and be necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.	Case law as developed by the European Court of Human Rights

The Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (Cets No. 108)

Entirety	Rules to safeguard the handling of personal data by public authorities and private entities.	

The Convention on Cybercrime (Cets No. 185)

Preamble	Mentions the need to ensure the right to respect for privacy as enshrined in international human rights instruments.	
Article 15	Sets conditions and safeguards, including reference to human rights and freedoms enshrined in the ECHR, ICCPR and other international human rights instruments.	

Council of Europe Convention on the Prevention of Terrorism

Entirety	No explicit address of the protection of privacy but references to obligations under international human rights law in the Preamble.	

Council of Europe Convention on Action against Trafficking in Human Beings

Article 11	Affords protection of the private life and identity of victims by stating that their personal data shall be stored and used in conformity with the conditions provided by the Data Protection Convention (Cets No.108). States shall adopt measures to ensure that the identity of a child subject to trafficking is not made publicly known, e.g. through the media
Article 30	Affords protection of victims' private life in relation to court proceedings.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, CETS No. 164

Article 10	Specific provisions related to health information.

European Union (EU) instruments

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	Rules for the protection of personal data in both the public and private sector.	Opinions from the Article 29 Data Protection Working Party

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

Entirety	Rules for the retention of traffic and location data generated by using electronic communications services.	Opinions from the Article 29 Data Protection Working Party

Politically Binding Instruments

UN documents

Universal Declaration of Human Rights (UDHR)

Critical Substantive Points
Article 12 provides protection of arbitrary interference with a person's privacy or correspondence.

OSCE documents

The OSCE Human Dimension Commitments, Volume 1.

Critical Substantive Points
In Paragraph 24, the States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications.
In order to avoid arbitrary intrusion by the state in the realm of the individual, the exercise of this right is subject only to restrictions prescribed by law and consistent with human rights standards. The states will ensure that searches and seizures of persons and private premises and property take place only in accordance with standards that are judicially enforceable.

OSCE Decision No. 3/04 on Combating the Use of the Internet for Terrorist Purposes

Participating States will exchange information on the use of the Internet for terrorist purposes and identify possible strategies to combat this threat, while ensuring respect for the rights to privacy.

OSCE Decision No. 2/03 on Combating Trafficking in Human Beings

The decision stresses the need for privacy protection of victims and witnesses during judicial proceedings, of victims and personnel in shelters, of victims in connection with repatriation, rehabilitation and reintegration, and of alleged perpetrators during monitoring.

OECD documents

OECD Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data of 1981

Critical Substantive Points
The guidelines describe personal information as data that are afforded protection at every step, from collection to storage and dissemination, and set out specific rules covering the handling of these data.

EU documents

Charter of the Fundamental Rights of the European Union (2000)

Critical Substantive Points
The charter contains a general provision on privacy in article 7 and an explicit protection of personal data in article 8.
Article 3 contains an explicit protection of integrity in the fields of medicine and biology.

11B.10. References

Electronic Privacy Information Center / Privacy International, *Privacy and Human Rights 2004* (Washington: EPIC, 2005).
The book, which is published annually, provides an overview of electronic privacy developments in more than 50 countries. It is written in close cooperation with national partners in the countries concerned. The book includes some good introductory chapters and summarizes current trends and developments.

Nowak, Manfred, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, 2nd revised edition (Germany: N.P. Engel Publisher, 2005).
The commentary contains a detailed analysis of human rights principles and the content and application of each provision in the ICCPR. Also, it explains the historical background of each article and provides the reader with an insight in and overview of the case law of the Human Rights Committee.

O'Boyle, M., Warbrick, C., Bates, E and Harris, D.J., *Law of the European Convention on Human Rights*, 2nd ed. (London: Oxford University Press, 2005).
The book provides an overview of the case law of the European Court of Human Rights and on this basis explains the invocability and application of the ECHR.

OSCE, *The Media Freedom Internet Cookbook* (Vienna: OSCE, 2004).
The book offers recommendations and best practices emanating from the 2004 Amsterdam Internet Conference of the OSCE Representative on Freedom of the Media.

Rotenberg, Marc, *The Privacy Law Sourcebook 2004* (Washington: EPIC, 2004).
The Privacy Law Sourcebook gives an overview of privacy law in the United States and around the world.

Electronic Resources

www.epic.org
EPIC is a public interest research centre in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, particularly focusing on the United States.

www.eu.int/comm/justice_home/fsj/privacy/
Website on EU and privacy. Overview of data protection measures and initiatives in the European Union by the European Commission.

www.privacyinternational.org
Privacy International (PI) is a human rights group formed in 1990 as a privacy rights watchdog. The website provides a good resource on a wide range of privacy issues, e.g. wiretapping and national security, ID cards, video surveillance, data matching, data retention, medical privacy, and freedom of information and expression.

CHAPTER 12

RIGHTS OF REFUGEES AND ASYLUM SEEKERS

12.1. Definitions

The basic international instrument concerning refugee protection in international law is the Convention Relating to the Status of Refugees 28 July 1951 [hereinafter 1951 Convention].[1] Under the Convention, a **refugee** is defined as a person who is outside of his/her country of origin, and who possesses a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion. For the purpose of this chapter, the term refugee will be understood broadly to include not only individuals who meet the definition of a refugee in the 1951 Convention, but also individuals who are entitled to protection from **refoulement** (i.e., protection from being removed or returned to a territory where the person concerned risks serious harm) under any other human rights treaty.

The term **asylum** is typically understood in the sense of a right of a refugee to enter a country and to sojourn there on a permanent basis. Notably, States do not have a legal obligation under international law to grant a refugee asylum understood in this sense. In some usages the term asylum takes on a slightly different meaning. We shall understand the notion an **asylum seeker** as an individual who claims to be entitled to protection from refoulement. The notion **asylum-procedures** will be used to refer to domestic procedures set up to determine eligibility for such protection.

By way of brief history, refugee protection not only has ancient roots but the principle of protecting the "necessitous stranger" can be found in virtually all religions. However, international refugee protection only arose with the rise of nationalism (but also statelessness) in the late 19th and early 20th century and then in the aftermath of World

[1] The 1951 Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under G.A. Res. 429 (V), 14 December 1950. It entered into force 22 April 1954.

War I. The international community's first effort to formally address this issue was the High Commissioner for Russian Refugees, created by the League of Nations in 1921. Over the course of the next three decades, there were no less than nine international entities created to deal with refugee affairs. Finally, in 1950 the Office of the United Nations High Commissioner for Refugees (UNHCR) was established. UNHCR has functional responsibility for administering international refugee assistance. Its statute assigns UNHCR the responsibility of "providing international protection, under the auspices of the United Nations, to refugees.…"

12.2. Legally Binding Standards

This chapter deals with the most important international sources related to refugee protection, namely, the 1951 Convention Relating to the Status of Refugees (1951 Convention)[2] and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol)[3] and international and regional human rights treaties (e.g. International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)). These two legal sources will be dealt with in turn. Because of the vast scope of the subject matter of this chapter, it will not deal with customary law or pertinent soft law. The chapter does not deal with the rights of rejected asylum seekers and only briefly deals with the issues of returning refugees and Internally Displaced Persons (IDPS).

The Convention relating to the Status of Refugees (1951)

On first impression, the 1951 Convention appears rather straightforward. It begins by defining the term refugee in Article 1 A and then sets forth a catalogue of rights and corresponding State obligations in Articles 3–34. In fact, however, the 1951 Convention is a relatively complicated treaty. First, like many other human rights treaties, the 1951

[2] The 1951 Convention was adopted in 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under G.A. Res. 429 (V), 14 December 1950. It entered into force 22 April 1954. As of 2006 a total of 146 states have acceded to one or both of these instruments.

[3] The Protocol entered into force 4 October 1967.

Convention is cast in rather abstract and vague terms which give rise to difficult questions of interpretation and application. But, the interpretation and application of the 1951 Convention is further complicated by the way that rights and corresponding obligations accrue under the Convention. Some of the rights, including the most basic ones, apply to refugees by virtue of their status as refugees alone. A contracting State is obligated to secure these rights to any persons who meet the definition of a refugee, and who are within its jurisdiction. Other rights, however, apply only to refugees who are physically present within the contracting State's territory. And finally, the application of certain other rights is contingent on the legal status that a refugee enjoys in the contracting State (i.e., whether the refugee is lawfully present, lawfully residing or habitually residing in the receiving State).

Adding another layer of complexity to the 1951 Convention are the standards of treatment owed to refugees, or subsets of refugees. Some rights owed to refugees are absolute. These rights include the right of refugees to avoid penalties for unauthorized entry (Article 31) and the right of refugees not to be subjected to refoulement (Article 33). Other rights, however, are comparative in nature. That is to say their scope is contingent on (and vary as a function of) the standards of treatment that a State has chosen to extend to some other categories of persons within its jurisdiction. For example, several provisions of the Convention require that a contracting State accord to refugees the same standard of treatment that it has extended to non-citizens generally (see e.g., Article 21 which regulates refugees' access to public housing, and Article 26 which regulates refugees' right to freedom of movement). This means that a contracting State is required to grant these rights to refugees only to the extent that they have chosen to grant comparable rights to other admitted non-citizens.

Finally, as implied above, the personal and substantive scope of rights and corresponding obligations under the 1951 Convention frequently depends on the content of States' national laws and practices (e.g., whether a refugee is lawfully within a contracting State's territory, and what treatment the State's laws and practices afford to other non-citizens). This aspect of the 1951 Convention complicates matters further in that to determine the scope of a particular State's obligations under the 1951 Convention, one needs to consider and understand both the specific language of the 1951 Convention as well as relevant domestic laws and practices.

The 1967 Protocol: the Geographical and Temporal Limitations

The definition of a refugee in Article 1 A of the 1951 Convention contains two limitations which, though of little practical significance today, nonetheless require explanation. Specifically, Article 1 A limits the scope of the 1951 Convention's application to refugees who have fled their countries "as a result of events occurring before 1 January 1951." Furthermore, a contracting State has, pursuant to Article 1.B(1)(a), the option to further limit its obligations under the Convention to individuals fleeing countries in Europe. These historically significant limitations were lifted with the adoption of the 1967 Protocol. States that have ratified the 1967 Protocol must apply the 1951 Convention without a temporary geographic limitation. Hereinafter when we refer to the 1951 Convention, we shall mean the 1951 Convention as amended/supplemented in this respect by the 1967 Protocol.

International Supervision of the 1951 Convention

Pursuant to Article 35(1) of the 1951 Convention, the contracting States have undertaken to "co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR)…in the exercise of its functions" and "in particular its duty of supervising the application of the provisions of [the 1951] Convention."

The main functions of UNHCR, as set forth in its statute,[4] are to provide "international protection" for refugees …" and to seek "permanent solutions for the problems of refugees." What international protection for refugees entails is further developed in the Statute, which states that UNHCR shall provide for the protection of refugees by:

1. Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.

[4] The General Assembly (GA) established UNHCR through G.A. Res. 319 A (IV), 3 December 1949. The Statute of UNHCR was adopted in 1950 as an Annex to G.A. Res. 428 (V), 14 December 1950 [hereinafter UNHCR Statute]. Both resolutions were passed pursuant to U.N. CHARTER Article 22. The mandate of UNHCR was initially limited to three years. However, the GA has continuously renewed UNHCR's mandate on a five years basis. Most recently, the GA decided to continue the Office until 31 December 2003 through G.A. Res. 52/104, 9 February 1998.

2. Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
3. Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
4. Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States.[5]

In pursuing its supervisory function under the 1951 Convention, UNHCR is inter alia entitled to

– monitor and report on contracting States' refugee status determination procedures and more generally their treatment of asylum seekers and refugees,
– make representations to governments on protection concerns either on behalf of individuals or groups of asylum seekers and refugees,
– advise governments on legislation and decrees affecting refugees and asylum seekers to have prompt and unhindered access to asylum seekers and refugees and vice versa.

In addition, it is well accepted that the contracting States' duty under Article 35 implies a duty to give a measure of deference to UNHCR's interpretation of the Convention as set forth in various documents. Of particular importance in this regard is UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol [hereinafter referred to as **UNHCR Handbook**] which, though not legally binding, is considered to have substantial authority.

Notably the 1951 Convention does not provide individuals with the possibility to petition a judicial or a quasi-judicial international body regarding alleged violation of their rights under the Convention. Whereas the UNHCR may, and often does, intervene on behalf of individual asylum seekers, UNHCR has not been endowed with an adjudicatory or quasi-adjudicatory function similar to that of, for example, the European Court of Human Rights and the Human Rights Committee.

According to Article 38 of the 1951 Convention, disputes between two or more contracting States about the Convention's interpretation

[5] UNHCR Statute, Article 8.

or application may, at the request of one of the States, be referred to the International Court of Justice (ICJ). So far no such complaints have been referred to the ICJ.

12.3. The Definition of a Refugee

Box 12.1. The Definition of a Refugee in the 1951 Convention

According to Article 1 A of the 1951 Refugee Convention (as supplemented by the 1967 Protocol) the term refugee applies to any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

To effectively understand the international refugee regime it is a key to have an understanding of the 1951 Convention's definition of a refugee. The following provides an overview of the core elements of this definition commonly referred to as:

1. alienage
2. well-founded fear,
3. persecution and
4. the nexus grounds, or the five Convention grounds (i.e. race, religion, nationality, social group, political opinion) and some of the main disputes regarding the definition's interpretation.

Alienage (Outside the Country of Origin)

To meet the definition of a refugee, a person must be outside of his/her country of origin; that is, outside of his/her country of nationality or, in case of a stateless person, outside of his/her country of former habitual residence. For those with more than one nationality, refugee status is dependent on a well-founded fear of persecution in each of the countries of which s/he is a national. In the following we shall use the terms outside his/her country of origin as shorthand for all three situations.

The definition does not require that a person has fled his/her country of origin because of a well-founded fear of persecution. A person may also acquire the requisite well-founded fear of persecution after having departed his/her country of origin. This category of refugees is commonly referred to as **refugees sur place**. The classic refugee sur

place situation is where a person acquires the requisite well-founded fear of persecution because of some significant event that takes place in his/her country of origin while s/he is abroad. Another situation is where a person, while abroad, expresses or adopts certain views or engages in certain activities that places her/him at risk of persecution in the country of origin. For illustration, s/he may have become an outspoken critic of the authorities in his/her country of origin or may have converted to a religion that is disfavored in that country.

Well-founded Fear: Subjective v. Objective Criteria

There is a long-standing controversy over whether the expression well-founded fear shall be understood to entail both an objective and a subjective element. Three basic positions will be outlined here.

According to the dominant view, the term fear refers to a claimant's state of mind. Proponents of this view agree that a claimant's subjective fear of being persecuted is not sufficient to establish refugee status: the claimant's subjective fear must also be well-founded. This implies that the person's fear must be based on objective facts, i.e., it must be based on actual events and circumstances as opposed to purely imaginary ones. It is also common ground that a person's fear is well-founded if that person faces a prospective risk of persecution if returned to his country of origin. There is, however, some disagreement within this camp as to whether or not the subjective element—the person's subjective state of mind—is a necessary element of refugee status, or whether it is merely an element that shall be considered and given weight. The latter view is the most plausible one. While subjective fear according to this view is not an essential element of refugee status, it shall not be ignored. In particular, there may be instances where an individual has endured such terrible human suffering that refugee protection is granted, even if the risk of being subjected to such treatment again would otherwise not have been sufficiently high.

Finally, there are those who argue that the term well-founded fear denotes a purely objective criterion. The proponents of this view argue that the interpretation of fear as a subjective element could wrongly result in identically situated persons with respect to their actual risk of being persecuted being treated differently depending on the fearfulness or ability to express their fearfulness. They also maintain that such an interpretation would result in the denial of international protection to a variety of applicants who are unable either

to experience or effectively to communicate their subjective fear to the decision maker (e.g., children). Therefore, they argue, the term well-founded fear must be understood as exclusively incorporating a requirement of prospective risk of persecution.

Well-founded Fear: the Threshold of Risk

While there is considerable debate as to the exact meaning of the term fear, there is no debate that in the vast majority of cases, the central question is what will happen to the person if s/he were to be returned to her or his country of origin or, more specifically, whether he/she will risk persecution on account of one of the five Convention grounds if returned to that country.

The question then arises: how much risk is necessary to establish a well-founded fear of persecution? First, the answer will depend on whether, how, and to what extent the claimant's subjective fears and beliefs should be taken into account. Second, many would argue that the level of risk required depends on what kind of prospective persecution the person risks. According to this view, the more serious the harm or form of persecution that a person risks if returned to his/her country of origin, the lower the threshold of risk is required to establish a well-founded fear.

These difficulties not withstanding, there seems to be some agreement about the general parameters in which a future risk must lie to meet the well-founded fear standard. In this vein, it is generally agreed that the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear. On the other hand, an applicant need not show that there is a "clear probability" that he or she will be persecuted. Rather, the standard that the applicant must show is a "real chance" or "reasonable possibility" of being persecuted.

The UNHCR has commented that:

> A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. As a general rule, however, to establish "well-foundedness," persecution must be proved to be reasonably possible.[6]

[6] UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 17.

Persecution—Type of Harm

What is persecution? There is no universally accepted definition of persecution and as noted by the UNHCR various attempts to formulate such a definition have met with little success.[7] What is clear, however, is that there is a direct connection between the notion of persecution and human rights. The exact implications of this approach are, however, not so obvious. Do all instances of human rights violations constitute persecution? If not, which instances of human rights violation do?

It is agreed that infringement of certain non-derogable rights, such as the right not to be subjected to torture and the right to life as well as serious infringement of a person's liberty, amounts to persecution. According to the UNHCR Handbook, it may be inferred from Article 33 (the principle of non-refoulement) that a threat to life or freedom constitutes persecution.[8]

But, it is also common ground that the notion persecution is not necessarily restricted to human rights violations involving serious infringements of the physical integrity and liberty of the individual, but, that it also includes other forms of ill treatment. Instead, the serious debate is what the minimum level of severity should be to qualify as persecution.

Most scholars and adjudicatory bodies maintain that this question cannot be answered in the abstract but must be assessed on a case-by-case basis. And in assessing whether a feared harm might qualify as sufficiently serious to amount to persecution, one needs to consider *inter alia* the interest of the claimant that might be harmed, to what degree the enjoyment, expression, or exercise of that interest might be compromised and also the motives of the persecutor. Further, it is generally recognized that a number of less serious harms considered cumulatively may rise to the level of persecution.

A final point: it has been suggested by prominent refugee scholars that the term persecution should be understood in the sense of persistent, repetitious and systematic infliction of harm. This position is clearly inaccurate. Some very serious infringements of human rights are either incapable or unlikely to be repeated such as arbitrary killings. Other types of infringements such as torture are so severe that they are indisputably characterized as persecution, irrespective of whether or not they are inflicted in a persistent, repetitious and systematic manner.

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[7] UNHCR Handbook, para. 51.
[8] Id.

Persecution versus Prosecution

One challenge resulting from the ambiguity inherent in the term persecution is to distinguish *persecution* from legitimate *prosecution* and punishment. Individuals fleeing from legitimate judicial processes do not qualify as refugees. The problem is that the distinction between legitimate prosecution and punishment, as opposed to persecution, is frequently very difficult to draw.

First, a State may use its criminal law for illegitimate purposes. For example, a State's criminal law may impose stiff penalties for quite legitimate political opposition, or it may criminalize legitimate religious practices. Further, the criminal law may be discriminatory, imposing particular restrictions only on certain ethnic or racial minorities (as was the case in South Africa during Apartheid).

Second, the criminal law may pursue a legitimate purpose per se but its application on certain groups may result in the denial of their fundamental rights, e.g., when the law demands conflict with a particular group's fundamental religious and/or political convictions. If, in addition, the penalties for non-compliance of such demands are clearly disproportionate, a case can be made that the law and its application amount to persecution. Perhaps the most important cases of this sort involve refugee claimants who have refused to fulfil military service in their country of origins because of their fundamental religious and/or political and moral beliefs.[9]

Third, even if the national criminal law on its face appears to be a law of general applicability and pursue a legitimate State goal, it might be applied in a discriminatory manner. Indeed, even in cases which involve universally accepted criminal behaviour (such as armed robbery) there are situations where the distinction between legitimate judicial processes and persecution begins to blur. For example, a person facing charges for a common law offence may, if convicted, be subject to excessive punishment on account of one of the Convention grounds. Alternatively, she or he may be unable to get a fair trial.

Whether a person risks legitimate prosecution or punishment, as opposed to persecution, on account of one of the Convention grounds will depend on a number of considerations that cannot be adequately dealt with here. Very generally, it may be said that the question depends

[9] On the issue of "deserters and draft evaders" see UNHCR Handbook, para. 167–174.

on whether the national criminal law was applied in conformity with human rights standards. This proposition is not particularly instructive. Fortunately, the UNHCR Handbook treats the subject extensively and should be resorted to, when the issue arises.[10]

Agents of Persecution

Although the 1951 Convention does not specify any connection between the State and the sources of persecution feared by refugees, one of the great controversies regarding the definition is whether the persecution feared must come at the hands of State agents. Certainly, this represents the clearest case for refugee protection. However, there are at least three other situations to consider: 1) where there is a State sponsorship of the harm; 2) where the State tolerates the harm; and 3) where the State is simply unable to offer protection because it is overwhelmed or it is a failed State (i.e., a State where there is no functioning central government).

There are two schools of thought concerning this issue, which may be referred to as the accountability approach and the protection approach. The premise of the accountability approach is that the predicament of a refugee applicant will not count as persecution within the meaning of the 1951 Convention when a State cannot, as a matter of law, be held accountable for the (prospective) violations of human rights perpetrated on its territory. Thus, the proponents of this view concede that the 1951 Convention applies to the first two situations numbered above, but it will not apply in the last type of situation.

The protection approach, on the other hand, is promoted by most scholars in this area and has been adopted by most States. The key to this approach, as its name suggests, is to focus on the protection needs of the individual. The proponents of this approach maintain that the purpose of the 1951 Convention is to protect persons from persecution, not to attribute responsibility for such conduct. Consequently, they argue that the scope of the 1951 Convention also covers persons in the third situation.

[10] See UNHCR Handbook, para. 56–60.

The Nexus Requirement

The last element of the definition of a refugee is the so-called nexus requirement: that in order to meet the definition of a refugee under international law, the claimant must also establish that the feared harm (i.e., persecution) is based on one of five enumerated grounds: race, religion, nationality, membership of a particular social group or political opinion. If the reason does not lie in one of these sources, the person will not meet the definition. While persecution based on one of these grounds covers the situation of many human rights violations, arguably they do not cover all. In that way, there may be some individuals who face the prospect of serious human rights violations if returned to their country of origin, but who do not qualify as refugees under the 1951 Convention because they cannot meet the nexus requirement. The significance of this limitation depends in part on how narrowly or widely the different grounds for persecution are interpreted.

Race

The 1951 Convention includes, but never defines, race. According to the UNHCR Handbook "the term race…has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in the common usage."[11] This broad approach to the term race in Article 1 A is widely accepted and notably consonant with the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which defines racial discrimination as: "any distinction, exclusion or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[12]

Political Opinion

Another nexus ground is political opinion. For the purpose of the 1951 Convention, the notion political opinion ought not to be limited to traditional associations with one political party or faction. It should be

[11] UNHCR Handbook, para. 68.
[12] Article 1 of CERD.

understood to include any opinion on any matter in which the State policy may be involved. However, it is not limited to opinions regarding the State and its policies and activities. But rather, encompasses opinions about non-state actors, including non-state agents opposing the government of the State e.g., a guerilla movement. Further, strongly held opinions on broader issues of democracy and justice may also constitute political opinion. Likewise, in some societies it might be a political opinion to express opposition to traditional and societal norms.

A person does not have to express a political opinion outright. Put differently, persecution on the basis of political opinion not only encompasses persecution of individuals who openly professes to have a strong opinion of matters defined as political, but it also includes persecution based on political behaviour or persecution of individuals who, from their actions, are perceived to hold a particular political opinion.

Some of the most vexing problems concerning this nexus ground have been raised in civil war contexts. One is where citizens simply want to be left alone. The question becomes whether the desire to remain neutral—to not have any political opinions at all—is itself a manifestation of a political opinion. This issue was raised by the U.S. Supreme Court in *INS v. Elias Zacarias*, where a refugee claimant from Guatemala maintained that his desire to avoid fighting on either side of the country's civil war was an expression of a political opinion of neutrality. The Court held that it would assume that "neutrality" could constitute a "political opinion", but it denied refugee protection in this case on the grounds that the claimant had not offered any proof that he was being persecuted on the basis of this opinion, as opposed to his refusal to fight.

Nationality

The term nationality in this context is not to be understood as citizenship but refers primarily to membership of an ethnic or linguistic group. Hence, this ground is closely linked to, and frequently overlaps, race.

Religion

The Convention ground of persecution on the basis of religion must be understood in light of the right to freedom of religion as defined in various international human rights treaties (cf. chapter 8) and incorporates persecution on account of religion or belief in teaching, practice, wor-

ship and observance. It also encompasses persecution of non-believers. While States are prohibited from interfering with religious beliefs, they may place limitations on religiously motivated conduct when such "limitations…are prescribed by law and necessary to protect public safety, order, health, or morals or the mental rights and freedom of others."[13] Here again, the difficult issue concerning the distinction between legitimate prosecution and persecution arises.

Membership of a Particular Social Group

There is significant disagreement as to how this ground shall be interpreted. At one end of the spectrum are those who maintain that the social group category was meant to be a catch-all phrase that could include persecution based on any kind of human attribute or characteristic. At the other end of the spectrum are those who argue that this ground merely aims at clarifying certain elements in the other grounds for persecution. Under this approach, the term membership of a particular social group is essentially superfluous.

Most commentators and most contracting States have adopted a middle position, which neither interprets membership of a particular social group as redundant, nor all-inclusive. Under this interpretation, the notion 'social group' does not encompass every definable group in a population but only groups defined by certain kinds of characteristics. The question then becomes: what kind of characteristics can define a social group and by what principles are they identified?

According to one popular view, the common characteristic that defines a social group must be one that the members of the group either cannot change (because it is an innate attribute or because the attribute that defines the group refers to some past actions or experience shared by the members) or should not be required to change, because it is so fundamental to their identities. This approach to the notion social group can be quite open-ended. Some States have therefore adopted a modified approach according to which groups defined by a broadly based characteristic such as gender and age will not be considered a social group for the purpose of the 1951 Convention. UNHCR has not offered a clear analysis on how the notion social group shall be interpreted.

[13] Article 18 ICCPR.

Concerning the issue whether gender may constitute a social group, which in recent years has been one of the most intensely debated issues concerning the definition, UNHCR and its Executive Committee has taken the following rather cautious approach:

> The claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society's laws or customs regarding the role of women presents difficulties under the 1951 Convention. As a UNHCR legal adviser has noted, transgressing social mores is not reflected in the universal refugee definition. Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offence can range from adultery to wearing of lipstick. The penalty can be death. The Executive Committee of UNHCR has encouraged States to consider women so persecuted as a social group to ensure their coverage, but it is left to the discretion of countries to follow this recommendation.[14]

Mixed Causes

Frequently a person's well-founded fear of being persecuted has numerous causes. This raises the question whether the definition requires that a specific Convention ground be the sole or dominant cause for persecution. According to the prevailing view, the answer to that question is negative. It is sufficient that a Convention ground is a contributing cause for persecution. This means that a person may acquire the requisite well-founded fear of being persecuted through a combination of Convention grounds. For example, a female applicant who refuses to be bound by traditional religious practices may present a claim that is based on religion, political opinion, her membership in a particular social group and her ethnicity. It may well be the case that her opposition to the religious practices in her country of origin and her gender would not alone give rise to a well-founded fear of persecution, but that the combination of her political and/or religious views, gender and ethnicity does. It also means that a person may acquire a well-founded fear of being persecuted for several inter-related reasons, only one of which is a Convention ground. For example, a person may acquire the requisite a well-founded fear of persecution on account of his/her race in combination with, for example, alleged criminal activity.

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[14] UNHCR, "Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons"—Guidelines for Prevention and Response, 2003, para. 54.

Persecution on Account of Imputed Grounds

A person may erroneously be perceived to hold a particular opinion, a certain religious belief, or, alternatively, may erroneously be perceived to be member of a particular ethnic or racial group. What matters, however, is not whether a particular refugee claimant in fact has the attribute(s) that provides the basis for his/her fear or persecution, but rather, whether the persecutor(s) will perceive that person as having those attributes.

Generalized Oppression

It does not matter if the claimant's fear or risk of harm is shared by large numbers of compatriots. In actual practice, however, some adjudicatory bodies have shown a great reluctance to recognize as refugees persons whose fear is shared by large numbers of their fellow citizens. More specifically, they have interpreted the definition to require persons who have fled from generalized, group-defined persecution to show that they have been singled out—that they run a greater risk of persecution than other members of an oppressed group. As a consequence, rather than helping the claimant, there often has been an inverse relationship between levels of human rights abuse and the granting of refugee protection. This interpretation of the definition is fallacious for a number of reasons, which will not be developed here. Suffice it to note that it has little support in the text of the definition or in other relevant interpretive sources, and has been largely rejected.

12.4. Exclusion from Refugee Status

Article 1(F) identifies three categories of individuals who because of their past actions are considered undeserving of protection as refugees under the 1951 Convention, even though these individuals may be genuinely at risk of persecution in their country of origin. An individual who falls within one of these categories is not a refugee within the meaning of the 1951 Convention and therefore not entitled to any of the rights enshrined in it, including the right not to be returned to a territory, where s/he faces the risk of persecution (the right to non-refoulement).

The first category of excludable persons is any person of whom there are serious reasons to consider that s/he "has committed a crime against peace, a war crime, or a crime against humanity." In brief, crimes against peace include the planning, preparing, initiating of or participating in an unlawful war. War crimes refer to violations of the laws and customs of war. Crimes against humanity may be committed outside of the context of war and include acts such as murder, imprisonment or severe deprivation of physical liberty, torture, rape, deportation and forcible transfer of population and other inhumane acts that are "committed as part of a widespread or systematic attack directed against any civilian population." (cf. chapter 2, Box 3.)

The second category of excludable persons is any person of whom there are serious reasons to consider that s/he has committed a serious non-political crime. The purpose of this exclusion clause was to bring refugee law in line with the basic principle of extradition law and to ensure that fugitives from justice would not be able to escape criminal liability. What constitutes a serious non-political crime is not defined. Not only does the term crime have different connotations in different legal systems, but also what constitutes a serious as opposed to a non-serious crime varies considerably between different States. Commentators suggest that the notion of a serious crime in this context refers primarily to crimes against physical integrity, life, and liberty, such as homicide, rape, child molestation, armed robbery and kidnapping.

In determining whether a crime is political or non-political, what needs to be considered is the nature of the crime, its alleged purpose, and the casual connection between the crime and the alleged political purpose. Further, the political element of a crime must not outweigh its common law character: a crime committed with an allegedly political objective may be classified as a serious non-political crime within the meaning of Article 1(F)(c) if the act is grossly disproportionate to its alleged political objective, or is of a particular atrocious nature.

The third category of excludable persons constitutes those who have been considered guilty of acts contrary to the principles and purposes of the United Nations. The principles and purposes of the U.N. are—"to develop friendly and mutually respectful relations among nations; to achieve international co-operation in solving socio-economic and cultural problems; and to promote respect for human rights"—as well as to serve as a centre for harmonizing actions directed to these

ends.[15] This provision is quite opaque. What seems relatively clear is that this exclusion clause overlaps with Article 1(F)(c) as crimes against peace, war crimes and crimes against humanity, which are clearly acts contrary to the purposes and principles of the United Nations. It is, however, quite unclear what additional acts, if any, this provision intends to cover. Given the general langue in which the purposes and principles of the United Nations are expressed, the scope of this provision could conceivably be understood to encompass a vast variety of actions. A further uncertainty is what category of persons who, within the meaning of Article 1(F)(c), can commit acts contrary to the purpose and principle of the U.N. The Charter regulates the conduct of States. Therefore, the traditional view has been that this exclusion clause applies only to persons who were in a position of power in a contracting State and who were instrumental to that State's infringement of the purposes and principles of the UN. However, recently the argument has been advanced that Article 1(F)(c) also covers acts committed by non-state agents such as acts committed by persons holding leading positions in rebel movements or terrorist organizations. This interpretation, if it were to be accepted, would drastically extend the scope of this exclusion clause relative to how it traditionally has been understood and applied, particularly if coupled with a broad understanding of what type of acts that may be considered contrary to the purposes and principles of the United Nations.

The application of all three exclusion clauses demands that there are serious reasons for considering that a person has committed one of the enumerated offences. It may be safely inferred that this determination must be made on an individual case-by-case basis and be founded on some concrete evidence. However, it is not clear what standard of proof this language demands. Some commentators have argued that the expression requires a showing that it is more likely than not that the person concerned has committed the acts s/he is accused of. Others have interpreted this expression as requiring a lower standard of proof than a balance of probabilities. The UNHCR Handbook does not offer any specific guidance on this matter. However, UNHCR has advocated that, in view of the potentially severe consequences of excluding someone from refugee status, Article 1 F as a whole should be interpreted and applied with great caution. Presumably a restrictive

[15] See U.N. CHARTER Article 1 and 2.

approach to the interpretation and application of Article 1 F does not only suggest that the grounds for exclusion ought to be interpreted narrowly, but also that the evidentiary standard serious reasons for considering be interpreted as entailing a relatively demanding standard of proof.

Cessation from Refugee Status

A basic premise underlying the 1951 Convention is that international protection—i.e., protection afforded by the Convention itself—is a surrogate to national protection. Thus, international protection only comes into play in certain situations where national protection is unavailable and should, in principle, cease where an individual obtains adequate national protection either from his country of origin or another State. The so-called cessation clause—Article 1(c)—is premised on this idea and addresses five different situations when international protection is no longer considered necessary or justified because of adequate national protection.

The consequence of cessation of refugee status is that the individual concerned no longer benefits from the rights of the 1951 Convention, and that the contracting State no longer is obligated to treat the person as a refugee under the 1951 Convention. An erroneous application of the cessation clause to a particular individual may result in the erroneous withdrawal of his/her rights under the 1951 Convention. Given the potential serious consequences that cessation of refugee status may have, UNHCR has advocated that the cessation clause should be interpreted restrictively.[16]

The first four grounds for cessation focus on actions undertaken by the refugee that might indicate that continued protection is no longer needed or warranted. The first of these is re-availment of national protection, most notably, the renewal of a passport from the refugee's State of origin. According to the UNHCR Handbook, where a refugee has obtained or renewed a passport it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. However, the Handbook also notes that what must also be considered are three essential factors: voluntariness, intent and actual re-availment.

[16] UNHCR, The Cessation Clauses: Guidelines on their application, 1999, para. 2.

Re-acquisition of nationality constitutes another way that the cessation clause could be invoked for an action undertaken by the refugee, although it also has to be said that unlike re-availment of national protection, re-acquisition of nationality may be initiated by the State of origin itself, as in the case of a broadly based nationality law. Once again, what is important to consider is whether the refugee's actions are voluntary or not. However, one of the aspects of voluntariness is that there is no duty for refugees to facilitate a repatriation they do not wish to effectuate.

The third ground is acquisition of a new nationality, which thereby transfers the refugee's allegiances to another State.

The fourth cessation ground is re-establishment in the country of origin, and the focus here is whether the refugee has maintained sufficient connection to his State of origin—repeated visits, for example—that evince intent to re-establish a citizen/government relationship. The cessation clause must be understood in light of its underlying rationale. The risk of persecution must actually be removed as evidenced by the refugee's own conduct. Thus, while certain voluntary conduct may create a presumption of adequate national protection it should not be used in an automatic fashion.

The last ground is ceased circumstances cessation, where because of fundamental changes in the country of origin the basis for the fear of persecution has been essentially eliminated. The usual manifestation of this change is a substantial, as well as durable, improvement in human rights conditions in the home State.

12.5. The Principle of Non-Refoulement

The most critical of all refugee rights is **protection against refoulement** which is enshrined in Article 33(1) of the Convention (**cf. Box 2**).

Box 12.2. Non-Refoulement

Article 33(1) of the 1951 Convention states:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

A State's duty of non-refoulement under Article 33 is owed to all persons within its jurisdiction who in fact meet the criteria of a refugee

in the 1951 Convention. Conversely, only persons who in fact meet the definition of a refugee are entitled to protection under Article 33. Now, it is of course impossible for the competent authorities in a contracting State to know whether a particular refugee claimant meets the criteria of a refugee until they have examined the facts of the case. Therefore, to effectively implement the duty of non-refoulement, a State must provisionally extend the right to non-refoulement to all refugee claimants until and unless they are finally determined, through a fair procedure, not to meet the criteria of a refugee. As explained by UNHCR:

> Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refuges, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.[17]

It has been argued that a contracting State's duty of non-refoulement only applies to refugees and asylum seekers who have managed to enter its territory (whether lawfully or unlawfully), but not to those who present themselves at their borders. However, the prevailing international interpretation is that the duty of non-refoulement also covers rejections at the border. This means that if a State refuses a refugee admission to its territory, and as a result of this act the refugee is pushed back to a territory in which s/he risks persecution, the State is in violation of its obligation under Article 33.

It is also widely accepted that the principle of non-refoulement applies to situations where a State intercepts asylum seekers on the high seas and subsequently returns them to their country of origin, without examining their claims for protection. The contrary view was expressed by the U.S. Supreme Court in *Sale v. Haitian Centers Council*, granting American officials the authority to intercept and return Haitian asylum seekers on the high seas without a hearing on the grounds that the obligation against non-refoulement did not apply outside the territorial boundaries of the United States. It is noteworthy that the decision has been subject to near universal condemnation, at least outside the United States.

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[17] UNHCR, Note on International Protection, UN Doc. A/AC.96/815 (1993), para. 11.

Finally, it should be noted that Article 33 prohibits refoulement "in any manner whatsoever." This language underscores that not only are direct forms of refoulement prohibited, but more indirect actions taken by a State, or omissions that would have the effect of sending an individual back to his/her country of origin. Some measures adopted by States have been quite blunt, for example, summary rejection at the border. More indirect measures have included depriving refugees of food and other life necessities and thereby effectively forcing them to return to their country of origin. The key point is that refoulement can be effectuated in a number of different ways. The focus should be on the result, not how that result is achieved whether by more direct or indirect actions, omissions or measures.

Article 33(2) Exceptions to the Principle of Non-Refoulement

Article 33(2) provides two exceptions to the duty of non-refoulement, both of which seek to protect the safety and security interests of the country of refuge. The first exception authorizes a contracting State to refouler a refugee whom there are reasonable grounds to regard as a danger to the security of the country in which s/he is. A State may only invoke this exception when a refugee poses a threat to its own security—not the security of some other country. The evidentiary standard for denying protection under Article 33(2) (reasonable grounds) is notably higher than that for exclusion under Article 1(F). However, exactly what standard of proof this expression entails is uncertain. What is clear is that the mere possibility of harm to the contracting State's national security is not sufficient. States that seek to rely on this exception must undertake a careful assessment of the threat actually posed by the individual in question. It should not be assumed that a person poses a risk to national security based on the fact of group membership or affiliation alone. Finally, it should be observed that this exception only covers threats to the country of refuge posed by individuals, not threats that a group of refugees as such may pose on a State because of their numbers. Thus, the provision does not permit a State to derogate from the principle of non-refoulement in situations of mass influx of asylum seekers, even if such a situation poses a genuine and grave threat to its national security and public order.

The second exception authorizes contracting States to refouler refugees, whom, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of the country of

refuge. Only crimes of a particular serious nature will come within the purview of this exception. Finally, in order to be sent out, the person must be shown to constitute a future danger to the community of the country of refuge. A refugee who has been convicted for a particular serious crime does not necessarily constitute a future threat to the community.

Because the principle of non-refoulement involves the most vital interests of refugees, it is generally maintained that these exceptions should be interpreted and applied with great caution.

Non-Discrimination

Another important right that contracting States must extend to all refugees within its jurisdiction is the right to non-discrimination enshrined in Article 3 of the 1951 Convention. It states: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Article 3 is not directed against discrimination in general, but only against discrimination in relation to the provisions set out in the 1951 Convention. Thus, where a particular right falls outside of the ambit of the 1951 Convention, a State does not have an obligation under Article 3 to avoid discrimination between different categories of refugees within its jurisdiction. However, Article 3 should not be understood as applicable only to cases in which there is an accompanying violation of a specific Convention right. Rather it should be understood to apply to discrimination that affects the enjoyment of rights guaranteed by the 1951 Convention. For example, some categories of asylum seekers may be subjected to a more cursory asylum determination procedure than others, which may place them at a greater risk of erroneous decisions and, ultimately, of refoulement. If done on account of nationality, for instance, an issue of discrimination under Article 3 may arise.

Rights owed to Refugees Physically Present in the Contracting State

Refugees physically present in a contracting State's territory (lawfully or unlawfully) are entitled to be free from punishment because of unlawful entry in accordance with Article 31 of the 1951 Convention. This provision is based on the realization that genuine refugees are rarely able to comply with immigration requirements. The effective implementation of Article 31 requires that it be applied to asylum

seekers. That is to say, an asylum seeker is entitled to the benefits of Article 31 until and unless it is determined through a fair procedure that s/he does not meet the criteria of a refugee.

In principle, Article 31 denies governments the right to subject refugees to any detriment for reason of their unauthorized entry or presence. But it does not bar a State from imposing certain restrictions on the freedom of movement of refugees and asylum seekers that have entered its territory without proper authorization. This is made clear in Article 31(2), which authorizes a contracting State, in certain circumstances, to impose restrictions on unauthorized refugees until their status has become regularized (i.e., until they may be viewed as lawfully present on the contracting State's territory). However, restrictions imposed pursuant to Article 31(2) must be demonstrably necessary, they must be related to a recognized and legitimate State objective, and there must be a reasonable relationship of proportionality between the objective sought to be achieved and the means employed.

Further, Article 31(2) only authorizes, in appropriate circumstances, detention of refugees and asylum seekers for the purpose of provisional investigation of identity and circumstances of entry. It does not authorize detention throughout the asylum procedure. Finally, before resorting to detention, alternative measures should always be considered such as reporting duties, residence requirements, and bonds. As advocated by UNHCR, the detention of refugees and asylum seekers is an exceptional measure and should only be applied in individual cases, where it has been determined by the appropriate authority to be necessary in light of the circumstances and on the basis of criteria established by law in line with international refugee and human rights law.

Rights owed to Refugees Lawfully in the Contracting State

A number of rights, including Articles 18 (self-employment), 26 (freedom of movement) and 32 (expulsion), are provided to refugees lawfully in the host country.

While national laws concerning the requirements for entry and stay should be taken into account in determining the scope of this expression, the categorization of a particular immigration status in the national legislation is not decisive. What matters is the actual relationship between the State and the individual or, more precisely, how the State's laws and procedure in effect treat the refugee in question.

Although disputed by some governments, it is quite clear that an asylum seeker who has submitted to all necessary investigations of his/her asylum claim and filed whatever documentation or statements reasonably required to verify his/her claim, must be deemed to be lawfully present in the contracting State. The asylum seeker's presence would cease to be lawful within the meaning of the 1951 Convention upon a final decision to refuse recognition of refugee status. But until such time, the State must in principle treat the asylum seeker as a lawfully present refugee. Similarly, asylum seekers whose claim for protection have been suspended under so called temporary protection regimes are to be treated as lawfully present refugees under the 1951 Convention.

Rights owed to Refugees Lawfully Staying in the Contracting State

Those refugees who are not only lawfully in a country's territory but who are lawfully staying are entitled to additional rights including freedom of association (Article 15), the right to engage in wage-earning employment and to practice a profession (Article 17), and the right to access to housing (Article 21). The term lawfully staying must also be understood as having an autonomous international legal meaning. Thus, it is the refugee's de facto circumstances that determine whether, for the purpose of the 1951 Convention, s/he is lawfully staying in a contracting State. The notion lawfully staying denotes legal residency of some continuity and length. But, importantly, it is not synonymous with permanent resident status. Refugees who have been admitted and treated as refugees for some time and whom no other State will assume responsibility over are to be considered as lawfully staying in a contracting State and are thus entitled to the rights of refugees that accrue to this category of refugees.

Rights owed to Refugees Residing in the Contracting State

Finally, a few rights are reserved for refugees who reside in the contracting State. Habitual resident refugees have a right to legal aid, and to receive national treatment in regard to the posting of security for costs in a court proceeding (Article 16(2)). After a period of three years residence, refugees are also to be exempted from both requirements of legislative reciprocity (Article 7(2)) and any restrictive measures imposed on the employment of aliens (Article 17(2)).

12.6. Reservations and Limitations

Pursuant to Article 42 of the 1951 Convention a contracting State may make reservations to the provisions of the Convention, with the exception of Article 1 (the definition of a refugee), Article 3 (the right to non-discrimination]), Article 4, Article 16(1), Article 33 (the right to non-refoulement) and Articles 36–46.

Apart from the right to enter reservations (cf. chapter 2, section *Reservations or Declarations Concerning Rights)*, a few Convention rights may be withdrawn for reasons of criminality and national security in accordance to the expressed terms of the relevant articles. Article 33(2) (discussed above), Article 32 (freedom from expulsion) and Article 28 (travel documents) contain such limitation clauses.

Further, Article 9 authorizes a contracting State, in time of war or other grave and exceptional circumstances, to provisionally take measures which "it considers to be essential to the national security in case of a particular person, pending a determination by the contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security."

The purpose of Article 9 was to allow States some time, in an emergency situation, to determine whether a particular asylum seeker might pose a threat to its national security. In particular, the drafting States were concerned with the possibility that agents of enemy States would, in time of war, use the 1951 Convention as a means to infiltrate the host State. The scope of Article 9 was narrowly drawn to meet this limited objective. First, the application of Article 9 requires the existence of war or other grave and exceptional circumstances. This language, in particular the reference to war, makes clear that Article 9 was intended to apply only in truly exceptional circumstances. Second, Article 9 applies only to persons whose claims for refugee status have not yet been determined by the State and, importantly, only pending the examination of their cases. This means a State that pursuant to Article 9 has taken measures against a particular asylum seeker must proceed in good faith to 1) verify his/her claim to refugee status and, in case the individual is found to satisfy the criteria of a refugee, 2) verify whether the person indeed poses a threat to the host State and whether the continuance of such measure(s) is necessary in the interest of national security.

Provisional measures taken under Article 9 may only be continued for the time it takes to investigate these issues and must thereafter be

discounted. On the other hand, if pursuant to such an investigation it is clear that the person concerned both meets the definition of a refugee *and* poses a security threat to the host country, a State may invoke the national security exception to the principle of non-refoulement under Article 33.

Third, a contracting State that faces a public emergency that rises to the required level may only take measures that "it considers essential to the national security in the case of a particular person." This requirement implies among others that the State before imposing any particular measure must make a good faith assessment that the person concerned indeed poses a serious threat to the State's national security; and if so, that the measure taken is logically connected to the avoidance of the threat; that it is not excessive in terms of the seriousness of the threat; and that the State could not avoid the threat by a measure that is less intrusive.

There is some controversy as to whether Article 9 demands an individualized determination of threat or whether it authorizes broad based measures against members of particular groups. On one view, the expression "in case of a particular person" suggests that the applicability of Article 9 is restricted to individual persons, thus ruling out large-scale measures against groups of refugees. But others have contended that provisional measures may be taken in particular cases so long as they are based on a specific or general assessment that national security would be jeopardized, but for the action in question. On this view, the detention of all refugee claimants from a certain State could be justified in certain extreme circumstances with reference to Article 9. Suffice it to note that any measure taken under Article 9 must also be consistent with Article 3 of the 1951 Convention, which proscribes discrimination on the basis of race, religion or country of origin.

Article 9 does not specify what kind of provisional measures it authorizes. The drafting history suggests that Article 9 was primarily intended to provide the contracting States with greater flexibility in terms of restricting the freedom of movement of asylum seekers. But, it has also been suggested that Article 9 in appropriate circumstances authorizes departure from any of the rights of the 1951 Convention, including the right of non-refoulement. This interpretation is unpersuasive. In particular, it is difficult to reconcile this interpretation with the requirement that measures taken under Article 9 be provisional—i.e., pending an examination of the particular person's claim for refugee status and the State's security concerns. To return a refugee to a terri-

tory where s/he risks persecution is per definition not a provisional measure as the consequences of such a measure are typically irrevocable. Further, it is difficult to see how a contracting State can pursue an investigation into a person's asylum claim and the potential security concerns his/her presence poses when that person is no longer on its territory. The better view is that exceptions to the principle of non-refoulement can only be made under Article 33(2).

12.7. Rights of Refugee and Asylum Seekers under Human Rights Law

As human rights are intended to be universal and apply to everyone, all refugees and all asylum seekers must also be granted the rights set forth under international human rights law more generally. This is important. For one, human rights treaties such as the ICCPR embody a large number of rights (to refugees and asylum seekers) that are more beneficial than the rights mentioned in the 1951 Convention. Second, various human rights treaties afford protection against refoulement to categories of persons who fail to meet the definition of a refugee in the 1951 Convention and/or 1967 Protocol but who nonetheless need such protection (i.e. ICCPR, CAT and ECHR). Third, the lack of an individual complaints procedure under the 1951 Convention regime means that the supervision of the rights of individual refugees under the 1951 Convention are sometimes less effective than under some other human rights treaties. Finally, and most obviously, the 1951 Convention only protects persons who meet the definition of a refugee. While some of the rights under the 1951 Convention must be extended to asylum seekers, the 1951 Convention does not protect rejected asylum seekers, i.e., persons who through a fair procedure have been found not to meet the definition of a refugee. It is quite clear, but often overlooked, that States' obligations under human rights treaties also apply to this category of human beings, irrespective of whether their claim for protection were lodged in good faith, manifestly unfounded or fraudulent. Certainly, States have a right to return persons who do not meet the definition of a refugee (or who do not qualify for protection from refoulement under other human rights treaties). Yet, they must do so in a way that is consistent with their obligations under human rights treaties. This has important implications for how rejected asylum seekers are treated during the time leading up to their return and how their return is executed.

Below are given some examples of how refugee law and international human rights treaties interact and complement each other in the protection of asylum seekers and refugees.

Non-Refoulement in Human Rights Treaties

In addition to Article 33 of the 1951 Convention, there are other provisions in international and regional human rights treaties that proscribe refoulement, most importantly, Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), Article 3 (in conjunction with Article 1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (in conjunction with Article 2). These provisions will be dealt with in turn.

Article 3(1) of the CAT reads: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In contrast to the duty of non-refoulement in the 1951 Convention, Article 3 of the CAT does not have a "nexus" requirement: the duty of non-refoulement in Article 3 is not limited to persons who risk harm on account of their political opinion, religion, race, nationality or membership of a social group. In addition, the obligation admits of no exceptions. Thus, even some of the worst human rights offenders and persons who would pose as future security threats would be protected under this provision.

On the other hand, it must also be said that the Torture Convention only protects against refoulement based on torture, and does not offer protection for other forms of human rights violations. To qualify as torture under the CAT, an act must be carried out with some degree of involvement of public authority ("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.") This means that persons who are in danger of being subjected to severe pain or suffering by private actors, if returned to their country of origin, cannot rely on Article 3, unless it is shown that such ill-treatment will be carried out at the instigation of or with the consent or acquiescence of a public official.

In contrast to the Torture Convention, the European Convention does not contain any explicit duty of non-refoulement. However, the ECHR has been interpreted to imply such a duty. Thus, in one of its

most notable decisions (*Soering v. UK*), the European Court of Human Rights (ECtHR) interpreted Article 3 in conjunction with Article 1 of the ECHR, so as to bar States from removing a person to a State where there are substantial grounds for believing that the person faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

Like the Torture Convention, but unlike the Refugee Convention, the implied duty of non-refoulement under the European Convention does not encompass a nexus requirement (cf. above, section *The Nexus Requirement*). Further, Article 3 prohibits torture and other inhuman or degrading treatment in absolute terms.[18] According to Article 15(2), no derogation may be made from this prohibition, even in times of public emergency threatening the life of the nation. In *Chahal v. United Kingdom*, the Court ruled against the deportation of a Sikh separatist who was viewed by British authorities as a security threat, the ECtHR pointing to the absolute nature of Article 3 protection. In its opinion, the Court stressed the fact that: "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."

In contrast to the Torture Convention, the implied protection against non-refoulement in Article 3 applies not only to torture but also to inhuman and degrading treatment, which is a broader category including treatment of a less serious nature. Another difference between Article 3 of the CAT and Article 3 of the European Convention is that the duty of non-refoulement under the latter provision applies to situations where the country of origin is unable to protect an individual from harm by private actors as well as situations where there is no effective government in the country of origin that can provide protection. Finally, it should also be said that the implied obligation against non-refoulement applies not only with regard to Article 3 but to other substantive provisions of the Convention as well.[19]

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[18] *D. v. UK*, European Court of Human Rights Judgment of 2 May 1997 (expulsion to the country of origin—known for the lack of medical facilities and appropriate treatment for HIV/AIDS—would amount to inhumane treatment prohibited by Article 3); *BB v. France*, European Court of Human Rights Judgment of 7 September 1998 (finding Article 3 violation whereby a citizen of Congo suffering from AIDS would be deported to the country of origin without access to adequate medical care).

[19] *Beldjoudi v. France*, European Court of Human Rights Judgment of 26 March 1992 (deportation of applicant residing in France for more than four decades with no de facto links with Algeria, apart from his nationality, constitutes a violation of Art. 8); *Berrehab v. the Netherlands*, European Court of Human Rights Judgment of 21 June 1988

The International Covenant on Civil and Political Rights does not specifically mention the principle of non-refoulement either. However, like the ECHR, the Human Rights Committee (HRC) has interpreted the positive obligation to ensure the Covenant's rights entailed in Article 2 as implying such an obligation, in particular in regards to Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In *Kindler v. Canada*, the Committee held that, "if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."[20] Similar to the European Convention, Article 7 of the ICCPR is also non-derogable. Article 4(2) of the Covenant forbids derogation from Article 7 even in times of public emergencies. The HRC has also recognized that the duty of refoulement may apply to other rights of the Convention in particular in regards to the right not to be arbitrarily killed in Article 6.

Under all three instruments, CAT, ICCPR, and the ECHR, an applicant for protection must establish a real risk of future harm.[21] Past ill-treatment alone will not protect an applicant from being returned to his/her country of origin (or some other territory) unless there are substantial grounds for believing that the person might be exposed to such treatment again. However, if a person has been subject to serious human rights violations in the past, which circumstance may

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(refusal to grant a new residence permit after a divorce and the resulting expulsion order infringes right to respect for family life guaranteed in Article 8); *Dogan and others v. Turkey*, European Court of Human Rights judgment of 29 June 2004. (internal displacement as a result of terrorist activities of the PKK constitutes a breach of Article 8); *Mehemi v. France*, European Court of Human Rights Judgment of 26 September 1997 (enforcement of order for permanent exclusion from French territory of Algerian national convicted for drug-trafficking thereby separating applicant from family in France is an Article 8 violation); *Gul v. Switzerland*, European Court of Human Rights Judgment of 9 February 1996 (finding no violation of Article 8 in case of refusal by public authorities to allow family reunification).

[20] *Joseph Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

[21] *Vilvarajah and others v. UK*, European Court of Human Rights Judgment of 30 October 1991 (holding no breach of Article 3 although applicants faced forms of ill-treatment upon return to Sri Lanka, which did not pose a risk of treatment beyond the threshold of Article 3, noting that their personal situation was not worse than "the generality" of other young male Tamils); *Cruz Varas and others v. Sweden*, European Court of Human Rights Judgment of 20 March 1991 (finding no Article 3 violation in expulsion of Chilean national denied asylum, noting that risk assessment by State Party must be based on facts known at time of expulsion).

constitute strong evidence that the individual may be subjected to such treatment again, if the human rights conditions in the country have not changed appreciably. The individual must always show that he or she is personally in danger of being subjected to harm if returned to his/her country of origin.[22]

While evidence of gross human rights violations in the country of origin has probative value, such evidence does not in itself constitute a bar for returning an individual to that country. Conversely, the absence of a pattern of gross human rights violations in a country may have probative value, but does not necessarily mean that a particular individual is not in danger of being subjected to harm if returned to that country.

Finally, the duty of non-refoulement in these three instruments applies to all persons seeking protection under them (i.e. asylum seekers) until and unless it has been determined that they do not qualify for protection. They also cover persons at the border seeking entry into a contracting State and persons on the high seas. Like Article 33 of the 1951 Convention, these provisions also place constraints on the practice of sending persons seeking protection to so called safe third countries.

The Right to Life and Physical Integrity

Although the protection of the refugee's life and physical integrity is fundamental to any meaningful notion of refugee protection, the 1951 Convention is silent on such matters. But, this is not a significant problem, as the life and physical integrity of refugees and asylum seekers are well-protected under human rights treaties. What should be reiterated in this context is that States' obligations under human rights treaties, for example under Article 3 of the ECHR, do not only include the duty to refrain from harming asylum seekers and refugees in certain ways, but also the positive obligation to protect their lives and physical integrity e.g., by ensuring that conditions in reception centres or refugee camps are safe

[22] See e.g., *Mutombo v. Switzerland* (CAT 13/1993) (27 April 1994).

Racism

Throughout OSCE states, xenophobia and intolerance towards foreigners—in particular, towards refugees and asylum seekers—has increased in recent years. This may contribute to a hostile local environment in which reduced standards of treatment are tolerated or even seen as acceptable. The Convention on the Elimination of Racial Discrimination (CERD) is worth mentioning at this point. It proscribes racial discrimination with regard to a wide range of issues. More pertinent to the present discussion is the general and demanding obligation that it imposes on the contracting States to take affirmative steps to eliminate racial discrimination. Article 2(1) of CERD reads: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms, and promoting understanding among all races." Governments that not only continue to ignore the racial animus directed against asylum seekers and refugees but also use xenophobia against asylum seekers for political gain clearly do not live up to this obligation (we assume here that the State in question is party to CERD).

Detention

As we have seen, the 1951 Convention imposes certain restrictions on the detention of asylum seekers and refugees. The detention of asylum seekers and refugees is further restricted by various prohibitions in human rights treaties against arbitrary deprivation of liberty. Of particular importance here is Article 9 of the ICCPR which states that no person may be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. Article 9 constrains the detention of asylum seekers and refugees in several ways. First, it requires that any detention must be governed by law as opposed to administrative or executive directives. The domestic law upon which detention is based must be foreseeable and accessible in its application. That is to say, the law governing detention of asylum seekers and refugees must be precise and pertain to the particular circumstances at issue, and those subject to the law must have access to it. Second, it requires that any deprivation of an asylum seeker's or refugee's liberty is in fact carried out in accordance with the applicable domestic law. Third, and perhaps less obviously, the requirement that

deprivation of liberty may not be made except on such grounds and in accordance with such procedures as are established by law is also understood to require that the substance of the law must not be arbitrary or contrary to human rights standards. As noted by the Human Rights Committee "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 law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances."[23] The requirement that the detention of a person must be reasonable and necessary implies, among others, that it must not be used in pursuit of an illegitimate State objective. For example, the use of detention as a means of dissuading asylum seekers to follow through with their asylum claims cannot be regarded as a means in pursuit of a legitimate State objective and thus, for that reason, would be in breach with Article 9. In light of Article 14 of the Universal Declaration of Human Rights—which proclaims that all human beings shall have a right to seek, albeit not enjoy, asylum—it may also be argued that detention of asylum seekers as part of a policy to deter future asylum seekers violates Article 9, because such policy pursues an illegitimate State objective.

While the detention of asylum seekers and refugees ought to be an exceptional measure, there are valid reasons to detain or otherwise restrict their liberty. Thus, it is widely accepted that States may, *if necessary*, detain asylum seekers for the purpose of verifying their identity, to determine the basic elements of their claims for protection, to make sure that they do not pose a risk to society, before admitting them on their territories. It is also accepted that States, in certain circumstances, may detain asylum seekers for the purpose of ensuring their removal, in case they are denied protection. Specifically, it may be justified in certain circumstances to detain an asylum seeker during the asylum procedure, to prevent him/her from absconding before a decision in his/her case is reached.

Even when used in pursuit of a legitimate State objective, the detention of an asylum seeker or a refugee must also be a necessary and a proportionate means to the attainment of that objective. For instance, the indefinite detention of asylum seekers on account of

[23] Communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5(8); Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9(8).

disputed identity is arguably a disproportionate means to achieve a legitimate State goal and, hence, for that reason in violation of ICCPR, Article 9. Further, it follows from this requirement that a State Party to the Covenant may be in breach of Article 9 if it has detained a person for a legitimate reason (e.g., to prevent the person from absconding) but could have achieved the same end by less invasive means.

Article 9 also demands that the domestic law be applied in a non-arbitrary and non-discriminatory manner. In particular, the question whether appropriate grounds for detention exist (whether detention is a necessary and proportional means in pursuit of a legitimate goal) must be determined on a case-by-case basis. For example, it is generally accepted that a State may legitimately detain asylum seekers to prevent them from absconding prior to the completion of the asylum determination procedure, which may thus impede their removal from the State's territory. But it cannot simply be assumed that all asylum seekers—or all asylum seekers in a particular subset of asylum seekers—will abscond. There must be some substantive basis for such a conclusion in the individual case at hand.

According to Article 9(4), a detained asylum seeker or refugee must be granted the opportunity, within a reasonable time, 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. According to the Human Rights Committee, such a review should not be restricted to the issue whether the detention complies with domestic law. Rather, the reviewing Court's authority "must also include the possibility of release if the detention is incompatible with the requirements of the Covenant."[24]

Finally, international human rights standards also place constraints on the condition under which asylum seekers and refuges are detained: Article 10 of the ICCPR obligates States to treat all persons deprived of their liberty with humanity and with respect for their dignity. The demands of this provision go beyond the prohibition in Article 7 of the Covenant against torture or other cruel, inhuman or degrading treatment or punishment, which of course also applies to detained asylum seekers and refugees. It bears to note that ICCPR, Article 10, paragraph 2 (a), requires that accused persons, save in exceptional circumstances, be kept separate from convicted persons. Detaining

[24] 1014/2001 (*Baban v. Australia*).

asylum seekers who are neither accused nor convicted of any crimes with convicted prisoners must be presumed to be contrary to this provision. Unfortunately, this is a rather common practice.

Economic and Social Rights

As part of the general restrictive trend towards asylum seekers many States have dramatically restricted their access to economic and social benefits. With no welfare benefits and no right to work, how do asylum seekers—including genuine refugees—survive?

It was noted earlier that the 1951 Convention provides certain economic rights based on whether a refugee is lawfully staying or a resident of the receiving State. However, what this also implies is that these rights can be denied to asylum seekers. This, however, is not the end of the matter. For one, it stands to argue that denying asylum seekers basic life necessities could constitute refoulement, in violation of Article 33, when the deprivation is so severe that a refugee is in effect forced to abandon his/her claim and return to his/her country of origin.

But beyond this, international human rights law also imposes obligations on States in this respect. In the first place, denying asylum seekers basic life necessities may constitute inhuman and degrading treatment in violation of international law, e.g., Article 3 of the ECHR. In addition, the International Covenant on Economic, Social and Cultural Rights (ICESCR) also protects asylum seekers. Although this treaty is not as specific as the ICCPR, allowing for the progressive realization of economic and social rights depending on the maximum available resources of a State, what also has to be said is that the UN Committee on Economic, Social and Cultural Rights has asserted that the duty to take steps is of immediate application, and it has also specified that there is a minimum core obligation that each State Party is obligated to meet. Thus, any attempt to deny these core economic and social rights to refugees and/or asylum seekers would be in violation of international human rights law.

Non-Discrimination

In contrast to Article 3 of the 1951 Convention, Article 26 of the International Covenant on Civil and Political Rights contains an autonomous right to freedom from discrimination. In other words, the application of Article 26 is not limited to the ambit of those or other

rights that are provided for in the Covenant but protect individuals from invidious distinctions in any field regulated and protected by the State. This provision is highly relevant in the asylum and refugee context as States commonly treat different categories of refugees differently in regards to a whole range of issues that are not protected by the 1951 Convention such as, for instance, the right to family-reunification.

Rights of the Child

A substantial portion of the world's refugee population is comprised of children. Refugee children benefit from the comprehensive and near-universally ratified Convention on the Rights of the Child. One of the key provisions of this Convention is Article 3, which stipulates that the child's best interest must be a primary consideration in all actions that affect them. Also noteworthy are Articles 22(1), which stipulates that the States Parties shall ensure that a child, who is seeking refugee status or who is considered a refugee under international or national law, receives appropriate protection and humanitarian assistance, Article 22(2) which imposes an obligation on the States Parties to co-operate with the competent international agencies in finding parents of unaccompanied refugee children, and Article 37 which sets forth particularly stringent conditions for the detention of children.

12.8. Implementation in Domestic Law

International human rights treaties generally leave it to each State Party to choose its method of implementation. However, a State's discretion in this regard is limited by the general duty of States to give effect to their treaty obligations in good faith. The 1951 Convention provides a good illustration of this. It says nothing on how contracting States shall implement their obligations under the Convention. In fact, there is no requirement that a State adopts any kind of procedures for making refugee determinations or otherwise incorporates the Convention's provisions into its domestic law. However, because the States have assumed certain obligations to refugees under the 1951 Convention—including the obligation not to return a refugee to territories where s/he risks being persecuted—it is incumbent on them to take certain steps to effectively discharge them, such as exempting refugees from general immigration requirements, providing adequate training to offi-

cials dealing with refugees, and so forth. Similarly, unless a State is prepared to grant refugee protection to all persons within its jurisdiction who claim to be refugees (which no State is willing to do), it must create some means of adjudication or procedure that identifies, in good faith, those who meet the criteria for refugee protection and those who do not. Whatever procedure a State adopts for this purpose, it must necessarily provide certain minimum procedural safeguards.

In 1977 the Executive Committee of the UNHCR recommended that States not only adopt formal procedures in making refugee determinations, but also that competent authorities are well versed in the relevant international instruments; there is a clear line of authority that is established and uniform procedures that are followed; applicants be given the necessary facilities to pursue their claim including competent interpreters and the opportunity to contact officials of the UNHCR; that applicants deemed to be refugees be notified of this immediately and issued appropriate documentation; and refused applicants be given the opportunity to appeal and to remain in the country while the appeal is pending.

Establishing Eligibility

For a whole host of reasons, including sudden flight, refugee claimants are oftentimes not able to provide substantial documentation of their claims. For this reason the key to the refugee determination process is most often the careful consideration of the claimant's own testimony. As a general rule, the applicant bears the responsibility of proving that s/he is deserving of refugee protection. However, it is generally accepted that a fairer approach is one in which this burden is shared by the competent authorities. Essentially what this means is that in examining a claim, the competent authority must ex officio take into consideration and seek to establish all relevant facts of the case. In addition, as the UNHCR Handbook points out, because of the inherent difficulties facing the claimant, as well as the consequences of a wrongful determination, it is generally agreed that the applicant should be given the benefit of the doubt.

Decision-making in this realm is a most difficult task. Not only must the adjudicator be very knowledgeable about conditions in the claimant's country of origin, s/he must also be sensitive to the unique problem of determining the claimant's credibility, which is complicated by a number of factors, only two of which we will mention here. The

first is that because refugees are fleeing from government authorities in their own country, fear and distrust may extend to officials in the receiving State as well. Another problem is that asylum proceedings will take applicants through extraordinarily painful events—events that might make it nearly impossible to recount. This will be especially true for victims of torture and rape.

One of the major issues is what to do about the claimant who is thought to be lying, or whose story has various inconsistencies, or finally, the individual who has used false documents to exit his/her country or to gain entry into the host State. In fact, many State authorities will deny claims, when it is thought that the asylum seeker is being untruthful about a material fact. This kind of summary determination is wrong. What needs to be explicitly recognized is that the fear of return may prompt an asylum seeker to embroil or exaggerate his/her real story. Beyond this, asylum smugglers oftentimes advise asylum seekers to destroy their travel documents and to use standardized or prefabricated accounts of persecution. The larger point is that inconsistencies and even proven lies should not automatically lead to rejection of asylum claims. The decision maker needs to find out whether there are reasonable explanations for inconsistencies and misrepresentations. In addition, in evaluating a person's claim for protection it is important to distinguish between inconsistencies and misrepresentations concerning facts central to the asylum claim and more peripheral issues such as travel routes. Lies about such things as an asylum claimant's travel route rarely have a direct bearing on the veracity of a person's claim for protection but are more typically associated with the so called safe third country principle discussed below.

Denial of Asylum Hearings and Accelerated Procedures

A growing number of States have adopted measures that either deny asylum hearings altogether or else provide for accelerated procedures. The ostensible aim is for the State to spend little time and resources on claims that are thought to be manifestly unfounded. Beyond this, government often fear political backlash, when asylum policies are perceived as too generous.

Safe Third Country

Most Western States have denied access to asylum procedures in situations where responsibility for assessing an application for asylum could have been assumed by another State. This is generally known as the principle of "first country of asylum" or "safe third country", and it is based on the idea that the applicant could have (and should have) requested asylum if s/he passed through a safe country before arriving at the State where asylum is being sought.

The principle of non-refoulement only prohibits return to territories where the applicant faces a serious prospect of harm. The principle does not prevent a State from sending a person to a country, where this person would not face such a risk. However, a State's obligations of non-refoulement do not only extend to situations where the State itself sends a person to a territory where his/her life would be threatened. Rather, it also extends to situations where a State is part of a larger chain that leads to this same result. To illustrate, if State A removes a refugee to State B under the rationale that he or she could have applied for asylum in the latter State, and State B in turn returns the asylum seeker to his/her country of origin, both States A and B may be in violations of the duty of non-refoulement.

Whether another State is considered safe or not should be dependent not only on the general human rights conditions in that country but also on the basis of the applicant's particular situation. Beyond this, before returning this individual to this safe State, it must first be established that the individual will, in fact, be readmitted and will be able to access fair asylum procedures and, if recognized, will be able to enjoy effective protection in that country.

Finally, it should be observed that a country is not obligated under general international law to re-admit non-nationals. Thus, there is nothing that prevents the designated safe third country (State B in the example above) to send the asylum seeker back to the State that seeks to apply the principle (State A in our example above). As a consequence, asylum seekers risk being sent back and forth between different States, each refusing to admit him/her and assess his/her claim for asylum (this problem is commonly referred to as refugees in orbit). To address this problem, States have adopted various bilateral and multilateral re-admission agreements and agreements that determine which state among the contracting parties that shall be responsible for assessing which asylum claim.

Safe Country of Origin

In addition to the safety of States that asylum seekers have passed through, many countries have also developed the notion of safe countries of origin. Toward that end, these States have drafted an extensive list of countries thought to be safe that either:

a) has served as an automatic bar to access to the asylum procedure; b) has been used as a means of assigning cases to an accelerated procedure (i.e., no appeal or procedures with limited due process rights); or c) has meant assigning an evidentiary burden that the applicant must overcome.

There are several problems with the notion of safe country of origin. First, to automatically reject claims from persons coming from a designated safe country of origin is inconsistent with the language of the 1951 Convention, which contains no geographic restrictions other than the ones addressed by the 1967 Protocol and explicitly prohibits discrimination on the basis of nationality. To assign claimants coming from a safe country of origin to so called accelerated procedures is not *per se* incompatible with the 1951 Convention. The legality of such practices will depend on whether or not the designated country of origin is indeed safe, and whether claimants from this country are given a fair chance to rebut the presumption that they do not need protection. Deciding whether a given country is safe is a very complex enterprise. And even if a State is appropriately thought to be safe at the time that the list of safe countries of origin is drawn up, rapid changes in the designated States might make such assessment unsound before its use is discontinued. Moreover, even in States deemed safe for valid reasons, exceptional cases of persecution may occur. In short, a certain number of genuine refugees may inevitably face real persecution in countries listed as safe. Another problem is that foreign policy concerns may influence the designation of safe countries of origins. In practice, many countries that have been designated by western governments as safe countries of origin—Algeria in the 1990s is one of the more egregious examples—could hardly be considered as such.

The UNHCR has made the following suggestions in regards to the safe country of origin approach: "If a State decides to establish a list of safe countries of origin, the procedure for adding or removing countries from any such list needs to be transparent, as well as responsive to changing circumstances in countries of origin. In addition, given the need for an individual's assessment of the specific circumstances of

the case and the complexities of such a decision, best State practice does not apply any designation of safety in a rigid manner or use it to deny access to procedures. Rather, it bases any presumption of safety on precise, impartial and up-to-date information and admits the applicant to the regular asylum procedure; so that s/he has an effective opportunity to rebut any general presumption of safety based on his/her particular circumstances."[25]

Visa Requirements and Carrier Sanctions

Finally, receiving States have adopted broad measures that are aimed at, or which effectively prevent, would-be refugees from reaching their borders. The two most important are the application of visa requirements and the institution of carrier sanctions. A visa requirement is essentially permission to travel to the receiving State. This allows the receiving State to decide for itself whether to even allow individuals (or certain individuals) from a particular country to travel there. Typically, States institute visa requirements for all persons coming from refugee producing countries and no exceptions are made for those seeking refugee status. To make visa requirements an effective bar against entry, States have imposed sanctions on carriers (airlines, boats, etc.) that have brought aliens to their borders without visas or with improper travel documents.

The general view is that these measures are not a violation of the Refugee Convention[26] because refugees are not being sent back to their country of origin. In fact, they are not being sent back at all, but rather, are prevented from leaving in the first place. The combination of visa requirements and carrier sanctions have gone far in severely reducing the ability of individuals to flee their country of origin—at least legally. As a result, a growing problem has been asylum seekers who arrive at a State's borders with either no documents or forged documents.

Some governments have responded to this development by assigning persons who lack valid travel documents to accelerated asylum procedures and by mandatory detention of such claimants. What governmental authorities have tended to downplay is the imperative to employ

[25] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures) in Global Consultations on International Protection (31 May 2001), UN Doc. EC/GC/01/12, para. 39.

[26] Article 33.

illegal means in order to be able to flee one's State and/or to gain entry into another. In this connection, it should be reiterated that Article 31(1) of the 1951 Convention provides that the lack of appropriate documentation or the use of false documents, by itself, should not render a claim abusive or fraudulent and should not be used to deny access to a procedure.

Returning Refugees

Growing resentment and hostility towards asylum seekers and refugee populations in general has resulted in dwindling options for refugees to settle permanently in host countries. As a consequence, UNHCR has recently adopted the view that the preferred option for dealing with refugee situations is voluntary repatriation that is carried out "in safety and dignity." There is a deep concern that much repatriation that is labeled as voluntary by governments is not, and, more importantly, is not always carried out in safety and dignity. In short, it should be kept in mind that what may be labeled as voluntary reparation may in fact constitute refoulement. On the other hand, the 1951 Convention does not obligate a contracting State to grant refugees a right to settle permanently on its territory and, conversely, it does authorize a State to forcibly return persons who previously have been recognized as refugees, but who no longer are in need of international protection. Of course, such forcible return must also comply with human rights standards under other human rights treaties.

It should also be pointed out that those who do choose to return *voluntarily* to their countries of origin have a right under international law to do so. The right to leave any country, and the right to return to one's own country are guaranteed under international law. Once a refugee (or former refugee) has returned, responsibility for securing his/her human rights is in principle shifted back to the country of origin. The problem is that even in cases of voluntary repatriation, refugees are oftentimes returning to countries where conditions are harsh and future prospects bleak. Commonly, there is also significant tension between returning refugees and the rest of the population.

In some situations, tension may arise between returning refugees and those who have remained in the country of origin during civil war and widespread human rights abuse. Returning refugees are oftentimes thought of as persons who "bailed out", allowing other people to struggle on their behalf. In short, returning refugees often remain a

particularly vulnerable group whose human rights must be carefully monitored.

One issue that has received a great deal of attention lately, and which deserves a brief comment, is the restitution of housing and property to returning refugees lost during their displacement. While repossession of property is not the only issue facing returning refugees, it is often a very crucial component in the successful repatriation and reintegration of refugees. With the important exception of Article 1, Protocol 1 of the ECHR, human rights treaties do not protect the right to property. However, it should be noted that Article 26 of the ICCPR requires States to protect a person's property on a non-discriminatory basis. Further, several peace agreements signed in the last decade make reference to the rights of refugees and displaced persons to return to their homes and to repossess property. The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), signed in 1995, is perhaps the most comprehensive plan for the return of refugees and displaced persons and the restitution of property.

12.9. Internally Displaced Persons (IDPs)

It is often noted that the majority of persons who have been forced to flee their homes as a result of armed conflict and systematic violations of human rights are not refugees within the meaning of the 1951 Convention, because they have not crossed an international border, but remain in their country of origin. This category of persons is commonly referred to as Internally Displaced Persons (IDPs). The issue of IDPs is a particularly pressing human rights problem in many OSCE countries.

In 1999, the former UN Human Rights Commission requested the Secretary General's Special Representative on Internally Displaced Persons to examine the international normative framework of IDPs. The outcome of this study was the so called Guiding Principles on Internal Displacement (see box 3). This document is not legally binding in itself, but rather, attempts to restate binding international law relevant to the protection of IDPs, i.e., international human rights law and humanitarian law. By synthesizing and specifying what this highly complex and voluminous body of law demands in the particular context of internal displacement, the Guiding Principles provides valuable assistance to those working with IDP populations. On the other hand, when using the Guidelines it is important not to lose sight of the legally

binding law that underpins them. After all, the rationale behind the guiding principles is to effectuate the implementation of already binding law, not to overshadow or create confusion about its application to IDPs.

12.10. Additional Sources, including OSCE Commitments

In addition to the treaties discussed above, there is a plethora of legally relevant instruments and guidelines that may be resorted to for the protection of refugees and asylum seekers. The relevance of interpretive statements by the UNHCR has already been noted. It should be added here that UNHCR may, at the Office's request, receive advice on its statutory functions from the Executive Committee of the High Commission's Programme (EXCOM). The Executive committee's conclusions (EXCOM Conclusions) provide general recommendations to the UNHCR on various refuges issues. While these conclusions are useful sources for the interpretation of the 1951 Convention, they are not binding.

Also worth highlighting here are the various commitments that OSCE Participating States have made in regards to preventing refugee situations from occurring and protecting refugees once they do occur. The most pertinent ones are quoted below.

> VIENNA 1989
>
> (The participating States)
>
> (22) will allow all refugees whom so desire to return in safety to their homes.
>
> HELSINKI 1992
>
> (The participating States)
>
> (39) Express their concern over the problem of refugees and displaced persons;
>
> (40) Emphasize the importance of preventing situations that may result in mass flows of refugees and displaced persons and stress the need to identify and address the root causes of displacement and involuntary migration;
>
> (41) Recognize the need for international co-operation in dealing with mass flows of refugees and displaced persons;

(42) Recognize that displacement is often a result of violations of CSCE commitments, including those relating to the Human Dimension;

(43) Reaffirm the importance of existing international standards and instruments related to the protection of and assistance to refugees and will consider acceding to the Convention relating to the Status of Refugees and the Protocol, if they have not already done so;

(44) Recognize the importance of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross, as well as of non-governmental organizations involved in relief work, for the protection of and assistance to refugees and displaced persons;

(45) Welcome and support unilateral, bilateral and multilateral efforts to ensure protection of and assistance to refugees and displaced persons with the aim of finding durable solutions.

STOCKHOLM 1992

(The CSCE as a Community of Values, paragraphs 5 and 7)

(…) Violations of international humanitarian law and CSCE principles and commitments, such as 'ethnic cleansing', or mass deportation, endangered the maintenance of peace, security and democracy and will not be tolerated. [The Ministers] were convinced that increased attention should be paid by the CSCE, and in particular by the Committee of Senior Officials and the High Commissioner on National Minorities, to these threats to human rights and fundamental freedoms

(…)

The increasing problem of refugees and displaced persons is an issue of major concern to all participating States, particularly in conflicts where the fulfilment of basic human needs is most at risk. The Ministers deplored the plight of civil populations most affected in such conflicts and called on all participating States to contribute to a concerted effort to share the common burden. All Governments are accountable to each other for their behavior towards their citizens and towards their neighbors. Individuals are to be held personally accountable for war crimes and acts in violation of international humanitarian law.

ROME 1993

(Chapter IV, paragraph 3)

In the context of conflict prevention and crisis management, the issue of mass migration, namely displaced persons and refugees, will be addressed, as appropriate, by the CSO and the Permanent Committee of the CSCE, taking into account the role of other relevant international bodies.

BUDAPEST 1994

(Decisions, chapter VIII, paragraph 32)

32. The participating States express their concern at mass migratory movements in the CSCE region, including millions of refugees and displaced persons, due mainly to war, armed conflict, civil strife and grave human rights violations. Taking into account the Rome Council Decisions 1993, they decide to expand their co-operation with appropriate international bodies in this respect. They take note of efforts undertaken by UNHCR to prepare a regional conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the countries of the CIS and other interested neighboring States.

LISBON 1996

(Summit Declaration, paragraphs 9 and 10)

9. (…) Among the acute problems within the human dimension, the continuing violations of human rights, such as involuntary migration (…) continue to endanger stability in the OSCE region. We are committed to continuing to address these problems.

10. Against the background of recent refugee tragedies in the OSCE region and taking into account the issue of forced migration, we again condemn and pledge to refrain from any policy of 'ethnic cleansing' or mass expulsion. Our States will facilitate the return, in safety and in dignity, of refugees and internally displaced persons, according to international standards. Their reintegration into their places of origin must be pursued without discrimination. We commend the work of the ODIHR Migration Advisor and express support for his continuing activities to follow up on the Programme of Action agreed at the May 1996 Regional Conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the relevant States.

ISTANBUL 1999

(Charter for European Security, paragraph 22)

22. We reject any policy of ethnic cleansing or mass expulsion. We reaffirm our commitment to respect the right to seek asylum and to ensure the international protection of refugees as set out in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as to facilitate the voluntary return of refugees and internally displaced persons in dignity and safety. We will pursue without discrimination the reintegration of refugees and internally displaced persons in their places of origin.

12.11. Monitoring the Rights of Refugees and Asylum seekers

Monitoring the rights of refugees and asylum seekers under international law is a vast undertaking. It not only involves the monitoring of a particular State's compliance with the principle of non-refoulement, but also its compliance with all the other rights set forth in the 1951 Convention, and finally, the rights that this category of persons are entitled to under all other human rights treaties by the simple fact of their humanity.

The problem is not simply the number of rights that must be monitored. An added problem is that monitoring must take place in a wide range of places and for various reasons.

We begin with the country of origin itself. There must be monitoring of this State to understand what is driving refugee flows in the first place. There must also be monitoring to ensure that this State is not preventing individuals from fleeing. And finally, if individuals are determined not to be refugees and are returned, there must be monitoring to ensure that (this determination not withstanding) no persecution occurs after this repatriation.

Monitoring is also needed in the receiving State itself. At the border, monitoring is needed to ensure that border guards are not summarily rejecting refugee claims. Monitoring is also needed to make sure that asylum seekers are given a proper hearing and are not summarily returned to their country of origin or simply refused admission. After being admitted, monitoring is needed to ensure that asylum seekers are treated properly by the receiving State's authorities, and that the asylum determination procedure is fair. Finally, that those whose application for asylum have been rejected are treated in accordance with human rights standards during their removal proceedings.

Further, to effectively monitor the rights of refugees and asylum seekers, it is necessary to acquire a keen understanding of not only relevant international law but also domestic immigration and asylum law. In addition to the intricacy of States' immigration and asylum laws, what also has to be said is that there is oftentimes a disjunction between the law as written and the law as practiced in this particular field.

One of the keys in the monitoring process is having access to asylum seekers. While this might seem straightforward, asylum seekers are oftentimes held in remote reception and refugee centers. And what must also be said is that where monitoring is most desperately

needed—the border area itself—is where monitoring is always the least likely to take place.

Aside from access, a further problem is establishing trust and communication with asylum seekers. One problem, of course, is that asylum seekers commonly do not speak the native language and it will often be necessary to employ interpreters. Interpreters must not only be proficient in the language of asylum seekers but they must also be unbiased.

Needless to say, the monitor must acquaint him- or herself with administrators and authorities who play various roles in the refugee determination process and the reception of asylum seekers and refugees. Since it is the conduct of national agencies that are to be monitored, the information received should not be accepted at face value.

It is also vital to survey and to establish working relationships with international and regional organizations working with refugees for the purpose of: 1) information sharing, 2) coordination and 3) for the purpose of identifying persons that can aid refugees in need. For the purpose of coordination, it is important to understand the objectives of various organizations—but also their potential limitations (political, financial, etc). The larger point is this: the fact that one organization monitors one matter does not mean that another organization should not also monitor this same thing.

The following checklist can be used to acquire an initial picture of the conditions of refugees and asylum seekers in a particular country. The checklist only covers a selection of the most important issues that need be examined in order to effectively monitor the rights of refugees and asylum seekers.

12.12. Monitoring Checklist on the Rights of Refugees and Asylum seekers

Checklist – The Rights of Refugees and Asylum seekers

1. Legislation and Regulation Check
   - Which international human rights instruments—including the Refugee Convention—has the State ratified?
   - What, if any, reservations has the State made to these treaties and do these reservations affect the rights of refugees and asylum seekers?
   - Has the country declared any state of emergency, security threat, or other conditions that it regards as a restriction or limitation on its obligations towards asylum seekers and refugees?
   - Are all national regulations and legislation related to the treatment of asylum seekers and refugees easily available?
   - Has the monitor undertaken a critical review of this body of law?
   - Is the law governing the treatment of asylum seekers and refugees clear and specific—or vague and permissive, granting a wide range of discretion to law enforcement officers?
   - To what extent have the State's human rights obligations been incorporated into domestic law?
   - Does the national law used to implement the State's human rights obligations clearly apply to non-citizens including refugees and non-citizens?
   - Does the immigration law exempt asylum seekers and refugees from normal immigration requirements?

2. Monitoring the Rights in Practice
   a. Procedures
      - Are border guards adequately trained in international human rights law, the 1951 Refugee Convention and relevant domestic laws and procedures? Do border guards have clear instructions on what to do with asylum seekers? Is there evidence of summary rejections at the border?
      - What are the main features of the national asylum procedure in terms of legal safeguards, training of adjudicators, right to appeal, etc.?
      - Does the State have a policy against denying a hearing to those who are either from "safe countries of origin" or have passed through "safe third countries"? If hearings are denied altogether, does the State seek to ensure that the asylum applicant is able to file a claim in the State that s/he is sent to?
      - What countries are considered "safe"?
      - Are the lists of safe countries made public?
      - Are lists of safe countries frequently reviewed?

- How are these determinations arrived at? Essentially, how safe are these "safe" countries?
- What are the consequences of coming from, or passing through, "safe" countries?
- Are accelerated procedures applied in a discriminatory manner?
- Are persons found with fraudulent documents punished in any way?
- Is there any time limit for applying for asylum and what are the consequences of failing to meet such a deadline?
- Is there an application fee?
- Are asylum applicants able to present their case properly and does the adjudicator provide assistance?
- Is the asylum interview focused on the central aspect of the claim as opposed to, for instance, the claimants' travel routes?
- Does the decision maker meet the applicant?
- Are translation services available and appropriate?
- Do the applicants get an opportunity to review the interview transcripts?
- Is counsel available to all applicants?
- Does the adjudicatory body make special provisions for minors and other vulnerable populations?
- Are asylum seekers given a fair chance to present their claim?
- Are adjudicators of asylum claims sufficiently trained in international human rights law and the 1951 Convention?
- Do they have adequate and up to date country of origin information?
- Are adjudicators sufficiently independent?
- Are decisions issued in writing?
- Are grounds of refusal provided in writing and are they clear?
- Is there a right to appeal negative determinations?
- Is there a de novo hearing or are appellate determinations simply based on the record?
- Does the appeal have suspensive effect, that is to say, does the asylum seeker have a right to stay pending appeals?
- Are asylum seekers able to file a new application for asylum due to a change of circumstances in the country of origin?

b. Reception of refugees and asylum seekers
   - Do asylum seekers get adequate housing, food, education, etc.?
   - Do States take sufficient measures to ensure the safety of asylum seekers?
   - Does the State take measures to combat xenophobia?
   - Under what circumstances does the State detain or otherwise restrict the freedom of movement on those seeking asylum?
   - What kinds of facilities are used for the purpose of detention?
   - Are asylum seekers kept separate from general prison population?
   - Do detained asylum seekers get an opportunity to prepare their case?

- Are children detained, and if so, under what conditions?
- Are detained families kept together?
- Is there a judicial review of the detention?
- Is there evidence suggesting that detention is used discriminately?
- Is there any evidence suggesting that detention is being used to deter asylum seekers?
- Are decisions on detention based on individual assessments?
- Do States take adequate steps to ensure the physical and emotional wellbeing of those in detention?
- Is there any evidence suggesting that the State seeks to discourage asylum seekers from pursuing their claims through detention or by limiting their subsistence rights?

c. Other
- What national/international organizations work with refugees and asylum seekers?
- What are their objectives—but also their limitations?
- What are the main countries of origin of asylum seekers and what sources of information are available about these States?

12.13. Instruments on the Rights of Refugees and Asylum seekers

Relevant Legally Binding Instruments

UN Instruments

Convention Relating to the Status of Refugees (1951) Protocol Relating to the Status of Refugees (1967)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 1A	Defines the term a refugee for the purpose of the 1951 Convention	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1979.
		UNHCR, Position Paper on Agents of Persecution, 14 March 1995.
		UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998.
		UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002.
		UNHCR, Guidelines on International Protection: "Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees", 2004.
		UNHCR, UNHCR EXCOM, Conclusion No. 8 Official Records of the General Assembly, Thirty-Second Session, Supplement No. 12.

Article 1C	Contains standards for the cessation of refugee status	UNHCR Handbook para. 118–139. UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 2003 UNHCR, The Cessation Clauses: Guidelines on their application, 1999 UNHCR, Note on Cessation Clauses, UN Doc. EC/47/SC/CRP.30, 30 March.
Article 1F	Contains standards for the exclusion from refugee status	UNHCR Handbook para. 140–163; UNHCR, Guidelines on International Protection. Application of the Exclusion Clauses (Article 1F of the 1951 Convention), 2003.
Article 3	Requires the contracting States to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin.	
Article 31(1)	Prohibits the punishment of asylum seekers and refugees on account of unauthorized entry	UNHCR, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, 1999.
Article 33	Prohibits the expulsion or return ("refoulement") of a refugee to the frontiers of territories where his/her life or freedom would be threatened	UNHCR EXCOM, Non-refoulement, Conclusion No. 6 (XXVIII), 1977; UNHCR, Note on International Protection, (1994) para. 14–15, 30–41.

International Covenant on Civil and Political Rights (ICCPR)

Article 2	Sets forth the general undertaking of each contracting State "to respect and to ensure to all individuals" within its jurisdiction (which obviously includes refugees, asylum seekers, failed asylum seekers etc.) the rights recognized in the Covenant. The positive obligation to ensure the rights recognized in the Covenant entails the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant.	General Comment No. 15. The position of aliens under the Covenant (1986). General Comment No. 31. The nature of the general legal obligation imposed on States Parties to the Covenant (2004), para. 10.
Article 6	Prohibits arbitrary killings. Does not only prescribe negative State conduct but also enjoins States to take affirmative steps to protect the lives of all persons within their jurisdiction (including refugees and asylum seekers) against infringements by non-state actors or by agents of other States. The Human Rights Committee has understood Article 6 (in conjunction with Article 2) to entail a duty of non-refoulement (see Article 2)	

Article 7	This article sets forth the right of all individuals—including refugees and asylum seekers—to freedom from torture, cruel, inhuman, or degrading treatment. It enjoins contracting States not only from taking actions which amount to torture, cruel, inhuman, or degrading treatment, but also to take affirmative steps to protect everyone under their authority from such treatment by non-state actors or by agents of other States. The Human Rights Committee has understood Article 7 (in conjunction with Article 2) to entail a duty of non-refoulement (see above under Article 2)	See e.g., *Joseph Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).
Article 9	This article provides that no individual—including refugees, asylum seekers and other individuals subject to immigration control—may be deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law. It also establishes a right of any detained persons "to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."	General Comment No. 8 Right to liberty and security of persons (Article 9) (1982); See also the Committee's views in *C. v. Australia* (900/1999) ICCPR, (28 October 2002), *A. v. Australia* (560/1993) ICCPR (3 April 1997), *Torres v. Finland* (291/1988) ICCPR (2 April 1990), which deal specifically with detention of individuals subject to immigration control.
Article 10	This article requires a contracting State to treat all individuals deprived of their liberty—including detained refugees, asylum seekers, and rejected asylum seekers—with humanity and dignity	General Comment No. 9 Humane treatment of persons deprived of liberty (Article 10) (1982).

Article 26	This article contains the broadest guarantee of non-discrimination in international human rights law. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities and on any ground. Article 26 is of great importance to refugees and asylum seekers as there is often a significant difference in the way States treat particular subsets of refugees and asylum seekers.	General Comment No. 18. (General Comments) Non-discrimination (Thirty-seventh session, 1989). http://www.unhchr.ch

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT)

Article 1	Defines the notion torture for the purpose of the Convention	
Article 3	Provides that no Party of the Convention shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that s/he would be in danger of being subjected to torture.	General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture, 1997; *Mutombo v. Switzerland* (CAT 13/1993) (27 April 1994); *Tala v. Sweden* (CAT 43/1996) (15 November 1996); *Aemei v. Switzerland* (CAT 34/1995) (9 May 1997); *Paez v. Sweden* (CAT 39/1996)

International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Article 2	Imposes an affirmative duty on the States Parties "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races."	General Recommendation No. 30: Discrimination Against Non Citizens: 01/10

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 (ECHR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 1	Sets forth the general duty of the States Parties to secure to everyone [including asylum seekers and refugees] within their jurisdiction the rights and freedoms defined in the Convention.	
Article 2	Proscribes arbitrary taking of life. This provision, in conjunction with Article 1, implies a duty of non-refoulement.	
Article 3	Prohibits torture, inhuman and degrading treatment or punishment. This provision, in conjunction with Article 1, implies a duty of non-refoulement.	On non-refoulement see e.g.,: *Soering v. the United Kingdom*, at 35–36, P 91; *Cruz Varas and Others v. Sweden*, App. No. 15576/89, 201 Eur. Ct. H.R. (ser. A) p. 28, PP 69 and 70 (1991); *Vilvarajah and Others v. the United Kingdom*, p. 34, P 103. On treatment of asylum seekers in the country of refuge see e.g., *Dougoz v. Greece*, European Court of Human Rights, Judgment of 6 March 2001.
Article 5	Proscribes arbitrary deprivation of liberty and thus also imposes restrictions on the detention of asylum seekers and refugees.	*Amuur v. France*, European Court of Human Rights, Judgment of 25 June 1996; *Dougoz v. Greece*, European Court of Human Rights, Judgment of 6 March 2001; *Conka v. Belgium*, European Court of Human Rights, Judgment of 5 February 2002
Article 8	Entails a right to respect for private and family life, home and correspondence. Protects the family life of refugees.	*Beldjoudi v. France*, European Court of Human Rights, Judgment of 26 March 1992; *Mehemi v. France*, European Court of Human Rights, Judgment of 26 September 1997
Article 4 of Protocol No. 4	Prohibits the collective expulsion of aliens and has been found to apply to the collective expulsion of asylum seekers.	*Conka v. Belgium*, European Court of Human Rights, Judgment of 5 February 2002.

12.14. References

Erika Feller, Volker Türk, and F. Nicholson (eds.), *Refugee Protection in International Law UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).
In this recent anthology, leading international refugee scholars offer up-to date and comprehensive analyses on some of the most urgent issues concerning international refugee protection including the issue of detention of refugees and asylum seekers, cessation of refugee status, exclusion from refugee status, and the principle of non-refoulement.

Guy S. Goodwin-Gill, *The Refugee in International Law, 2. edition* (Oxford: Oxford University Press, 1996).
This is one of the standard texts of international refugee law and is frequently referred to by national adjudicative bodies and legal scholars in the refugee field. It contains chapters on, among others, the refugee definition, the principle of non-refoulement, asylum procedures.

James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991).
This is another standard text on refugee law and offers an in-depth, yet easily accessible, analysis on the definition of a refugee in the 1951 Convention.

James C. Hathaway, *The Rights of Refugees Status under International Law* (Cambridge: Cambridge University Press, 2005).
This recently published text offers a comprehensive analysis of the rights of refugees under the 1951 Convention and under some key international human rights treaties. It covers a wide range of issues including the right of refugees to enter and stay in an asylum State (the principle of non-refoulement), freedom from arbitrary detention, physical security, access to food and shelter, healthcare, family unity, right to work, education, housing, public relief, social security, property rights, and freedom of expression.

Electronic Resources

www.amnesty.org
Website of Amnesty International. NGOs such as this, as well as ECRE and HRW (see references below) provide indispensable information on the treatment of refugees and asylum seekers in asylum States as well as conditions in countries of origin.

www.ecre.org
The European Council on Refugees and Exiles

www.hrw.org
Website of Human Rights Watch.

www.unhcr.org

This is the official website of The United Nations High Commissioner for Refugees (UNHCR). It contains a wealth of information including policy statements by UNHCR, information on ratifications of and reservations to the 1951 Convention and the 1967 Protocol, EXCOM Conclusions, statistical information, information on the conditions in refugee producing and refugee receiving countries, as well as links to other refugee material.

CHAPTER 13

RIGHTS OF MINORITIES

Rights of minorities are a pressing issue in Europe. Ethnic conflicts have flared up after the disintegration of the Soviet Union in the early nineties and the establishment of sovereign States in the Baltic and in the Caucasus. Moreover, during the gradual transition towards democracy and market economy in Central and Eastern Europe and the Balkans, previously suppressed conflicts between groups have emerged. Among other circumstances, the conflicts in States and across borders are caused by groups being defined and defining themselves as 'ethnic'. Governments of new States may emphasize ethnic, religious, and linguistic homogeneity for the sake of national security and peace—and maintenance of power. Hence, minorities are in danger of having their rights infringed upon.

In Western Europe there is a growing need for protection of minority groups, for example protection of groups of Muslims after the implementation of measures of counter-terrorism taken by governments after September 11, 2001, and because Islam is increasingly being confused with terrorism.

Also, there is a growing need for protection of Jews against anti-Semitism. A current increase of anti-Semitism in many European countries is caused by the actions of marginal or radical groups. In some societies, however, anti-Semitism is a more mainstream phenomenon.

Yet minority rights should not only be seen in a context of conflict. They are also an integral part of human rights, cf. the international instruments and mechanisms concerning minority rights adopted since 1990.

13.1. Definitions of Minorities

There is no universally accepted definition of 'minorities' in international human rights law. The international minority rights instruments do not explicitly define minorities in the text; one reason being

that it is difficult to arrive at a definition to which all States Parties will agree.[1]

In the literature concerning minority rights, however, there are several proposals for a definition.[2] A recurring theme in the proposals is the distinction between objective and subjective criteria.

According to most authors, ethnic, linguistic and religious characteristics different from the majority or 'the rest' of the population is a crucial **objective criterion**. Also, a numerical minority position, that is that the group comprises fewer people than the total of the rest of the population, is suggested by some authors as an objective criterion of what constitutes a minority group. However, numerical inferiority does not necessarily imply that the group possesses inferior political (economic, social, or cultural) power, just as numerical superiority does not necessarily mean superior power. This is one reason for proposals of adding 'in a non-dominant position' to the objective criteria, thus excluding dominant minority groups from the definition of minorities and thereby from minority rights.

Likewise, requirements of citizenship and length of stay or ties with a particular territory as criteria for minority status have been controversial. Requirements of citizenship can result in a State depriving certain population groups of their minority status and thereby of their minority rights.

The **subjective criterion** refers to the subjective consciousness of belonging to a minority, and the personal will to preserve and promote that minority identity. However, there can be reasons for being silent about one's minority identity, for instance fear of suppression by the authorities.[3]

The Human Rights Committee (HRC), monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), stresses that, "The existence of an ethnic, religious or linguistic minority in a given State Party does not depend upon a decision

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[1] Explanatory Report to the Council of Europe's Framework Convention for the Protection of National Minorities (para. 12).

[2] For a thorough discussion, see Kristin Henrard: *Devising an Adequate System of Minority Protection* (The Hague: Martin Nijhoff Publishers, 2000).

[3] Kristin Henrard: "The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities", The Global Review of Ethnopolitics, Vol. 1, No. 1 September 2001, p. 41–42.

by that State Party but requires to be established by objective criteria."[4] Thus, according to the Committee, being a minority "is a matter of fact and not of law".[5]

The UN Human Rights Committee suggests that persons belonging to minorities need not be citizens of the State Party, nor need they be permanent residents. The Committee observes that the ICCPR confers rights on persons belonging to minorities who 'exist' in a State Party. However, the HRC does not find it relevant to determine the degree of permanence that the term 'exist' connotes. Thus, migrant workers or even visitors in a State Party belonging to such minorities should not be denied to exercise those rights.[6]

National Minorities

The notion of 'a national minority' has materialized in international human rights law and resulted in a specialized treaty, namely the Framework Convention on National Minorities (FCNM), and in the adoption of the mandate of the High Commissioner on National Minorities (HCNM) under the OSCE.

Although the concept of a national minority is not explicitly defined in the FCNM, it is possible to find a delimitation of the groups of persons that the convention encompasses: National minorities are groups that have traditionally inhabited/inhabit a territory within a State. The Advisory Committee (ACFC) of the FCNM and the HCNM, however, conceive 'national minorities' as overlapping 'ethnic, religious and linguistic minorities' and use the concepts interchangeably.

Moreover, in his keynote address at the opening of the OSCE Minorities Seminar in Warsaw in 1994, the High Commissioner on National Minorities notes that the existence of a minority is a question of fact and not of definition. This is in conformity with the Human Rights Committee's statement on the definition of minorities in general.

[4] Para. 5(2) in its General Comment No. 23: The rights of minorities (Article 27). 08/04/94.CCPR/C/21/Rev.1/Add.5.

[5] Advisory opinion of the Permanent Court of international Justice regarding Greco-Bulgarian communities of 31 July 1930.

[6] Para. 5(2), op.cit.

Who Can Belong to a National Minority?

How to become recognized as belonging to a national minority is not a theme in international law. The OSCE Copenhagen Document of 1990 simply states that, "To belong to a national minority is a matter of a person's individual choice."[7] The Framework Convention further stipulates that, "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice", Article 3(1). This provision aims to protect the freedom to choose to be treated as belonging to a member of a national minority, and to secure that the enjoyment of that freedom of choice shall also not be impaired indirectly.

The Explanatory Report to the FCNM states that this provision leaves it to every such person to decide, whether or not he or she wishes to come under the protection flowing from the principles of the Framework Convention. This does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.[8]

Actually, several States Parties to the FCNM have decided (through a declaration upon ratification) whether a minority group is a national minority and hence encompassed by the rights of the Convention. Thereby they risk running counter to the HRC's (cf. above) and the ACFC's interpretation that being a minority is a matter of fact and not of law, and that it is up to every person to decide whether he or she wants to belong to a minority or not.

In its first cycle opinions on State Party reports, the ACFC underlines "that in the absence of a definition in the Framework Convention itself, the Parties must examine the personal scope of application [of the FCNM]." The Committee, noting that States Parties have a margin of appreciation in order to take specific circumstances in their country into account, stresses that this should be done in accordance with the general principles of international law and the fundamental principles set out in Article 3 of the Convention. The Committee

[7] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, http://www.osce.org/documents/odihr/1990/06/13992_en.pdf.

[8] FCNM para. 33–36.

further emphasizes that it considers it a part of its duty to verify that "no arbitrary or unjustified distinctions" should be made.[9]

Indigenous Peoples

Indigenous peoples are encompassed by the same protection as other 'ethnic' minorities, but they also have their own legally binding protection under the Convention concerning Indigenous and Tribal Peoples in Independent Countries.[10] 'Indigenous peoples' is the only category of 'ethnic' groups who have **collective rights**; i.e. rights which the members of the group have in their capacity of belonging to the group (and solely for that reason); for instance rights to land and water in a given territory, and the right to a certain level of autonomy.

This chapter deals only with ethnic, linguistic, and religious minorities. There are, however, other groups with ascribed minority status, such as groups of persons with disabilities and groups of persons with a sexual preference that results in them being treated as minorities.

13.2. Principles for Protection of Minorities

Although human rights encompass every human being, and minority rights are an integral part of human rights (see, for example, FCNM, Article 1), it is, nonetheless, necessary to stress minorities' rights—as rights of individuals, and of persons belonging to a group.

The two fundamental principles of minority protection generally accepted in international law are equality and prohibition of discrimination, and measures to protect and promote the separate identity of a minority group.[11] The right to a separate identity covers all minority rights, although the specific content may vary from State to State and from minority group to minority group.

The core aim of the provisions concerning protection of minorities' rights is protection and promotion of a person's identity as a member

[9] See ACFC's first opinion; for instance on Albania, para. 17–19, and on Denmark, para. 13–15.

[10] ILO Convention 169: Indigenous and Tribal Peoples Convention, 1989.

[11] These principles were already formulated by the Permanent Court of International Justice in the inter-war period in its (often referred to) advisory opinion regarding the minority schools of Albania (1935). P.C.I.J., Series A/B, No. 64. For definitions of discrimination, see the Chapter on the Right to Non-Discrimination.

of a minority group. However, the protection of society against social unrest, in this case ethnic tension, is also an aim. Likewise, the purpose of the provisions against discrimination is both to ensure the right to an identity for a minority group and to avoid the institutionalization of certain privileges for members of a minority group that cannot be justified as necessary to obtain equality.

Individual and Group Rights

The rights of ethnic, linguistic, and religious minorities in international human rights law are rights of individuals, yet rights that a member of such a group may enjoy individually as well as in community with other members of the group. The Human Rights Committee states that the individual rights depend on the ability of the minority group to maintain its culture, language, or religion. Accordingly, positive measures by States may also be necessary to ensure that this will be possible.[12]

The rights and freedoms of the Framework Convention may be enjoyed individually as well as in community with others. The term 'others' shall include persons belonging to the same national minority, to another national minority, or to the majority.[13]

The UN Working Group on Minorities offers a rather wide understanding of the enjoyment of rights in community with other members of the group: They include not only rights belonging to national, religious, ethnic, and linguistic minorities, but any human right. Minorities shall not be subject to any discrimination as a consequence of exercising their rights. The Working Group further emphasizes this principle, because, as it states, Governments or persons belonging to majorities are often tolerant of persons of other national or ethnic origins until such time as the latter assert their own identity, language, and traditions. It is often only then that discrimination or persecution starts.[14]

Minorities' rights are not collective rights like the rights of **peoples** to self-determination.[15]

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[12] ICCPR, Article 27, Human Rights Committee's General Comments No. 23, para. 6(2).

[13] FCNM, Article 1 and 3(2); its Explanatory Report, para. 31 and 37.

[14] In the final commentary of the Working Group on the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (E/CN.4/Sub.2/AC.5/2005/2 4 April 2005), para. 53.

[15] The Human Rights Committee's General Comment No. 23, para. 3(1). The Framework Convention's Explanatory Report, para. 13.

13.3. Legally Binding Standards Concerning Minorities

The general principles of non-discrimination, of equality before the law, and equal protection under the law are of course very relevant to individuals and groups of minorities (cf. chapter 14).

General Minority Protection

The International Covenant on Civil and Political Rights (ICCPR) has the important provision that ethnic, religious or linguistic 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.[16] This article has been a central point of departure for minority rights.

The right is expressed in negative terms, i.e. 'shall not be denied'. However, when the Human Rights Committee states that a right 'shall not be denied', it means that a State Party is obliged to protect that right against denial or violation. Furthermore, the State is obliged to undertake positive measures against violations caused by the State itself through its legislative, judicial, and administrative authorities—and against acts of other persons within the State's territory.[17]

The Committee makes it clear that the right of individuals belonging to a linguistic minority to use their **language** amongst themselves, in private or in public, is distinct from other language rights protected under the Covenant. This right should be distinguished from the general right to freedom of expression and from accused persons' right to interpretation where they can not understand or speak the language used in the courts.[18]

Concerning the enjoyment of one's own **culture,** the Committee observes that culture has many manifestations, including a particular way of life associated with the use of land resources, which particularly applies in the case of indigenous peoples (for instance fishing, hunting, or the right to live in reserves). The Committee finds that the enjoyment of such rights may require positive measures and initiatives to ensure the effective participation of members of minority communities in decisions that affect them.

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[16] ICCPR, Article 27.
[17] General Comment No. 23, para. 6(1).
[18] General Comment No. 23, para. 5(3).

The HRC also stresses that a religion recognized as a State religion, or established as official or traditional, or whose followers comprise the majority of the population, shall not result in violation of any of the rights under the Covenant[19] (see also chapter 8, section *State Religion and Official Religion*).

The rights and freedoms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) pertain to everybody and might, besides, be relevant for persons in their capacity of belonging to a minority (see examples of cases of the European Court of Human Rights (ECtHR) later in this chapter).

Protection of National Minorities

Protection of national minorities is an important issue for the Council of Europe. In 1994, the Committee of Ministers[20] adopted the FCNM; it entered into force in 1998. The Framework Convention is the first legally binding multilateral instrument that protects national minorities in general. Besides, it is open to States that are not members of the CoE.

The word 'framework' indicates that the protection and rights contained in the Convention are not provisions directly applicable to national law in the member States, but will have to be implemented through national legislation and government policies. Thus, the provisions are formulated in a programmatic way, as principles and objectives.

The FCNM seeks to promote the full and effective equality between persons belonging to a national minority and those belonging to the majority by creating conditions enabling them to preserve and develop their culture and to retain their identity. To that end, it sets out principles relating to national minorities in the sphere of public life, such as freedom of peaceful assembly, freedom of association, freedom of expression, freedom of thought, conscience and religion, and access to the media, as well as in the sphere of freedoms relating to language, education, transfrontier cooperation, and participation in economic, social and cultural life. Moreover, it prohibits forced assimilation.

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[19] General Comment to Article 27 does not comment on the right to profess and practise one's own religion; see instead General Comment No. 22, The right to freedom of thought, conscience and religion (Article 18).

[20] The Committee of Ministers is the Council of Europe's decision-making body. It consists of the Foreign Affairs Ministers of all the member States.

Several of the FCNM articles contain qualifying language such as "take appropriate measures to protect", "within the framework of their legal system", "as far as possible", etc. A rather emphatic qualification concerns the right to use a minority language (Article 10). Paragraph 2 states that, "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities."

Many provisions of the FCNM are already contained in the ECHR as individual rights, but the importance of these being included in the FCNM lies in that they concern rights to be enjoyed individually and in community with others. Thus, extra requirements are added to some rights (e.g. Article 9 on Freedom of Expression) in order to safeguard the right for minority groups.

Protection of Minority Languages

The European Charter for Regional or Minority Languages was adopted as a convention in June 1992 by the Committee of Ministers. It entered into force in March 1998. The Charter is a convention with the purpose both to protect and promote regional and minority languages in Europe and to enable speakers of a regional or minority language to use it in private and public life.

The Charter is not concerned with speakers of minority languages as such. It is focused on the languages themselves and covers regional and minority languages, non-territorial languages, and less widely used official languages. The Charter is aimed at languages 'traditionally used' within a State's territory. It only covers languages that have been spoken over a long period of time in the State in question. Hence it does not deal with languages connected with recent migratory movements or dialects of the official language.[21]

The Charter stresses the objectives and principles that the States Parties undertake to apply to all the regional or minority languages spoken within their territory: respect for the geographical area of each lan-

[21] The Charter Article 1(a)—Definitions, and the Explanatory Report, para. 31. According to the Explanatory Report, the period is "long", but it does not comment on the length of this period.

guage; the need for promotion; the facilitation and/or encouragement of the use of regional or minority languages in speech and writing, in public and private life.

Each State Party can pinpoint a minimum of thirty-five of the measures mentioned in the Charter, while not ignoring any of the major fields of protection of regional or minority languages: education, judicial authorities, administrative authorities and public services, media, cultural activities and facilities, economic and social life.[22] Moreover, upon ratification every State Party has to specify each regional or minority language, or official language which is less widely used in the whole or part of its territory, to which the provisions chosen shall apply.

This flexibility makes room for the major differences in the specific situations of each regional or minority language (number of speakers, degree of fragmentation, etc.). It also takes the costs of the provisions into consideration and the varying administrative and financial capacities of the European States.

Protection of Nationality

The European Convention on Nationality was adopted by the Committee of Ministers in 1997 and entered into force in March 2000.[23]

It is the States Parties' sovereign decision to define who their nationals are. Nevertheless, it is generally recognized that there is a need to cooperate and coordinate nationality laws in order to deal with such questions as acquisition of nationality, retention, loss, recovery, nationality in the context of State succession, and multiple nationality and its effects.

The aim of the Convention is, in particular, to avoid cases of statelessness. Among the essential principles behind the text, besides the prevention of statelessness, are non-discrimination and respect for the rights of persons habitually resident in the territories concerned.

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[22] Article 2(2) and the Charter's Explanatory Report, para. 41–44.

[23] See also the UN Convention on the Reduction of Statelessness, adopted 1961, entering into force 1975.

13.4. Permissible Limitations on Minority Rights

The Human Rights Committee has commented on the ICCPR's rules on States Parties' possibilities of derogation. The Committee finds that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the prohibition of discrimination in relation to derogation measures, as well as in the non-derogable nature of freedom of religion.[24]

The FCNM provides for the possibility of derogations from, or limitations and restrictions to its provisions. When the undertakings included in the Convention have an equivalent in other international legal instruments, in particular the ECHR, only the limitations, restrictions or derogations provided for in those instruments are allowed. When the undertakings contained in the Convention have no equivalent in other international legal instruments, the only limitations, restrictions or derogations allowed are those included in other legal instruments (such as the ECHR) that are relevant to the provisions in the Convention.[25] This means that limitations, restrictions, etc. are required, as a minimum, to be prescribed by law, to be proportionate to their aim, and to be necessary in a democratic society.

Other Limitations

The FCNM and other minority rights documents entail provisions guaranteeing the national sovereignty and territorial integrity of States. That is also the case as regards the European Charter for Regional or Minority Languages. Thus, the undertakings with respect to a regional or minority language that a member State to the Language Charter has initiated may not be used by another State with a special interest in the language in question, nor be invoked by the users of the language as a pretext for taking action that is harmful to the sovereignty and territorial integrity of the State.[26]

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[24] Para. 13(c) in General Comment No. 29, States of emergency (Article 4). CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[25] The Explanatory Report of the Framework Convention, para. 88.

[26] The Charter's explanatory report, para. 55. The principle of sovereignty and territorial integrity is also referred to in General Comment No. 23 to ICCPR Article 27, The rights of minorities, para. 3(1) and 2.

As regards implementation of the provisions concerning administrative authorities and economic and social life, the Charter adds the phrase: "as far as this is reasonably possible." This means that in the implementation of the relevant provisions, the States are allowed to determine in individual cases, whether there may be circumstances where it is not—or not yet—realistic to apply the provision totally and without reservation.[27] Another limitation lies in that the flexibility approach of the Charter leaves much choice to the member States.

13.5. Current Interpretation (Examples of European Court of Human Rights Case Law)

The ECHR contains general human rights, not specific minority rights. However, the particular importance of the Convention lies in the effective supervising body attached to it, namely the ECtHR. The ECtHR case law dealing with general human rights is also relevant to minorities.

In several cases where minorities have been involved, the ECtHR has specified the scope and limits of minorities' rights *vis-à-vis* the rights and obligations of States Parties. See the following three examples of cases.

Who Can Decide about Status as a National Minority?[28]

In a case brought before the ECtHR by three Polish nationals attempting with others to form an association called 'Union of People of Silesian Nationality', the Court decided that the Polish authorities were not obliged to register the association, as its name and programme seemed to claim the right for the members of the association to be recognized as a 'national minority', which would automatically give them unconditional and legally enforceable privileges under electoral law. The refusal of registration was intended to counteract specific, if only potential, abuse by the association of its status. The Court did not find in the refusal a denial of the distinctive ethnic and cultural identity of Sile-

[27] Articles 10(1) and 3, and 13(2); Explanatory Report, para. 104.

[28] Gorzelik and Others v. Poland. Appl. No. 44158/98, Judgment of 17 February 2004.

sians or a disregard for the association's primary aim, which was to "awaken and strengthen the national consciousness of Silesians."

The Court stated, furthermore, that the notion of 'national minority' was not defined in any international treaty, nor did the notion mean that States had to adopt a particular definition in their legislation or introduce a procedure for the official recognition of minority groups. It might also be undesirable to formulate rigid rules.

Language Demands on Representatives from Minority Groups[29]

In a case before the Court, a Latvian national of the Russian-speaking minority had been denied the right to run for the Parliamentary election as a candidate, after her failure to pass a test in the national Latvian language. The applicant claimed that her right to run in free elections, to an effective remedy before a national authority, and to non-discrimination had been violated.[30]

The Court found that requirements of an advanced degree of proficiency in the national language when running for election was a legitimate aim, namely to ensure the proper functioning of the country's institutional system. The choice of the working language of a national parliament was solely for the State concerned to determine. However, although the Latvian authorities had not contested the validity of the applicant's language certificate, the applicant had nonetheless been required to submit to further language examination. Moreover, the assessment had been left to the sole authority of a single official whose powers the Court found to be 'excessive'.

The Court concluded that the procedure followed in this case was incompatible with the requirements of fairness and legal certainty for determining eligibility for election. It unanimously held that her right to run in free elections had been violated.[31]

[29] Podkolzina v. Latvia. Appl. No. 46726/99, Judgment of 9 July 2002.

[30] Article 3 of Protocol No. 1 to the Convention, Articles 13 and 14.

[31] As to the Articles 13 and 14, the Court found it unnecessary to examine whether they had been violated as the complaints concerning these were essentially the same as that concerning Article 3 of Protocol No. 1.

Limitation to a State's Right to Counter Separatist Ideas

The applicant association, Ilinden, was founded in 1990 to unite Macedonians in Bulgaria on a regional and cultural basis and to achieve recognition of the Macedonian minority in Bulgaria. In 1991, the association was refused registration as the domestic courts found that its aims in actual fact were directed against the unity of the nation, that it advocated ethnic hatred and endangered the territorial integrity of Bulgaria. The applicants complained that their right to freedom of assembly had been violated.[32]

Having found that there was an interference with the applicants' right to peaceful assembly, the Court concentrated on whether or not that interference was necessary in a democratic society (cf. chapter 2, section *Limitations of Rights*).

The Court considered the grounds enumerated by the Bulgarian authorities to justify the ban, among these the question of dissemination of separatist ideas. The Court found it possible that clamours for autonomy or even secession would be broadcast by some participants. However, even a demand for fundamental constitutional and territorial changes could not automatically justify a prohibition of the organization's assemblies. Demanding territorial changes in speeches and demonstrations did not in itself amount to a threat to the country's territorial integrity and national security. The Court stressed that the essence of democracy was its capacity to resolve problems through open debate, and that preventive measures to suppress freedom of expression and assembly, other than in cases of incitement to violence or rejection of democratic principles, could be at threat to democracy. The Court concluded that the probability of separatist declarations did not justify the ban on Ilinden's meetings.

As for the argument that the organization's assembly offended public opinion, the Court noted that Ilinden's meetings generated a degree of tension touching on national symbols and national identity. This meant that the authorities had to be particularly watchful to ensure that national public opinion was not protected at the expense of minority views (the applicants had only about 3,000 supporters), no matter how unpopular these views might be. The Court concluded that there was no real, foreseeable risk of violent action, of incitement to violence, or

[32] Stankov and the United Macedonian Organization Ilinden v. Bulgaria, appls. No. 29225/95 and 29221/95, Judgment of 2 October 2001.

of ignoring democratic principles. Thus, the bans on the applicants' meetings were not justified.

13.6. Politically Binding Instruments

The politically binding nature of OSCE's decisions (cf. chapter 2, section *Politically Binding Instruments* (*OSCE Documents*)) enables the organization to act as a spearhead when new needs arise. For example, when human rights violations with regard to minorities increased at the beginning of the 1990s, the then CSCE drafted a comprehensive set of standards in the field of minority protection. Later, these political standards served as a basis for the legally binding FCNM; cf. the preamble to the Convention which explicitly refers to the CSCE Copenhagen Document of 29 June 1990.

At a meeting in 1990 on the 'human dimension' in international security policy, the participating States of the Conference on Security and Cooperation in Europe (CSCE, now OSCE) came to a decision on how to protect the rights of the national minorities in Europe. At the conclusion of the meeting, they signed the Copenhagen Document, an instrument which remains a very important source of OSCE commitments in the 'human dimension,' including human rights.[33]

The document emphasizes that respect for the rights of persons belonging to national minorities is an essential part of universally recognized human rights. In this connection, the document emphasizes the States' adherence to the central principles of non-discrimination and the free choice of belonging to, or not belonging to, a national minority.

13.7. Additional Sources (Soft Law)

In 1992, the General Assembly adopted **the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**. The Declaration is inspired by Article 27 of the International Covenant on Civil and Political Rights that provides general protection of minorities' rights. Unlike the ICCPR provi-

[33] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. http://www.osce.org/documents/odihr/1990/06/13992_en.pdf.

sion, the Declaration is not legally binding. Nevertheless, the Declaration is valuable as the only United Nations instrument that addresses the special rights of minorities in a separate UN document.

To the beneficiaries of Article 27 (ethnic, linguistic and religious minorities), the Declaration adds the term 'national'. In its substantive provisions, however, the Declaration does not distinguish between the different categories of minorities, but leaves the possibility of taking different needs into account in the interpretation and application of the various provisions.[34]

According to the Declaration, States shall actively protect and promote the possibilities for minorities to enjoy their culture, practise their religion, and speak their language in public and in private without interference or discrimination. The Declaration is, thus, more explicit than Article 27 of ICCPR in requiring positive action. It makes it clear that the enforcement of the rights often requires action, including protective measures and encouragement of conditions for the promotion of minorities' identity and specified, active measures by the State.[35] However, as mentioned above, the Human Rights Committee has interpreted Article 27 as requiring more than mere passive non-interference.

A new **United Nations Special Mechanism on Minorities** has been approved by consensus of the Commission on Human Rights in 2005 (on Special Mechanisms, cf. chapter 1, section *Box 7.*). The UN High Commissioner for Human Rights has appointed an independent expert on minority issues for a period of two years. Among other initiatives, the independent expert will engage in dialogue with governments and minorities worldwide to promote and protect minority rights and to promote the implementation of the Declaration.

According to Article 22 of **the Charter of Fundamental Rights of the European Union** (EU), the Union shall respect cultural, religious, and linguistic diversity. Respect for diversity is seen as essential for giving minorities access to the fundamental rights. The Charter contains substantial rights that are important for protecting minorities, including: respect for private and family life; protection of personal data; the right to marry and raise a family; freedom of thought, con-

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[34] Para. 6 and 7 in the Final Text of the Commentary to the Declaration. E/CN.4/Sub.2/AC.5/2005/2 http://daccessdds.un.org/doc/UNDOC/GEN/G05/133/85/PDF/G0513385.pdf?OpenElement.

[35] Para. 33 in the Commentary on Articles 1, 2 and 4.

science and religion; freedom of expression and information; freedom of assembly and association; the right to asylum; and protection in the event of removal, expulsion or extradition.

At present (autumn 2005), the Charter is not legally binding, but provided that all EU member States ratify the treaty establishing a Constitution for Europe, the Charter as incorporated in the Constitution will be legally binding.

13.8. Monitoring Mechanisms on Minority Rights

Non-discrimination and equality before the law are very important principles to be aware of when monitoring minorities' rights. That also applies to the so-called **mainstreaming** of minority rights, i.e. the awareness of how minorities are generally treated in law and practice. For instance, when an act is passed, the consequences for minority groups should be considered.

The Working Group on Minorities (UN)

The Working Group on Minorities, established in 1995, is a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights. The Working Group meets in Geneva once a year. The Working Group aims at being a forum for dialogue to seek better understanding and mutual respect among minorities and between minorities and Governments. It can also hear suggestions and make recommendations for the peaceful and constructive solution to problems involving minorities, through the promotion and protection of their rights.

The Advisory Committee of the Framework Convention (ACFC)

The ACFC evaluates the States Parties' implementation of the FCNM. The twelve to eighteen members of the Advisory Committee, appointed by the Committee of Ministers of the CoE, are recognized experts in the field of protection of minority groups. They serve in their individual capacity and must be independent and impartial.

The States Parties to the FCNM are required to submit reports every five years, containing full information on legislative and other measures effectuating the principles of the Convention.

The ACFC does not deal with individual complaints. Its competence is to examine the State reports, which are made public, and to prepare an opinion on the measures undertaken by the State in question. In delivering its opinion, the Committee has an article-to-article approach which means a rather thorough examination of the State Party's compliance with the provisions of the Convention. Having received the opinion of the ACFC, the Committee of Ministers shall make the final decisions ('conclusions') concerning the measures undertaken by the State Party. It may also adopt recommendations in that respect.

European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance (ECRI) is an independent human rights monitoring body under the CoE dealing with issues concerning racism and racial discrimination. Its activities are highly relevant to minorities. For instance, ECRI conducts research on the 46 member States' legal measures in the area of racism and intolerance. Another central undertaking of ECRI is its country-by-country approach, whereby it analyses the situation in relation to racism and intolerance in each of the member States and makes proposals on how to tackle the problems identified. There is a process of confidential dialogue with the national authorities of the country and meetings between the rapporteurs and representatives of national NGOs. ECRI also makes general policy recommendations.

The OSCE High Commissioner on National Minorities (HCNM)

The HCNM is an instrument 'on' minorities and not 'for' minorities, and it does not monitor minority rights. However, being an instrument of conflict prevention involving minorities implies a focus on minorities' integration in society and thereby also on protecting their rights.

The HCNM was established in 1992 as an instrument of conflict prevention. According to its mandate, the HCNM is independent, impartial and works in confidentiality, which is important for credibility and efficiency. His/her task is to identify and seek early resolution of tensions involving national minorities that in his/her view might endanger peace, stability, or friendly relations between the OSCE member States.

The mission of the High Commissioner is both to try to contain and de-escalate tensions and to be responsible for alerting the OSCE

whenever such tensions threaten to develop to a level where the means at the High Commissioner's disposal are not sufficient. In order to contain and de-escalate tensions, the High Commissioner engages in other undertakings such as on-site missions and recommendations to States. These may include changes in legislation, institutions, or policies towards national minorities, for instance education rights (Hague Rec. 1996), linguistic rights (Oslo Rec. 1998) and effective participation in public life (Lund Rec. 1999).[36] He/she also sets up programmes and projects, for instance programmes aiming at integrating a minority into the mainstream of a country's public life. Or he/she makes statements, e.g. concerning certain laws that might endanger the legal status of persons belonging to national minorities.

In general, the HCNM's mandate contains guidelines for determining which areas and situations he/she may interfere in. The mandate does not permit the Commissioner to consider national minority issues in situations involving organized acts of terrorism, nor to communicate with or acknowledge communications from any person or organization that practices or publicly condones terrorism or violence.

Individual cases concerning persons belonging to national minorities are explicitly excluded from the HCNM's mandate. However, the office is open to receiving information on the situation of national minorities from different sources.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR)

The OSCE has conflict prevention as a very important field of work. In that respect, the organization does not deal exclusively with issues of military security, disarmament, or border issues. Based on a broad conception of security, it deals equally with human rights. Security has a 'human dimension' of which human rights, including minority rights, are an essential element. ODIHR, based in Warsaw, is the principal institution of the OSCE responsible for the human dimension. The term 'human dimension' encompasses for instance human rights and fundamental freedoms, democracy, tolerance, and the rule of law, as well as national minorities. ODIHR's mandate includes assisting partic-

[36] The Hague Recommendations Regarding the Education Rights of National Minorities (1996); The Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998); The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999).

ipating States in building democratic institutions and in implementing their human dimension commitments.

Monitoring Roma Rights

The ODIHR Contact Point for Roma and Sinti Issues aims to promote the full integration of Roma and Sinti communities into the societies in which they live. ODIHR addresses these issues either directly through its programmes or by promoting the establishment of institutional frameworks at local and national levels designed to advise governments and administrations on policy-making on Roma and Sinti affairs. In doing so, the Contact Point co-ordinates closely with other international organizations and NGOs and seeks to involve Roma and Sinti in all its activities. The main priorities of ODIHR concerning Roma and Sinti issues are political participation, discrimination and racial violence, and education.

The situation of Roma is also a major concern for the CoE European Commission against Racism and Intolerance (ECRI). Its General Policy Recommendation No. 3: Combating racism and intolerance against Roma/Gypsies (adopted 1998) sets the goals that must be achieved in order to put an end to all discrimination against Roma/Gypsy communities, as well as the measures necessary to promote respect for their rights and participation in national life.

The European Monitoring Centre on Racism and Xenophobia

The task of the European Monitoring Centre on Racism and Xenophobia (EUMC) under the EU is primarily to provide the EU and its member States with objective, reliable, and comparable information and data on racism, xenophobia, Islamophobia, and anti-Semitism at the European level and in the member States. On the basis of the data collected, the EUMC studies the extent and development of the phenomena and manifestations of racism and xenophobia, and analyses their causes and effects. The European Information Network on Racism and Xenophobia (RAXEN) collects data and information at national as well as at the European level.

Following a decision made by the Heads of State and Government of the member States of the EU to establish a European Union Agency for Fundamental Rights, the mandate of the EUMC is planned to be extended and converted into a Fundamental Rights Agency. The

Agency will begin its work on 1 January 2007. The Fundamental Rights Agency is intended to be an independent centre of expertise on fundamental rights issues through data collection, analysis and networking, which currently does not exist at the European Union level. It will advise the Union institutions and the member States on how best to prepare or implement fundamental rights related to European Union legislation.

The Charter of Fundamental Rights is the point of reference for the mandate of the Agency. The Agency will be in charge of the general promotion of the Charter and on the awareness-raising work concerning fundamental rights. The Agency shall have no powers to examine individual complaints or to make regulations.

National Implementation Mechanisms

The National Human Rights Institutions (NHRIs) are pivotal organizations aiming at getting international rights, including minority rights, converted to national rights. Among the NHRI responsibilities are efforts to combat all forms of discrimination by increasing public awareness, for instance through information and education. Not least, an NHRI may be authorized to hear and consider complaints and petitions concerning individual situations.[37]

Also of keen importance to the national implementation of international human rights or in making them effective are parliamentary and minority ombudsman institutions, protecting human rights and proper administration and justice. Daily, the staff members of ombudsman institutions are confronted with human rights related issues faced by the public, among these minority issues. By virtue of this, they play a significant role in educating the administration and citizenry about human and minority rights. In promoting good practices in minority governance, they contribute to the advancement of minority rights standards; they monitor and correct governmental and administrative conduct in relation to non-dominant groups; and they provide an informal remedy in cases of individual complaints.[38]

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[37] Annex to Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (the UN "Paris Principles") and additional principles concerning the status of commissions with quasi-jurisdictional competence.

[38] See "Ombudspersons and minority issues", a site on ECMI's homepage, the last link referred to under Electronic resources.

13.9. Monitoring Checklist on the Rights of Minority Groups

Checklist – Rights of Minority Groups

1. Legislation and Regulation Check
   - Which relevant international human rights instruments has the State ratified, and what reservations were made upon ratification?
   - Which relevant national legislation and regulations exist? Concerning: Enjoyment of culture, own language, freedom of religion and practicing religion, the area of participation in elections, peaceful assembly and association, opinion and expression, education and training, the field of employment, of housing, social welfare, health care, condition and procedures of acquisition of citizenship, protection against discrimination and hate speech (see also chapter 14)
   - Is the aim of national legislation and regulations consistent with recognized human rights principles?
   - Is the legislation and regulations clear and specific (predictable) or is it vague and permissive of a wide range of discretion?
   - Which legislation and regulations exist relating to prevention and protection against terrorism and/or other emergencies that affect minorities' rights?

2. Monitoring the Right in Practice
   - Which possibilities of complaint of violations of rights related to minorities exist at the national level?
   - Is the access to complaint known and easily available?
   - Has the State accepted the possibility of complaints related to some of the UN human rights treaty bodies? (The European Court of Human Rights is available for persons and groups of persons residing in the CoE member States)
   - Are minority related NGOs and other minority related organizations secured a hearing during the process of legislation and regulations?

13.10. Instruments on the Rights of Minorities

Relevant Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 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."	Human Rights Committee General Comment No. 23, 1994

Council of Europe (CoE) Instruments

Framework Convention for the Protection of National Minorities, 1995 (ETS No. 157)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	This Convention is the leading international instrument regarding the rights of national minorities. Article 3 states that every person belonging to a national minority shall have the right freely to choose whether to be treated as such or not and no disadvantage shall result from this choice. Articles 4–19 are the Convention's substantive provisions. Article 4 guarantees national minorities equality before the law and equal protection of the law. States must help national minorities to maintain and develop their culture and to preserve essential elements of their identity, i.e. religion, language, traditions, cultural heritage; States must refrain from practices/policies aimed at assimilation (Article 5). Parties must protect persons from threats and violence related to their ethnic, cultural, linguistic, or religious identity	Advisory Committee on the Framework Convention for the Protection of National Minorities Explanatory Report to the Framework Convention for the Protection of National Minorities

(Article 6) and ensure their freedom of peaceful assembly, of association, of expression, and of thought, conscience, and religion (Article 7), and recognize national minorities' rights to manifest religion or belief (Article 8). Article 9 states that national minorities have freedom to hold opinions and receive/impart information in the minority language; Parties may require the licensing of radio/TV/cinema enterprises; Parties shall not hinder the creation and use of printed media by national minorities. National minorities have the right to freely use their language, and if needs be, States Parties must ensure the possibility for these people to use their language in relations with administrative authorities. In the case of arrest, accusation or legal defence, Parties shall guarantee the use of a language the person understands (Article 10). Parties must recognize the right to use surnames and first names in the minority language, the right to official recognition of these, the right to display publicly visible information in the minority language, and allow the display of local names in areas inhabited by national minorities (Article 11). In education, measures be taken to foster knowledge of national minorities; equal access to education must be promoted (Article 12), and national minorities' right to set up their own educational/training establishments shall be recognized, but not entail any financial obligation for the Parties (Article 13). National minorities have the right to be taught in their language and as far as possible be given opportunities for being taught their language (Article 14). Parties shall create conditions necessary for the effective participation of national minorities in cultural, social and economic life and in public affairs, in particular those affecting them (Article 15). Parties must not alter the proportions of the population in areas where national minorities live (Article 16), and must not interfere with these peoples' right to have cross-frontier contacts or to participate in the activities of national/international NGOs (Article 17), and Parties shall endeavour to conclude bi-/multi-lateral agreements with other States to ensure the protection of persons belonging to national minorities (Article 18).

	Articles 20–22 are general provisions on interpretation in relation to other international legal standards. The remaining Articles 24–32 are technical of nature, regarding implementation, monitoring, and ratification of the Convention.	

European Convention on Nationality, 1997- (ETS No. 166)

Entirety	Articles 1–2: General matter (Object of the Convention; Definitions); Articles 3–5: General principles relating to nationality (Competence of the State; Principles; Non-discrimination). Articles 6–9: Rules relating to nationality (Acquisition of nationality; Loss of nationality *ex lege* or at the initiative of a State Party; Loss of nationality at the initiative of the individual; Recovery of nationality). Articles 10–13: Procedures relating to nationality (Processing of applications; Decisions; Right to a review; Fees). Articles 14–17: Multiple nationalities (Cases of multiple nationality or *ex lege*; Other possible cases of multiple nationality; Conservation of previous nationality; Rights and duties related to multiple nationality). Articles 18–20: State succession and nationality (Principles; Settlement by international agreement; Principles concerning non-nationals). Articles 21–22: Military obligations in cases of multiple nationalities (Fulfilment of military obligations; Exemption from military obligations or alternative civil service). Articles 23–24: Co-operation between States Parties (Co-operation between States Parties; Exchange of information). Articles 25–26: Application of the Convention (Declarations concerning the application of the Convention; Effects of the Convention). Articles 27–32: Final clauses (Signature and entry into force; Accession; Reservations; Territorial application; Denunciation; Notifications by the Secretary General).	Explanatory Report to the European Convention on Nationality

European Charter for Regional or Minority Languages, 1992 (ETS No. 148)

Entirety	Articles 1–6: General Provisions (Definitions; Undertakings; Practical Arrangements; Existing regimes of protection; Existing obligations; Information). Article 7 (Part II): Objectives and principles pursued in accordance with Article 2, §1 (which reads, "Each party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definitions in Article 1"). Article 8–14: Measures to promote the use of regional or minority languages in public life (Education; Judicial authorities; Administrative authorities and public services; Media; Cultural activities and facilities; Economic and social life; Trans-frontier exchanges) in accordance with the undertakings elaborated under Article 2, §2. Articles 15–17: Application of the Charter (Periodical reports; Examination of the reports; Committee of experts). Articles 18–23: Final Provisions.	Committee of Independent Experts. Explanatory Report to the European Charter for Regional or Minority Languages.

CSCE/OSCE Instruments

OSCE Instruments

The CSCE (OSCE) Copenhagen Document, 1990

Section	Critical Substantive Points
Paragraphs 30–39	These articles deal with the protection of human rights and fundamental freedoms, including equality of opportunity and non-discrimination of national minorities (Articles 31, 32, 35–39); national minorities' effective participation in public and political life (Article 35); national minorities' cultural, linguistic, and religious identity, and education (Articles 32–35); human contacts, free media and information (Article 32); and the role of organizations and associations (Articles 30 and 32). Article 32 states that to belong to a national minority is a matter of a person's individual choice and that no disadvantage may arise from the exercise of such choice.

Paragraph 40	Deals with racism and discrimination and the combating of racism and stereotypes, recognizing the particular problems of Roma.

Other International Instruments

UN Instruments

UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1992

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Entirety	Article 1: States shall protect the identities of national or ethnic, cultural, religious and linguistic minorities and encourage conditions for the promotion thereof, and adopt legal/other measures to these ends. Article 2: Minorities' rights to enjoy own culture, profess and practise own religion, and freely use own language; have the right to participate effectively in cultural, religious, social, economic and public life; 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; establish and maintain their own associations, as well as free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers. Article 3: Minorities may exercise their rights individually as well as in community with other members of their group, and no disadvantage shall result from that.	Final Commentary on the Declaration by the UN Working Group on Minorities, 2005.

Article 4: States shall take measures where required to ensure that persons belonging to minorities may exercise all their human rights and fundamental freedoms without discrimination; States shall take measures to create favourable conditions to enable persons belonging to minorities to express and develop their characteristics, and take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn or have instruction in their mother tongue. States should, where appropriate, take measures in the field of education, to encourage knowledge of the characteristics of national minorities existing, and persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole. States should consider appropriate measures for minorities' full participation in the country's economic progress and development.

Article 5: National policies and programmes, and programmes of cooperation and assistance among States shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6–7: States should cooperate on questions related to persons belonging to minorities in order to promote respect for the rights set forth in the Declaration.

Article 8: General provisions on interpretation in relation to other international legal standards.

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The book opens ECMI's Handbook Series on minority issues. It offers a comprehensive overview of the issue of minorities in international law (legal protection and jurisprudence) with a focus on developments following the end of the Cold War.

Ruiz Vieytez, E.J., *Working Together: NGOs and regional or minority languages* (Strasbourg: Council of Europe, 2004).
A small handbook on the Charter for Regional and Minority Languages in Europe.

United Nations, *United Nations Guide for Minorities*. (2001).

http://www.ohchr.org/english/issues/minorities/guide.htm
The purpose of the Guide is to assist minorities in understanding how to seek protection of their rights through the different procedures existing at the international and regional levels. The guide also gives practical advice on how to take legal action where members of minorities consider their rights under a particular treaty to have been violated. The contents of the guide are the text of the UN Minority Declaration and the final text of the commentary to the declaration and, besides, pamphlets covering UN and regional mechanisms concerning minorities. A coming pamphlet is about minorities and National Human Rights Institutions.

Electronic Resources

Council of Europe

http://www. CoE.int/T/E/human_rights/minorities/
Secretariat of the Framework Convention for the Protection of National Minorities. The Convention, monitoring results country by country: country reports, opinions of the Advisory Committee, resolutions adopted by the Committee of Ministers, publications, links.

http://www.CoE.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/
European Charter for Regional or Minority Languages. Contains information about the Charter, monitoring the Charter and the Committee of Experts. Besides: Texts about the Charter and about monitoring mechanisms: Country reports, the Committee of Experts' evaluations and the Committee of Ministers' recommendations.

http://www.CoE.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Nationality/
On nationality. Among other resources: The Convention on Nationality, the Expert Committee, CoE Conferences on Nationality, a draft protocol on the avoidance of statelessness in relation to State succession and an explanatory report to the draft protocol, other documents, links.

http://www.coe.int/T/E/human_rights/Ecri/
The European Commission on Racism and Intolerance (ECRI). Contains, for instance, educational resources; among these a European Passport against Intolerance; and Domino, a manual to use peer group education as a means to fight racism, xenophobia, and anti-Semitism and intolerance. Further: publications, such as reports on CoE member States, ECRI's general policy recommendations, etc.

http://www.errc.org/Judgements index.php

http://www.errc.org/Databases_index.php
European Roma Rights Centre. Contains important cases, decisions and judgements involving human rights violations of Roma delivered by the ECtHR and by UN Treaty Bodies, such as the Committee on the Elimination of Racial Discrimination, monitoring the Convention on the Elimination of All Forms of Racial Discrimination. For further information, see the CoE site on Roma and Travellers/Jurisprudence on Roma: http://www.coe.int/T/DG3/RomaTravellers/jurisprudence/echr_en.asp

EU

http://www.eumc.eu.int/eumc/index.php
European Monitoring Centre on Xenophobia and Racism (EUMC). EUMC's annual and thematic reports about the situation in different areas concerning xenophobia and racism in the EU member States. Further: a link to RAXEN (European Racism and Xenophobia Information Network) containing National Focal Points, i.e. the national coordinators for reporting to the EUMC. For information about the coming Agency for Fundamental Rights, cf.:

http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=41f60ebfde76f

OSCE

http://www.osce.org/hcnm/
High Commissioner on National Minorities. The Mandate, the High Commissioner's activities, recommendations, speeches concerning some minority key issues, such as language and integration.

http://www.osce.org/odihr/13369.html
Office for Democratic Institutions and Human Rights/Roma and Sinti (ODIHR). Information about ODIHR's activities on Roma and Sinti issues. Links to ODIHR's main issues concerning Roma and Sinti, information about the ODIHR Contact Point for Roma and Sinti Issues, legislation related to Roma and Sinti issues, etc.

The United Nations

http://www.ohchr.org/english/issues/minorities/index.htm
Office of the United Nations Office of the High Commissioner for Human Rights—Minorities. Contains links to the newly established Independent Expert on Minorities Issues, the Working Group on Minorities, Training Workshop for Minorities, Documents, Guide Publications, Declaration on the Rights of Minorities, Commentary on the Declaration, Minorities and National Institutions.

http://www.ohchr.org/english/issues/minorities/group/main.htm
Working Group on Minorities. The site contains reports, conclusions and recommendations, working papers, statements.

http://www.ohchr.org/english/issues/minorities/expert/index.htm
The Independent Expert on Minority Issues

Other

http://www.ecmi.de/
The European Centre for Minority Issues (ECMI). The homepage contains, among other resources, a Framework Convention Database covering the State reports submitted under the Convention's monitoring mechanisms, and another database covering NGO parallel or 'shadow' reports. Further: an ethnopolitical map of Europe that is an ongoing project intended to cover those regions in Europe which are currently facing or have recently experienced ethnopolitical tension or conflict.

http://www.eurac.edu/Org/Minorities/IMR/index.htm
The Institute for Minority Rights (IMR). IMR, attached to the European Academy in Bolzano, formulates problems, such as: How can cultural, linguistic and religious rights be applied to the relationship between majority and minority groups at the national and international levels? And: How can general socio-political acceptance be achieved and xenophobia combated?

http://www.minelres.lv/
MINELRES. Minority Electronic Resources. Directory of resources on minority human rights and related problems of the transition period in Eastern and Central Europe. Although it seems as if the homepage is not kept up to date and, consequently, several links do not function, it can, nevertheless, be a rather useful homepage which, among other resources, contains links to information about minorities, about relatively recent legislation in countries in Eastern and Central Europe, international organizations, human rights resources, NGOs and research organizations.

CHAPTER 14

THE RIGHT TO NON-DISCRIMINATION

14.1. Definitions

The principles of equality and non-discrimination are closely interlinked concepts that are fundamental to international human rights law. These concepts have translated into legal standards. The right to equality before the law and the related right to equal protection of the law are both aspects of the right to non-discrimination. The principle of equality requires that equal situations are treated equally and that different situations are dealt with differently.

The principles of equality and non-discrimination encompass both *de facto* (substantive) and *de jure* (formal) equality. These two concepts are different but interconnected. Formal equality assumes that equality is achieved if a law or policy treats all groups of persons in a neutral manner. Substantive equality is about the effects of laws, policies, and practices. Substantive equality is concerned with ensuring that inherent disadvantages that particular groups experience are alleviated.

However, it must be stressed that not all sorts of difference of treatment is discriminatory. If a law differentiates on the basis of objective and reasonable criteria, it does not amount to discrimination. Nevertheless, a law or policy that was originally considered reasonable might become discriminatory over time because of changing social values or changing situations within a given society.

Equality before the law denotes the obligation to apply the law equitably, consistently, and objectively to all persons. This implies equal application of the law to persons in similar/comparable circumstances and is in essence a formal requirement that binds judges and other legal administrators in their administration and enforcement of the law. To the extent that this obligation applies to judges, it reflects the rights of persons to equality before the courts (cf. chapter 6 A).

The **right to equal protection of the law** may have more substantive implications requiring material/substantive equality through equal distribution of rights and benefits. This obliges the legislative

branch of government to formulate national law in general terms applicable to every human being.

The **right to non-discrimination** can be defined through its obverse concept—that of discrimination. Discrimination may be described as a less favourable treatment of a person or group of people compared to others in a similar situation which is not founded on objective criteria and is without reasonable justification.

Discrimination should be understood as any distinction, exclusion, restriction, or preference based on unjustified grounds with the purpose or effect of nullifying or impairing a person's recognition, enjoyment, or exercise of human rights and fundamental freedoms on an equal footing with others. A more specific definition of discrimination may be found in the specialized international conventions on the elimination of discrimination.

Unjustified and hence illegal grounds for discrimination include race, colour, sex, political or other opinion, national or social origin, property, birth, or any other status. Different legal instruments use different lists of grounds on which discrimination is prohibited. However, the lists are generally not exhaustive; as demonstrated by the words 'unjustified and illegal grounds' and 'other status'. This is further discussed below.

Direct and Indirect Discrimination

Direct discrimination means differential treatment of persons in comparable situations without a reasonable and objective justification, applicable to discriminatory treatment that does not pursue a legitimate aim or lacks a proportionate relationship between the means used and the aim pursued. A law or policy that gives differential treatment to particular groups of persons on the basis of unlawful criteria such as race, colour, ethnicity, etc. is directly discriminatory if it cannot be justified objectively. Furthermore, direct discrimination may also occur through the actions of private individuals. For example, the refusal of a shop owner to hire suitably qualified people as shop assistants simply because they are of a particular racial or ethnic origin amounts to direct discrimination.

The term **indirect discrimination** implies a practice, rule, or policy that appears to be neutral, but has a disproportionate impact on a particular group. The purpose of the practice or rule may not seem reproachable, but in practice its effect is discriminatory with regard to a group of people. However, the negative effect of the rule

must have a disproportionate impact on persons belonging to a specific sex, race, ethnic group, etc. Furthermore, the impact does not amount to discrimination if the rule or practice is based on objective and reasonable grounds.

Indirect discrimination may manifest itself in different ways: Firstly, as mentioned above, when a neutral measure creates a disadvantage for members of a particular category of persons without reasonable and objective justification. Secondly, where the application of a general rule has failed to treat differently a person or group of people, living under significantly different conditions compared to other persons, which are treated in the same manner.

Positive Measures and Affirmative Action

Positive measures denotes the granting of preferential treatment to a group of people while the majority may not benefit from this more advantageous position, which may thus be perceived by members of the majority as discrimination.

One example of positive discrimination is the adoption of quotas for particular groups in legislative and other public or political bodies.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) require that special measures involving unequal or separate standards for different groups be discontinued once the objectives of *de facto* equality of opportunity and treatment are reached.[1]

Where historical and entrenched disadvantages have negatively affected the equal enjoyment of human rights by one group of people, positive measures or **affirmative action** may be necessary to improve the status of disadvantaged groups. International law recognizes that positive measures are not discriminatory, as long as they have an objective and reasonable justification. Such measures are not necessarily discriminatory in relation to a dominant group, even though they often grant more favourable rights or treatment to the historically disadvantaged group. One example of affirmative action that is not discriminatory against a dominant group is the establishment of special facilities to assist disabled persons, such as ramps, etc.

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[1] ICERD Article 2(2), CEDAW Article 4.

Affirmative action is acceptable when it seeks to correct factual discrimination. Yet the granting or implementation of special measures must not discriminate between comparable disadvantaged groups.

Victimization

Victims of discrimination seeking redress may face various negative consequences as a result. In order to avoid that victims of discrimination are punished a second time, measures protecting individuals from any adverse treatment or consequences as a reaction to a complaint should be provided.

14.2. Legally Binding Standards

General Non-Discrimination Provisions

Non-discrimination clauses may be found in numerous international human rights instruments. The two United Nations (UN) covenants both include general non-discrimination provisions prohibiting discrimination in relation to the rights protected by the covenant. The International Covenant on Civil and Political Rights (ICCPR) contains several provisions relating to the principle of equality and non-discrimination. Article 2(1) bans discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" with regard to the protection and enjoyment of the rights set forward in the Covenant. The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a parallel provision in Article 2(2). The provision imposes an immediate obligation on States not to discriminate with regard to economic, social, and cultural rights. Both covenants contain an identical Article 3, establishing equal rights for men and women (cf. chapter 15).

In Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) a corresponding provision contains a similar list of prohibited grounds, incorporating 'association with a national minority' as an additional ground. Article 14 only applies when one of the substantive provisions of the Convention is invoked and applicable to the case at hand.

Specialized Treaties Protecting Against Discrimination

The earliest international and legally binding definition of discrimination may be found in the International Convention on the Elimination of Racial Discrimination (ICERD), Article 1(1). It is also reflected in the Convention on the Elimination of Discrimination against Women (CEDAW), Article 1.

Both instruments use terminology similar to the definition of discrimination set out above, although their field of application is very different. ICERD applies to discrimination on the grounds of race, colour, descent, or national or ethnic origin, whereas CEDAW focuses on gender-based discrimination (cf. chapter 15). Discrimination on the basis of national or ethnic origin is specifically dealt with in Chapter 13 and will therefore not be discussed extensively here.

It should be noted that religion and citizenship are not referred to as grounds for discrimination in the wording of ICERD. However, the Committee on the Elimination of Racial Discrimination (CERD) has developed a firm interpretation of the Convention that includes religious discrimination—recognizing that ethnicity, religion and culture are interwoven in the self-perception of the victims as well as in the perception of the violators. Religious groups not characterized by a common culture and ethnicity are not covered by ICERD.

The ICERD also prohibits discrimination on the basis of 'descent'. The Committee on the Elimination of Racial Discrimination (CERD) has explained that descent includes "discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status". Descent may be covered by the reference to birth in ICCPR and ECHR.

ICERD Article 1(2) provides for the possibility of differentiating between citizens and non-citizens in relation to certain rights. However, CERD has clarified that the provisions must be understood in a way that does not undermine the basic prohibition of discrimination. It should therefore not be interpreted as detracting in any way from the rights and freedoms recognized in the Universal Declaration of Human Rights, the ICCPR, or ICESCR. Equality between citizens and non-citizens in the enjoyment of human rights must therefore be ensured to the extent recognized under international law.

The ICERD also obliges States to prohibit and eliminate racial discrimination and guarantee the right to equality before the law in

the enjoyment of all human rights.[2] While some of these rights, such as the right to participate in elections, to vote, and to run for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all people.

The Convention on the Rights of the Child is limited in its scope to persons below the age of 18. It contains an obligation to safeguard the rights contained in the Convention without discrimination on enumerated grounds identical to those of the two covenants, but also specifically including disability.[3] Notably, children may not suffer discrimination because of the status of their parents or legal guardians.

Moreover, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW) lists age and economic position as prohibited grounds for discrimination, in addition to the list contained in the two covenants.[4]

The Council of Europe Framework Convention for the Protection of National Minorities extends specific and comprehensive protection to the rights of national minorities beyond the right to non-discrimination in Article 14 of the ECHR (cf. chapter 13). The provision protects the rights of national minorities to equality before the law and equal protection of the law.[5] It requires that discrimination based on a person's belonging to a national minority be prohibited and that all necessary steps, including positive measures, be taken to ensure equal treatment of such persons. Specifically, it is required that measures be taken to protect persons at risk of suffering threats of discrimination or violence because of their ethnic, cultural, linguistic, or religious identity.[6] While the Framework Convention does not contain a definition of a national minority, persons defined by the State as belonging to such a minority are free to choose whether they want to be treated as such or not.

The Council of Europe Convention on Human Rights and Biomedicine aims at protecting the rights of individuals in relation to

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[2] ICERD Article 5.

[3] Convention on the Rights of the Child, Article 2.

[4] Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 1 and 7.

[5] Council of Europe Framework Convention for the Protection of National Minorities, Article 4.

[6] Ibid., Article 6.

the fields of biology and medicine. It contains a clause prohibiting discrimination on the basis of genetic inheritance.[7]

The United Nation's Educational, Scientific, and Cultural Organization's (UNESCO) Convention against Discrimination in Education[8] contains a definition of discrimination that is specific to the educational field. It states that certain policies that result in maintaining separate educational systems for the two sexes or for religious or linguistic groups are not discriminatory if certain requirements are respected.[9]

A similar definition of discrimination is also contained in the International Labour Organization's Discrimination (Employment and Occupation) Convention.[10] The definition includes 'national extraction' in combination with social origin in the exhaustive list of grounds of discrimination, encompassing race, colour, sex, religion, and political opinion. Linguistically, national extraction should be understood as national origin. Yet other grounds may be included as the definition is broadened to comprise other distinctions, exclusions, or preferences that impair equality of opportunity or of treatment in employment or occupation.

Within the European Union (EU), several important directives have been adopted providing further clarification of the concept of discrimination. The directive implementing the principle of equal treatment of people irrespective of racial or ethnic origin contains a definition of the concepts of direct and indirect discrimination. Notably, it does not cover discrimination on the basis of nationality.

The EU provisions can be invoked by any resident of an EU member State before the European Court of Justice. Decisions from the Court offer concrete interpretations of the non-discrimination clause.

Box 14.1. Concept of Discrimination

Article 2 of EU Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

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[7] Council of Europe Convention on Human Rights and Biomedicine, Article 11. The Convention has been ratified by 19 States as of 23 October 2005.

[8] UNESCO, Convention against Discrimination in Education, Article 1(1).

[9] Ibid., Article 2.

[10] ILO, Discrimination (Employment and Occupation) Convention, Article 1(a).

2. For the purposes of para. 1:

a. direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
b. indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

General Prohibitions of Discrimination

Additional Protocol 12 to ECHR introduces a general prohibition of discrimination on grounds identical to those mentioned in Article 14. The Protocol entered into force on 1 March 2005.[11] Its scope extends beyond that of Article 14. While Article 14 is limited to protection against discrimination in relation to the rights encompassed in the Convention, Protocol 12 provides general protection against discrimination in national law, in the authorities' exercise of discretionary powers and in any act or omission by public authorities.

ICCPR Article 26 reflects the principle of equality before the law and equal protection of the law. The provision is much broader in scope than Article 2(1) or Article 14 of ECHR. It stipulates that discrimination must be prohibited in national law and that equal treatment must be ensured. This also implies an obligation resting on national authorities not to adopt legislation that is discriminatory. The provision is not restricted to the rights contained in the Covenant; it is comparable to additional protocol 12 as it prohibits discrimination in law or in fact within any field regulated and protected by public authorities and is not confined to the scope of the rights encompassed by the Covenant, but is also applicable in relation to economic, social, and cultural rights.[12]

Box 14.2. ICCPR Article 26

All persons are equal before the law and are entitled without any discrimination to 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.

[11] Protocol 12 has been ratified by 11 States as of 23 October 2005.
[12] *Broeks v. NL*, Human Rights Committee, 172/84.

Nevertheless, while obligations under Article 26 to protect individuals against discrimination may extend to the quasi-public sphere, ECHR protocol 12 may be presumed to contain a more limited positive obligation imposed on the State. Article 1(2) of protocol 12 only applies in relation to the public sphere and the acts and omissions of administrative authorities, courts, and the legislature. The State has a duty under ICCPR Article 26 to regulate discrimination by private actors in quasi-public areas such as employment, housing, and access to publicly available goods and services. However, the State is not required to provide such regulation in the private or personal sphere. Be that as it may, egregious discrimination or human rights abuses within the personal sphere must nonetheless be prohibited.

14.3. Permissible Limitations

As mentioned earlier, not all differential treatment is considered discriminatory. If a law differentiates on the basis of objective and reasonable criteria, it does not amount to discrimination.

The ICERD provides that the Convention does not apply to distinctions, exclusions and restrictions made between citizens and non-citizens.[13] Nonetheless, the Committee on the Elimination of Racial Discrimination (CERD) has clarified that the provision should be understood in a manner that does not undermine the basic prohibition of discrimination. It is recognized by the Committee that the rights of non-citizens to participate in elections, to vote, and to run for election may be restricted. However, human rights are in principle to be enjoyed by all people. If differentiation is made between citizens and non-citizens in relation to benefiting from certain human rights, it must be based on a legitimate aim and be proportionate to the achievement of this aim.

Elements of the right to non-discrimination may not be derogated from under the ICCPR (on the concept of non-discrimination, cf. chapter 2). Thus, derogation measures adopted in times of emergency may not discriminate solely on the basis of race, colour, sex, language, religion, or social origin.[14] The list does not include the same grounds for discrimination that are used in the provision on non-discrimination of

[13] ICERD, Article 1(2).
[14] ICCPR Article 4(1).

ICCPR and it seems to be exhaustive. Emergency laws may consequently discriminate on the grounds of, say, national origin and political opinion.

Under ECHR, derogations are permitted to the extent that they respect other international obligations the State may have.[15] This implies that the measures taken must comply with other treaty obligations and respect customary international law. Considering that the principle of non-discrimination is accepted as part of customary international law, emergency measures under ECHR must not be discriminatory. Furthermore, Article 14 is applicable even if the relevant substantive provision has been derogated from in accordance with Article 15. The provision states that in times of war or public emergency threatening the life of the nation, derogating measures may be taken to the extent strictly required by the situation as long as they comply with international law. Furthermore, the Secretary General of the CoE must be kept apprised of the measures taken.[16]

14.4. Current Interpretation (Key Case Law)

Case law that provides insight into the understanding of the right to non-discrimination has emerged mainly from the European Court of Human Rights (ECtHR), the UN Human Rights Committee, and the UN Committee on the Elimination of Racial Discrimination.

Prohibited Grounds of Discrimination

As mentioned above, the lists of prohibited grounds of discrimination in the different instruments are not exhaustive. While some of the grounds of discrimination may overlap, it is not an easy task to define the precise content and scope of each and every one of them.

In a number of areas, the treaty monitoring bodies and the ECtHR have accepted that there are strict requirements to the justifications for differential treatment. These areas are gender (cf. chapter 15), race, illegitimacy, nationality, religion, and sexual orientation, discussed below.

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[15] ECHR Article 15; cf. also Article 53.
[16] *Ireland v. UK*, 18 January 1978, para. 225.

Some of the grounds for discrimination have been the subject of particularly minute debate as to their precise meaning. For example, the 'any other status' category in ICCPR is not explained further and the Human Rights Committee has preferred to elaborate on its content and scope on a case-by-case basis. In practice, however, the following characteristics have been accepted as 'other status': age, nationality, marital status, pregnancy, HIV/AIDS infection, disability, distinction between employed and unemployed persons, and between biological and foster children.

In certain cases, discrimination on the basis of race or ethnic origin, gender, religion, and sexual orientation may be so severe in nature that it constitutes degrading treatment violating basic human rights principles. Adversarial treatment of a particular group of people that violates the notion of respect for human dignity and debases its victims may amount to degrading treatment. For example, a group of people subject to severe and harsh living conditions because of their ethnic origin may be victims of degrading treatment (cf. also chapter 4).

Equal or Different Situations—Equal or Different Treatment

In order to assess whether a person has been subjected to discrimination, it is first of all necessary to examine whether the person has been subjected to treatment different from that applied to other people in similar situations. This requires the identification or definition of the people who are treated differently and involves a consideration as to whether their situations are comparable or similar. This is in no manner an easy task since there are no clear guidelines as to what situations are relevantly similar or significantly different. Even similar situations often have elements that are very different.

A primary question to ask is whether the person claiming to suffer discrimination has been treated less favourably than other individuals or groups in a similar, relevant situation; for the reasons mentioned in the non-discrimination clause. The ECtHR has ruled that persons who have received recognition in Ireland of a divorce obtained abroad are not in a relevantly similar situation to persons living in Ireland who could not divorce.[17] Yet even a seemingly neutral provision may be

[17] *Johnston v. United Kingdom*, 18 December 1986.

discriminatory, if it has a disproportionate impact on a specific group, as mentioned above.

Moreover, equal treatment of persons in significantly different situations may violate the principle of non-discrimination. In a recent case, a Jehovah's Witness was excluded from entering the profession of chartered accountant because he had been convicted of refusing to serve in the armed forces. The ECtHR recognized that the failure to treat him differently from other convicted persons was not justified, since his refusal to serve in the armed forces had been based on his religious beliefs. The legislation barring persons convicted of a crime from certain types of employment did not distinguish between different types of crimes, nor include any exceptions; in this case, it was not found to pursue a legitimate aim.[18]

Even if difference of treatment is identified, it will not be characterized as discrimination if it pursues a legitimate aim and is proportionate to this aim. It may for example be legitimate to exclude non-nationals from serving in the national police force.

In some areas, however, such as racial discrimination, or discrimination on the basis of gender or birth out of wedlock, very weighty reasons for difference in treatment must be put forward.

Ethnicity

Racial discrimination is considered particularly serious by the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), and the UN. Furthermore, discrimination on the basis of race is also of great concern to treaty monitoring bodies and the ECtHR. Historically, racial discrimination has disadvantaged groups of people around the world and is generally considered an affront to human dignity.[19]

A policy of racial discrimination, or even differential treatment on the basis of race, may amount to a breach of the absolute prohibition of inhuman and degrading treatment. The ECtHR has found that the debasing living conditions of the Greek-Cypriots in northern Cyprus were imposed upon them on the basis of their race, ethnicity, and

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[18] *Thlimmenos v. Greece*, 6 April 2000. See also, *Nachova and others v. Bulgaria*, 26 February 2004 and *Pretty v. United Kingdom*, 29 April 2002.

[19] See for example the *East African Asians v. United Kingdom*, 14 December 1973, Decisions and reports 78-A.

religion; distinguishing them from the Turkish-Cypriot population. The discriminatory treatment attained a level of severity that constituted inhuman and degrading treatment.[20] The Greek-Cypriots were severely restricted in their exercise of basic rights, as they were not allowed to bequeath immovable property to a relative unless the relative also lived in the North; there were no secondary education facilities and children who went to study in the South were not allowed to return once they reached the age of 16 (boys) and 18 (girls). Restrictions imposed on their freedom of movement had an adverse impact on their right to private and family life and on their right to freedom of religion.

In a recent landmark judgment, the ECtHR for the first time found that discrimination on the basis of race had taken place. The case concerned the killing of two persons belonging to the Roma minority that had not been adequately investigated by the national authorities (cf. chapter 13).

Racially motivated violence must not be treated on an equal footing with cases that have no racist elements (cf. also the section on equal and differential treatment).

National authorities have a duty to take all available measures to combat racism and racial violence. As part of this general obligation they have a duty to investigate possible racist motives to a crime. This means that generally, where there is reason to believe that racism has played a role in perpetrating a crime, particular vigour and impartiality must be used in its subsequent investigation.[21] Similarly, when State agencies such as the police are involved in violent incidents, there rests a particular obligation on the authorities to thoroughly investigate any possible racist motive.

The requirement for an in-depth investigation into claims of racial discrimination also applies to non-violent incidents. For example, a case of a person complaining of racial discrimination because of a refusal of a bank loan on the basis of his/her foreign nationality requires the authorities to conduct a proper investigation into possible racist motives for the refusal.[22]

Racial discrimination in the enjoyment of economic and social rights is also an issue of concern to the treaty bodies.[23] A plan to

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[20] *Cyprus v. Turkey*, 10 May 2001.
[21] *Nachova and others v. Bulgaria*, 26 February 2004.
[22] *Ahmed Habassi v. DK* (CERD 10/97). See also, *M.B. v. Denmark* (CERD 20/2000).
[23] Ms. L.R. et al. v. Slovakia (CERD 31/2003).

construct low-cost housing for the Roma inhabitants in the Dobšiná municipality of Slovakia potentially affected about 1,800 Roma living in the town under appalling conditions. The housing project aimed at alleviating Roma housing problems. Some inhabitants of Dobšiná and surrounding villages established a five-member 'petition committee' and prepared a petition with the following text: "I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions." The municipal council considered the petition and unanimously decided to cancel the project with an explicit reference to the petition. Having examined the case, CERD found that the State Party had failed to meet its obligation not to engage in racial discrimination and to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing.

Nationality

Discrimination on the basis of race or colour may sometimes overlap with discrimination on the basis of nationality. Nationality refers to a person's ties to a particular culture, people, and language. It must be distinguished from citizenship, which is a legal characterization of a person in relation to the State that may exercise jurisdiction over him/her.

A foreign national who has been granted a work permit may not, based on his or her citizenship, be excluded from an extension of work-related activity, such as the right to run for election to the relevant work-council.[24] Furthermore, emergency assistance under an unemployment insurance scheme may not be denied to persons on the basis of their nationality alone.[25]

The Human Rights Committee has found that a circular that specifically instructed public authorities not to use the minority language Afrikaans in their correspondence, including telephone conversations, specifically targeted Afrikaans speakers. Since it lacked justification, the circular violated the principle of non-discrimination.[26]

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[24] *Karakurt v. Austria*, Human Rights Committee, 965/00.
[25] *Gaygusuz v. Austria*, 16 September 1996.
[26] *Diergaardt v. Namibia*, Human Rights Committeee, 760/97.

Birth

A difference of treatment on the basis of birth out of wedlock demands particularly weighty reasons in order not to be discriminatory. A distinction between children born out of wedlock and other children in relation to inheritance rights amounts to discrimination.[27] This also applies where the distinction is between children born out of wedlock that have not been recognized by the father, and children of married parents or of unmarried parents where the father has recognized paternity.[28]

Religion

The protection against discrimination based on religion is closely linked to the right to freedom of religion and belief (cf. chapter 8). Difference of treatment based on religion alone is not acceptable. For example, a refusal to give parental authority to a parent on the grounds that he/she belongs to Jehovah's Witnesses is discrimination on the basis of religion.[29]

A rule or practice which does not allow for exceptions that take the religious beliefs and practices of a person into account may lead to indirect discrimination.[30] However, a number of general requirements which do not accommodate religious beliefs or practices have not been considered discriminatory. For example, it has been found to be legitimate to require motorcyclists to wear a crash helmet even if this may interfere with wearing a turban.[31] Also, requiring a teacher to respect normal working hours even if this interferes with attendance of prayers has been found not to violate religious freedom.[32] Even so, the Human Rights Committee has found that a requirement that all persons wear safety headgear during work did disproportionately impact on Sikhs in the practice of their religion. Nevertheless, such

[27] *Marckx v. Belgium*, 13 June 1979. See also, *Inze v Austria*, 28 October 1987 and *Mazurek v. France*, 1 February 2000.

[28] *Camp and Bourimi v. Netherlands*, 3 October 2000.

[29] *Hoffman v. Austria*, 23 June 1993.

[30] *Thlimmenos v. Greece*.

[31] *X v. United Kingdom*, Commission Decision 12 July 1978, Application No. 7992/77.

[32] *Ahmad v. United Kingdom*, Commission Decision 12 March 1981, Application No. 8160/78.

requirements have objective purposes and, thus, do not violate the right to non-discrimination or the freedom of religion.[33]

If a government decides to provide funding for religious schools, such financial assistance must be given without discrimination. The Human Rights Committee has explained that a difference in treatment between Roman Catholic schools that are funded as part of the public education system and other religious schools is not reasonable and objective. The Roman Catholics were not in a disadvantaged position that justified the difference of treatment.[34]

Sexual Orientation

Discrimination based on sexual orientation has been subsumed under the category of sex discrimination.[35] However, it may be argued that it should rather be seen as 'other status'. Based on case decisions from both the ECtHR and the Human Rights Committee, it remains undisputed that sexual orientation is a prohibited ground for discrimination, regardless of how it is classified. In recent case law, the ECtHR has established that the criminalization of sexual relations between same-sex consenting adults, when sexual activity between heterosexual persons is not an offence, is discriminatory.[36] This also applies where sexual activity between men is criminalized, whereas sexual relations between women are not.

Moreover, individuals also enjoy protection against discrimination on the basis of their sexual orientation in various other fields. For example, the exclusion of a same-sex partner from succession to a deceased partner's rights as a tenant is discriminatory when such rights are granted to heterosexual partners.[37] If pension benefits cannot be granted to same-sex partners, but only to heterosexual couples, it amounts to discrimination.[38]

The principle of non-discrimination based on sexual orientation also applies to family life. It is not legitimate to deprive a person of parental

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[33] *Karnel Singh Bhinder v. Canada*, Human Rights Committee, 208/1986.
[34] *Waldman v. Canada*, Human Rights Committee, 694/96.
[35] *Toonen v. Australia*, Human Rights Committee, 488/92.
[36] *Sutherland*, 27 March 2001; *SL v. Austria*, 9 January 2003; *L and V v. Austria*, 9 January 2003; *B.B. v. United Kingdom*, 10 February 2004.
[37] *Karner v. Austria*, 24 July 2003.
[38] *Young v. Australia*, Human Rights Committee (941/00).

authority or visitation rights with that person's child simply on the basis of the parent's homosexuality.[39]

14.5. Relevant National Implementation Mechanisms

All parts of a State face issues and questions related to discrimination and the implementation of the principle of equality and non-discrimination.

The transposition of relevant international or regional standards into national legislation appears to be a key factor in fighting discrimination. Only with a framework of national legal provisions may victims of discrimination effectively seek redress for discrimination suffered.

Parliament and other legislative bodies are therefore responsible for passing comprehensive legislation providing for equal treatment in various fields such as access to health care, social welfare, goods and services, education, housing, and employment. They are also charged with adopting the necessary framework prohibiting discrimination and criminalizing acts motivated by racial hatred or defamatory speech and other expressions of intolerance.

All levels of the executive branch are charged with ensuring that legislation is applied in a non-discriminatory manner.

The judicial system may be faced with complaints regarding discrimination in all fields. Judges are tasked with overseeing the equal application of the law to all individuals. They must also apply the law without discrimination themselves, for example when sentencing persons for criminal activity.

Furthermore, national human rights institutions, ombudsman institutions, or administrative bodies may be established within the executive branch. Their mandates often encompass hearing complaints of discrimination in particular areas, such as employment; or on specific grounds, such as ethnicity or race; as well as supporting actions to remedy discrimination. The mandates can also include mediation between the parties to a case of discrimination or assistance to victims of discrimination through legal advice. Furthermore, they may be charged with monitoring discriminatory practices and advising the government on appropriate action to counter such developments with legal, political, or social measures.

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[39] *Salguiro da SilvaMouta v. Portugal*, 21 December 1999.

14.6. OSCE Commitments

OSCE commitments to non-discrimination are sweeping. These commitments were first set down in the Helsinki Final Act (1975), and have since been reaffirmed and expanded repeatedly in subsequent documents and declarations. They express the politically binding commitment of all member States to the achievement of human rights without discrimination.

The Concluding Document of the Vienna Third Round Follow-Up Meeting adopted a list of non-discrimination grounds similar to that contained in the ICCPR.[40]

The Second Conference on the Human Dimension of the Conference for Security and Co-operation in Europe (CSCE), held in Copenhagen in 1990, affirmed the principles of equality before the law and equal protection of the law. The participating States have further committed themselves to prohibiting any discrimination and to guaranteeing all persons equal and effective protection against discrimination on any grounds.[41]

The OSCE States have often reiterated concern over recent and flagrant manifestations of intolerance, discrimination, aggressive nationalism, xenophobia, anti-Semitism, and racism; reaffirming their commitment to fight these evils.[42] The building of democratic and pluralistic societies fully protecting and respecting diversity in practice is seen as the answer to these problems. The States have agreed to take appropriate measures to assure everyone within their jurisdiction protection against discrimination on racial, ethnic, and religious grounds; all individuals, including foreigners, should be protected against acts of violence on any of these grounds. In order to fulfil this commitment, national courts and other institutions charged with enforcing national laws will play an important role.

The Istanbul Summit Declaration of 1999 committed participating States "to abstain from any form of discrimination". The Istanbul Declaration can be seen as a general prohibition of discrimination. It

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[40] Concluding Document of the Vienna Third Round Follow-Up Meeting, 4 November 1986 to 19 January 1989, para. 13(7).

[41] Second Conference on the Human Dimension of the Conference for Security and Co-operation in Europe, Copenhagen, 1990, para. 5.

[42] Helsinki, Human Dimension, para. 30. See also, Budapest Declaration, para 5 and the Section on the Human Dimension, para. 25.

may be regarded as going a step further than previous formulations, which included lists of discriminatory grounds that are unlawful. The Declaration also gave support to the adoption and full implementation of comprehensive anti-discrimination legislation to promote completely equal opportunity for all.

In their effort to build societies based on a climate of tolerance, the OSCE member States have undertaken:

- To provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic, or religious discrimination, hostility or hatred, including anti-Semitism;
- To take steps to protect persons or groups who may be subjected to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic, or religious identity, including measures to protect their property;
- To take effective steps at the national, regional, and local levels to promote understanding and tolerance, particularly in the fields of education, culture, and information;
- To endeavour to ensure that the objectives of education include special attention to the problem of racial prejudice and hatred; and to the development of respect for different civilisations and cultures;
- To recognize the right of the individual to effective remedies and endeavour to support the right of interested persons and groups to initiate complaints against acts of discrimination, including racist and xenophobic acts.[43]

In recent years the OSCE has recognized the importance of legislation to combat hate crimes and violent expressions of racism. Gathering statistical data on hate crimes and drafting or reviewing appropriate legislation is considered to be key aspects in eliminating racism. The Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE has therefore undertaken activities to support participating States in this endeavour.

[43] Copenhagen 1990, para. 40(1)–40(5).

14.7. Other International Instruments

The Universal Declaration of Human Rights contains one of the first non-discrimination clauses introduced into international law. The provisions of equality and non-discrimination elaborate on the prescriptions concerning equal rights in the UN Charter. Article 2 ensures that everyone enjoys basic human rights without discrimination. The principle of equality before the law and equal protection of the law is reflected in Article 7.

The Revised European Social Charter Article E contains a non-discrimination clause. This provision adds health to the grounds of discrimination, already well-known from the ECHR. It is only applicable in combination with the substantive provisions of the Charter.

14.8. Monitoring the Right: The Special Challenges

Non-discrimination is a cross-cutting obligation and applies to all human rights, making it a particularly complex right to monitor. Discrimination may occur in any field and a broad range of actors may be responsible for illegal differential treatment. The monitor should therefore consider ways to identify specific priorities within the national context and possibilities for collaboration with other monitors. In general, the monitor should pay particular attention to the rights of vulnerable groups, such as ethnic and national minorities, the disabled, gay and lesbian persons, and refugees and displaced persons, including children. However, the monitor must be sensitive to the varying needs and concerns that different vulnerable groups have in relation to their enjoyment of human rights. Certain groups may also be particularly vulnerable to reprisals if they report discrimination or other violations. The monitor must pay special attention to their needs for protection.

Moreover, there are special challenges to monitoring human rights in the light of the dominant societal values of individual countries. Dominant societal values are generally male, hetero-sexual, and able-bodied; reflecting the prevalent race, religion, and language of each country. Majority values are often reflected in the formulation of laws and practices to the exclusion or detriment of persons finding themselves outside the dominant norms. This may result in systemic inequality. All the same, the background to these values and their effect is often subtle and almost invisible, making it difficult to identify

it as potentially discriminatory. Moreover, these values may often be fundamental to the country in question and therefore particularly sensitive issues.

The elimination of discrimination and comprehensive enjoyment of human rights will be achieved at a different pace in different countries. The State will therefore have a margin of appreciation in adopting the appropriate measures to reach this goal. Consequently, it is not possible to propound what the State must do concretely to eliminate discrimination. Nevertheless, certain guidelines may be formulated for assessing whether the State is complying with its obligation to eliminate discrimination. These include abstaining from discrimination in law or practice and respecting human rights that are minimum standards.

Much discriminatory treatment is perpetrated by non-State actors. This may pose a particular challenge in terms of monitoring. The State has a duty to ensure that private actors, to the extent that they influence the exercise of rights or the availability of opportunities, do not create or perpetuate discrimination. An important area where private actors play a major role is employment. The State must ensure that private employers do not discriminate against persons belonging to certain groups when hiring, promoting, or dismissing employees.

Discrimination may often be couched in terms of violations of substantive human rights, such as the right to employment or housing. This may make the issue of discrimination 'invisible'. Violations of substantive provisions may overlap with violations of the right to non-discrimination. An examination of whether there is a separate violation of the right to non-discrimination or whether discrimination is a fundamental aspect of a complaint requires a comparison of each situation with treatment extended to others in a similar situation. The monitor should therefore carefully consider whether a situation involves unjustified differential treatment.

Statistics and national census data play an important role in monitoring the equal enjoyment of human rights. Specifically in the context of cases of indirect discrimination, statistical data indicating the situation of ethnic communities will be invaluable for documenting that indirect discrimination occurs or has occurred. However, statistics alone are probably insufficient as conclusive proof of discrimination against a group of people.

The Committee on the Elimination of Racial Discrimination (CERD) has been established to oversee the implementation of ICERD. Each examination of States' compliance with ICERD results in the

adoption of concluding observations. These may be extremely helpful to the framing of the issues of greatest concern in relation to the elimination of racial discrimination. States Parties to ICERD may recognize the competence of CERD to hear individual communications regarding purported violations of ICERD.[44] This is also the case with the Committee on the Elimination of All forms of Discrimination against Women overseeing the implementation of CEDAW (cf. chapter 15).

Decisions from CERD on individual communications can be used as tools to detail and particularize the scope of the non-discrimination obligation, as can decisions from the ECtHR.

[44] This requires that the State Party has made a declaration under Article 14 of ICERD.

14.9. Monitoring Checklist on the Right to Non-Discrimination

Checklist – The Right to Non-Discrimination

1. Legislation and Regulation Check
   - On which grounds is discrimination prohibited in national law?
   - Is equality and non-discrimination legislation in place in areas such as employment, education, health care, public services, etc.?
   - Is the aim of the law consistent with recognized human rights principles?
   - Is legislation non-discriminatory in nature?
   - Is incitement to racial discrimination or hatred prohibited in national law?
   - Is violence against a race or ethnic group prohibited?
   - Are ethnic groups and indigenous peoples equally recognized within the State?

2 Monitoring the Right in Practice

a. Does discrimination occur?
   - Does the person complaining of discrimination belong to an identifiable group?
   - Is there a distinction of treatment by the authorities between similarly situated individuals?
   - Is the distinction objectively or reasonably related to the aim of the law or the practice?
   - Are the means employed proportionate to the aim sought to be achieved?

b. Is there a discriminatory impact?
   - Does the measure, law, or policy have an unjustified disparate impact on a group of persons distinguished by race, ethnicity, colour, descent, social origin, birth, nationality, etc.?

c. Other factors
   - Are minorities ensured representation in public administration and political life?
   - Are minorities ensured access to national and local media?
   - Do national statistics and censuses reflect inequalities with regard to health, education, employment, access to goods and services, etc.?
   - Is data gathered on cases of discrimination violating the law, including sentences and follow-up?

14.10. Instruments on the Right to Non-Discrimination

Legally Binding Instruments.

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 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. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 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."	General Comment 18 (Non-discrimination)

Article 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."	General Comment 4—(Equal enjoyment of civil and political rights by men and women) General Comment 28—(The equality of rights between men and women)
Article 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."	

International Covenant on Economic, Social and Cultural Rights

Article 2	"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."	
Article 3	"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."	General Comment 16—(The equal right of men and women)

International Convention on the Elimination of All Forms of Racial Discrimination

Article 1	"1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."	General Recommendation No. 29: Article 1, para. 1 of the Convention (Descent) 01/11/2002 General Recommendation No. 24: Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (Article 1) 27/08/99 General Recommendation No. 14: Definition of discrimination (Article 1, para. 1) 22/03/93 General Recommendation No. 08: Identification with a particular racial or ethnic group (Article 1, para. 1 and 4) 22/08/90
Entirety		General Recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system General Recommendation 30 Discrimination against Non-Citizens

General Recommendation 27 Discrimination against Roma

General Recommendation 25 Gender Related Dimensions of Racial Discrimination

General Recommendation 23 Indigenous Peoples

General Recommendation 22 Article 5 Refugees and Displaced Persons

Convention on the Rights of the Child

Article 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."

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 1	"The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as 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.

	The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence."
Article 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."

International Convention on the Elimination of All Forms of Discrimination against Women

Article 1	"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11

Section	Critical Substantive Points
Article 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."

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Entirety	Article 1. "1. The enjoyment of any right set forth by law 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. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in para. 1."

European Social Charter (revised)

Article 20	"With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields: access to employment, protection against dismissal and occupational reintegration; vocational guidance, training, retraining and rehabilitation; terms of employment and working conditions, including remuneration; career development, including promotion."
Article E	"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

Convention on Human Rights and Biomedicine

Article 11	Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited.

European Union Instruments

Council Directive 2000/43 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin

Section	Critical Substantive Points
Entirety	Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation

Entirety	Grounds covered are racial and ethnic origin, religion, age, disability and sexual orientation.

Other International Instruments

United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention Against Discrimination in Education

Section	Critical Substantive Points
Article 1	"1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of access to education of any type or at any level; (b) Of limiting any person or group of persons to education of an inferior standard; (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man."

International Labour Organisation "Discrimination (Employment and Occupation) Convention"

Article 1	"1. For the purpose of this Convention the term 'discrimination' includes a. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; b. such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

Universal Declaration on Human Rights

Article 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."
Article 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."
Article 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."

14.11. References

Kevin Kitching (ed.), *Non-Discrimination in International Law, A Handbook for Practitioners*. (London: Interights, 2005).
The Handbook for practitioners is an excellent examination of international and regional human rights law in the field of non-discrimination. It also examines in detail the various grounds for discrimination and their interpretation in different contexts. Furthermore, it gives guidance as to how to make a discrimination claim in the UN or regional human rights systems. The Handbook is available at http://www.interights.org/doc/Handbook.pdf

Electronic Resources

http://www.antiracism-info.org/Prune/pageHome.php
Anti-Racism Information Service (ARIS). The site contains extensive lists of documents listed by theme and country that can be obtained on request.

http://www.coe.int/t/E/human_rights/ecri/
European Commission against Racism and Intolerance (ECRI). ECRI's task is to combat racism, xenophobia, anti-Semitism and intolerance at the level of greater Europe and from the perspective of human rights protection. The website contains country reports on racism covering national laws and practices as well as papers on best practices.

http://eumc.eu.int/eumc/index.php
European Monitoring Centre on Racism and Xenophobia (EUMC). The EUMC studies the extent and development of the phenomena and manifestations of racism and xenophobia, analyzing their causes, consequences, and effects. The site also has examples of good practice regarding the integration of migrants and ethnic and religious minority groups in the EU Member States.

http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubsg_en.htm
European Commission—Anti-discrimination and relations with Civil Society. The site contains studies and reports on discrimination-related issues. It also has extensive information about monitoring the implementation of the two EU anti-discrimination directives.

http://www.ohchr.org/english/
Office of the High Commissioner for Human Rights (OHCHR). The High Commissioner is the principal UN official with responsibility for human rights. The site contains links to all the treaties, the treaty monitoring bodies, the special procedures of the Commission on Human Rights, etc.

http://www.ohchr.org/english/issues/disability/index.htm
OHCHR on Disability. The site offers specific information about the disability study and on the drafting of a Disability Convention.

http://www.osce.org/odihr/13477.html
OSCE Office for Democratic Institutions and Human Rights (ODIHR). The Office for Democratic Institutions and Human Rights (ODIHR) is the specialized institution of the OSCE dealing with elections, human rights, and democratization. The website contains, *inter alia* a thematic compilation and a chronological compilation of the many politically binding commitments relating to what has become known as the human dimension of the OSCE.

http://www.stop-discrimination.info/99.0.html
European Commission: "For Diversity. Against Discrimination". This website serves as a source of information on the EU-wide campaign "For Diversity. Against Discrimination". Also, you will find background information about the measures that have been initiated by the European Commission's Directorate General for Employment, Social Affairs and Equal Opportunities to combat discrimination. Finally, the website provides an update on current anti-discrimination issues and activities in all of the 25 EU Member States.

CHAPTER 15

EQUALITY BETWEEN MEN AND WOMEN

Equality between men and women has to be seen within the context of general non-discrimination clauses (see chapter 14). The principle of non-discrimination includes equality between men and women. This chapter will examine the special circumstances for regulating equality between men and women. The assessment is based on the principle 'equal but different', recognizing the differences between men and women. It highlights the importance of seeing equality between the sexes as a structural, institutional, and cultural issue, rather than a 'women's problem'.

15.1. Definitions

General non-discrimination provisions in human rights treaties refer to 'sex' as one of the grounds that must not form the basis of discrimination (see chapter, section *Definitions, para. eight.* In political documents, the term 'gender' is often used instead of 'sex'; and equality between men and women is referred to as 'gender equality' to encompass legal, political, and policy measures; as well as formal (*de jure*) and factual (*de facto*) equality.

The term **sex** refers to the biological differences between men and women. The differences between the sexes are universal. Legal texts refer to the terms 'men' and 'women' when making reference to sex discrimination. In any case, none of the sexes can be used to determine the norm against which the other sex is measured; thus, the differences between the sexes are to be viewed neutrally, and not in normative or deviant terms.

The term **gender** refers to social attributes like roles, expectations, relationships, and opportunities associated with being 'female' or 'male'. These attributes are socially constructed, acquired through the socialization processes and therefore time and context specific and changeable. Gender determines what is expected, allowed, and valued in a woman or a man in a given context. Gender perceptions are often

used to justify sex discrimination.

Gender equality refers to the equal rights, responsibilities, and opportunities of women and men. It implies that interests, needs, and priorities of both men and women are taken into consideration. Thus 'equality' does not mean 'sameness', but recognition of common basic conditions (rights, opportunities) and providing additional rights or entitlements where relevant. For example, pregnancy entitles women to specific protection in the labour market.

The definition of what constitutes **discrimination against women** is declared by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[1] cf. Box 1.

Box 15.1. Definition of Discrimination against Women

"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (Convention on the Elimination of All Forms of Discrimination against Women, Article 1.)

The definition in CEDAW provides detailed criteria to be used when considering what constitutes discrimination against women. It does not, however, entail comparing women to men, but rather defining the essential rights and discrimination against enjoyment of those rights.

15.2. Reproductive and Sexual Health[2]

Reproductive health is a state of physical, mental, and social well-being in all matters relating to the reproductive system and to its functions and processes; not merely the absence of disease or infirmity. It also includes sexual health, such as issues related to reproduction and sexually transmitted diseases, as well as care and psychological aspects of sexual health, influenced by gender relations.

Reproductive rights imply certain human rights that are already recognized in international human rights documents. They include the right of all couples and individuals to decide freely and responsibly the

[1] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 of 18 December 1979.

[2] For more extensive information, see UN International Conference on Population and Development (ICPD) Programme of Action, para. 7(2)–7(3), 7(34).

number, spacing and timing of their children (based on the right to family life) and to have the information and means to do so (right to access to information). Reproductive rights, furthermore, embrace the right to attain the highest standard of sexual and reproductive health (an aspect of the right to access to health care or the highest attainable standard of health; sufficient standard of living; right to education); including the right of men and women to be informed about and to have access to safe, effective, affordable, and acceptable methods of family planning of their choice. It also includes the right of all (men and women) to make decisions concerning reproduction free of discrimination, coercion, and violence (based on, *inter alia*, the right to personal security, freedom from inhuman treatment, and freedom from slavery).

15.3. Legally Binding Standards

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the European Convention for Human Rights and Fundamental Freedoms (ECHR) all refer to equal enjoyment by men and women of the rights of the respective conventions. In these instruments, the prohibition of sex discrimination is part of broader non-discrimination clauses (see chapter 14, The Right to Non-Discriminatory Treatment).

In addition to general non-discrimination clauses, ICCPR and ICESCR have included special references to equality between men and women, obliging States to ensure the equal right of men and women to the enjoyment of all civil and political rights and economic, social, and cultural rights set forth in the respective Covenants.[3] Yet it has also been recognized that in practice, despite general non-discrimination measures, women in most countries are not able to enjoy these rights on equal terms with men. Therefore, special international instruments focusing on the rights of women have been adopted.

In addition to United Nations (UN) and Council of Europe (CoE) mechanisms which will be dealt with in greater detail below, the European Union (EU) legal framework can be used as a source of

[3] Article 3 of ICCPR and ICESCR section.

interpretation and inspiration. The EU has set wide-ranging standards relating to equal pay, sexual harassment, social policies and protection, vocational training, and education. While binding only for the EU member States, the references to general human rights norms and equality between men and women in various fields are often mentioned in bilateral association agreements between the EU and third parties.

Instruments Focusing on the Rights of Women

CEDAW is the most extensive document dealing with women's rights, and it encompasses various entitlements mentioned in earlier conventions. As indicated above, it provides a definition of what is considered discrimination against women and, along with the general human rights conventions it can serve as a special catalogue of rights or a checklist when working with gender equality. Furthermore, CEDAW provides for specific rights protection mechanisms, namely reporting and an individual complaints system. The Committee monitoring States Parties' compliance with the Convention thus follows the development of the gender equality norms and interpretations, offering an up-to-date framework for interpretation of the Convention in its General Recommendations.

CEDAW also provides a very detailed explanation on allowed special measures to enhance the practical realization of gender equality (see the section on permissible limitations below). To understand the purpose and function of these provisions, the definitions of positive discrimination and affirmative action should be consulted (see chapter 14, section *Positive Measures and Affirmative Actions*).

As mentioned above, the ECHR includes a general non-discrimination clause that can be invoked in relation to the substantive rights mentioned in the Convention. Hence, the current decisions (case law) of the ECtHR provide interpretation of gender equality in relation to other human rights. For example, the right to privacy includes issues related to family law and equality in family-related matters; freedom of expression refers to access to information on health care, etc.

Gender Aspects of War Crimes

Violence against women during armed conflict is not a new phenomenon, but during the 20th century, the character of war has changed and the practice of sexual violence as a means of warfare has

become even more widespread. Where soldiers used to target other soldiers, often the goal now is to kill or terrorize civilians. Since World War II, there have been many examples of this kind of violence. Sexual violence has been reported as a means of warfare during the Iraqi invasion of Kuwait in 1990, and the use of rape and forced pregnancy as tools of 'ethnic cleansing' in Bosnia in 1992, as well as during the genocide perpetrated in Rwanda in 1994 and 1995. Until the war tribunals of Rwanda and the Former Yugoslavia, sexual violence has not explicitly been called a grave breach in the main martial law documents—the 1949 Geneva Conventions and their 1977 Additional Protocols. The only exception was the Tokyo World War II trial, where Japanese officers were charged and held liable for the rape of 20,000 women during the occupation of Nanking (China) in 1937.[4]

The tribunals for Rwanda and for the Former Yugoslavia recognized sexual violence as war crimes. Yet the Rome Statute of the International Criminal Court (ICC) is the first document that refers to sexual crimes in relation to genocide and crimes against humanity as well, cf. Box 4. While men may also be victims of rape and sexual mutilation during armed conflict, it is widely recognized that sexual violence is usually targeted specifically at women. Due to the stigma attached to rape, women are reluctant to report it. Therefore, it is particularly important to acknowledge that crimes related to the reproductive and sexual health of women are not considered less severe than other types of physical or psychological abuse committed in the context of armed conflict.

Box 15.2. International Criminal Law and Gender

The ICC gives definitions of genocide (Article 6), crimes against humanity (Article 7), and war crimes (Article 8). The references to violations against sexual and reproductive health as aspects of crimes of genocide and crimes against humanity are given in the following articles:

Article 6: **Genocide** is "(…) acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", including "the measures intended to prevent birth within the group", Article 6(d). In such cases women, as the child bearers of the group intended for extinction, have been particularly targeted by means of sterilization, gang rapes with serious sexual health consequences, abortions, and killings.

[4] Analysis of such war crimes, including the sexual violence, can be found in the article "When Women are the Spoils of War." by Valerie Oosterveld, http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm.

Article 7: **Crime against humanity** means various acts committed as part of "widespread or systematic attack directed against the civilian population." While some of the acts, like murder, extermination, enslavement, deportation, or imprisonment, have been particularly directed towards men as potential combatants, women are targeted through "enslavement (particularly trafficking for sexual purposes)", Article 7(c), and "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization", Article 7(g). Hereby, the ICC defines sexual violence on the same basis as torture, murder, or other types of crimes against humanity, which were already recognized before the adoption of the Statute.

Protection from Trafficking

Trafficking in human beings affects both sexes. However, as with war crimes, men and women experience it differently and are subject to different types of human trafficking. While both men and women are trafficked for slavery (e.g. work on construction sites for men; domestic work for women), women and girl-children experience trafficking for the purposes of sexual exploitation to a greater extent than men.

The crime of trafficking includes elements related to the perpetration, means and purpose of this crime. To be defined as such, there is no need to "achieve the objective/purpose"—slavery, sexual exploitation, removal of organs—it is sufficient to prove the intention to achieve the purpose. This may include various fulfilled phases of the trafficking process: recruitment, transportation, harbouring, and transfer or receipt of the person in question. Moreover, various means are used to achieve the purpose, like use of force, fraud, abuse of power. It is not relevant to the criminal liability of the trafficker whether the victim has freely agreed to the exploitation.[5]

The definition of the crime of trafficking in human beings differs in various national contexts. Some States have chosen to limit the use of trafficking clauses only to crimes committed over the State border (transportation of the victim from one State to another), while others criminalize the same action within their own State borders, meaning that a person can be trafficked from one city to another, or even from one place of abuse to another. Nonetheless, there are legislative norms that contradict each other and can obstruct the efficiency of the anti-trafficking legislation. For example, legislation criminalizing prostitution

[5] Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN General Assembly Resolution 55/25 of 15 November 2000.

and trafficking exists on an equal footing, thus making the prostitutes who are the victims of trafficking easy targets for law-enforcement agencies, compared to the traffickers who operate in underground networks of national or trans-national crime.

Gender Equality in the Labour Market

The International Labour Organization (ILO) has set various standards to bolster equality between men and women. These relate to equal pay,[6] maternity protection, and workers with family responsibilities. In addition to conventions, various recommendations referring to the same subjects and also termination of employment and vocational training have been adopted.

The ILO standards regulate men's and women's specific conditions in the labour market. It should, however, be emphasized that while it is important to ensure special protection of women during pregnancy, such measures should not be overprotective and should consider the equal role of men in the raising of children.

15.4. Permissible Limitations

The limitations related to non-discrimination (see chapter 14, section *Permissible Limitations*) also have to be considered within the context of gender equality. The general principles of legitimacy, reasonable and objective criteria, and proportionality have to be observed.

Special Measures

Special measures to achieve *de facto* equality by limiting the rights of one sex are often allowed, since they are adopted to achieve legitimate aims, but will always be subject to specific criteria. The CEDAW Committee gives clear and specific criteria in this regard (which may also be useful in a general non-discrimination context), cf. Box 6.

[6] For the list and details of relevant international documents, see Reference box of International Instruments.

Box 15.3. Special Temporary Measures

CEDAW's Article 4 and General Recommendation 25[7] define Temporary Special Measures in relation to gender equality. The purpose of such measures is to accelerate *de facto* equality.

Key element:

- **Measures** are appropriate means towards achieving the goals, depending on these goals. They may be legislative, administrative or other regilatry instruments, policies, practices, such as allocation or reallocation of resources; outreach or support programmes; targeted recruitment, hiring and promotion procedures; quota systems, e.g. setting national election quotas at a certain percentage of seats for one sex;
- **Special measures** are means used for a specific purpose/goal; e.g. to involve women in parliaments or local governments and therefore implementing specific measures like quotas. The goal shall be clearly stated and cannot be a general provision like "to achieve quality between men and women";
- **Temporary measures** imply discontinuation when the goal is achieved; e.g. if an organisation has more male than female employees, the organisation can decide to hire the otherwise equally qualified people or the sex that is underrepresented; once the balance is achieved, the preference for that sex is removed. It may imply long-term implementation, but would include regular reviews of *de facto* figures of equality between men and women.

The above measures are considered to be part of a strategy directed at achieving *de facto* equality, and an exception to the norm of non-discrimination.

It is often argued that the existence of special measures, since they are by nature discriminatory, violates the principle of equality and thus human rights, (for the differences between 'positive discrimination' and 'affirmative action', see chapter 14 on non-discrimination). In any case, it should be kept in mind that the purpose of these measures is to increase *de facto* equality. It is important to focus not only on legal equal opportunities, but also to consider the *de facto* situation in a given social and cultural context. These considerations may confirm that *de jure* equal opportunities do not always translate into actual possibilities for discriminated groups to use the equal opportunities.

Non-Permissible Limitations in the Understanding of CEDAW

While CEDAW is a legally binding instrument, many States make reservations to some of its articles. The most common reservations are made with regard to the State obligations to take action, like adoption

[7] General Recommendation No. 25, on Article 4, Section 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures; CEDAW/C/2004/I/WP.1/Rev.1; 30 January 2004.

of laws, policies, review of practices;[8] taking effective measures against traditional practices;[9] enhancing women's participation in political and public life, particularly with regard to appointment of judges and succession of royal families;[10] ensuring equality of spouses in family life and with regard to their obligations and rights towards children;[11] ensuring equality before the law, particularly choice of domicile;[12] and with regard to the nationality of women.[13]

The reservations are sometimes justified by use of special reference to Islamic Sharia law based on the Holy Qu'ran and Sunna. Explanations may refer to the obligations prescribed or understood as traditional, such as women's adoption of the nationality of their husbands; automatic award of father's nationality to children; or rules regarding divorce.

With regard to articles on customary practices and on family matters, the arguments referring to tradition state that certain articles cannot be implemented immediately as they are contrary to existing customs and practices which, by their nature, can only be modified with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority.

Other States Parties have contested some of the general reservations based on Islamic Sharia or general customs or traditions, stating that due to the unlimited scope and undefined character of such reservations, they are contrary to the object and purpose of the Convention.[14]

15.5. Current Interpretation of Equality between Men and Women

Gender equality issues have been considered under international law and in courts in international and national contexts. Under the ECHR, discrimination based on sex can only be considered together with a claim of violation of one of the rights of the Convention. In cases related to gender equality, ECtHR has stated that the advancement

[8] CEDAW Article 2.
[9] CEDAW Article 5.
[10] CEDAW Article 7.
[11] CEDAW Article 16.
[12] CEDAW Article 15.
[13] CEDAW Article 9.
[14] For full text of reservations, see www.un.org/womenwatch.

of equality of the sexes is a major goal in the member States of the Council of Europe, and that very weighty reasons would be needed to justify difference in treatment based on sex as being compatible with the Convention.

The EU has stipulated equality principles in its treaties as well as directives and issues of equal pay, including pension schemes and social benefits as well as issues of the work conditions that have been extensively reviewed in the Court of Justice of the European Communities (CJEC). The EU regulations and decisions from the CJEC have played a significant role in changing the attitudes towards and interpretation of gender equality.

Women's Reproductive Rights

Women's reproductive rights are guaranteed through the implementation of *inter alia*, the right to access to health care and freedom of expression. This also implies the access to information necessary to exercise the rights related to health care. The ECtHR decision on Ireland,[15] allowing Irish women to obtain information on the possibilities for abortion, was a landmark case with regard to women's reproductive rights. While abortion remains legitimately prohibited in Ireland to protect morals, wherein the protection of an unborn child is one aspect, the Court considered whether restrictions on the distribution of information on health clinics abroad where abortion was legal were proportional to the aim of protecting morals and unborn children. It was found that restrictions to access information on abortion were too wide and violated the principles of freedom of expression, and that the prohibition of abortion *per se* was already a reasonable means to achieve the aim.

This decision gives support to the principle that women have an individual right to decide on how to exercise their sexual and reproductive rights and should not be overprotected or victimized by the State. This is particularly relevant in the field of employment, where European Union legislation and judgments in relevant cases would give additional means for interpretation. There is a tendency among States to adopt legislation that prohibits pregnant women from carrying out

[15] *Open doors v. Ireland* (1992), ECtHR.

specific jobs or which limits their work at night.[16] Unless that is objectively justified, it is up to the women to choose what type of employment they want to accept.

Differential Treatment in Family Relations

Considering cases of differential treatment, all courts have to recognize the differences between men and women and must assess whether the discrimination occurs between similarly situated people, cf. chapter 14, section *Equal or Different Situations—Equal or Different Treatment.* Then it is reviewed whether differential treatment of similarly situated people has an objective or reasonable justification; that is, whether or not it pursues a legitimate aim or whether there is a reasonable relationship of proportionality between the means employed and aims sought to be achieved.

Courts at all levels have recognized the differences between the sexes. Women may obtain special rights and entitlements related to pregnancy, and such measures should not be considered discriminatory against men. For example, in the labour market, special provisions may be adopted protecting women against dismissal during pregnancy, allowing them to retain their employment, and providing special conditions with regard to child care. EU law and decisions of the CJEC provide extensive practical guidelines with regard to employment, stating that pregnant women forced to leave work prior to their intended maternity leave, due to illness or conditions attested to by their physician in relation to said pregnancy, should receive full pay until the intended maternity leave is due, on an equal footing with men receiving sick leave payments.[17]

Such differences between the parents cease to exist once the special conditions are terminated. For example, in the *Pertovic* case,[18] ECtHR declared that, "while aware of the differences which may exist between mother and father in their relationship with the child, the Court starts from the premise that so far as taking care of the child during this period [after the child is born] is concerned, both parents are *similarly*

[16] *Kreil v. Germany*, 11 January 2000, Case 285/98, CJEC on employment of women in the military.

[17] *Høj Pedersen*, 19 November 1998, Case 66/96, C.J.E.C.

[18] *Pertovic v. Austria*, 27 March 1998, ECtHR; see also *Griesmar*, 29 November 2001, Case 366/99, and *Larsson v. Føtex Supermarked A/S*, 29 May 1997, Case 400/95 C.J.E.C.

placed." Nevertheless, the State retains a certain margin of appreciation to decide on national policy that may vary according to circumstances, subject matter, and background.

ECtHR looks not only at the facts of the specific case, but also at the general interpretation and the developments within the given area in national legislation, international law, and other regional instruments. For example, lack of unified standards in Europe with regard to parental leave for fathers was the decisive factor prompting the ECtHR to accept that the State had enough reasons to maintain differential treatment of men and women with regard to parental leave. Hereby, the arguments of historical gender roles seen in welfare provisions like parental leave (to protect mothers and to enable them to look after children) was still ample justification for the Court to sustain the 'gender roles' of mother and father as having different functions.

Nevertheless, in 2004, the ECtHR showed greater recognition of gender equality standards in family life in a case about choice of family name upon marriage in Turkey.[19] In family matters, women and men have individual rights, such as the right to retain nationality, right to work, or right to family name. Traditionally, women have taken the name of their husband upon marriage; be that as it may, legislation that forces women to take the name of the husband is now considered discriminatory against women, because the husband and the wife are considered to be similarly situated in family relations and the difference in treatment contravenes the ECHR.

The argument used by the Turkish State was that the traditional unity of the family could only be ensured by one surname, which customarily has been that of the husband. The Court, however, referred to "the goal of the CoE on equality between men and women, particularly to the fact that there has emerged consensus among the CoE States in favour of choosing the spouse's family name on equal footing for men and women."[20] Moreover, since the reforms in Turkey had already made both partners equal with regard to other family matters, the argument claiming that 'traditional unity of the family' was sustained by the husband's surname was not sufficient.

ECtHR has referred in its judgments to EU, CoE, and UN instruments, reports, and decisions. It is therefore essential to consider developments in other courts and take into consideration the developments

[19] *Unal Tekeli v. Turkey* (2004), ECtHR.
[20] *Unal Tekeli v. Turkey* (2004), para. 62.

of soft law that determine the 'consensus' on certain agreed standards. Therefore, the decisions of the EU (the laws and the court cases) shall be considered when interpreting certain gender equality norms and advancing common CoE standards in countries outside the EU.

Difference in Treatment in Labour Relations

The current EU interpretation (case law) will be relevant for any ECtHR case related to employment, since it sets important European standards and therefore influences the interpretation of the ECHR as much as ECHR influences the EU legislation and interpretations. Under EU law, discrimination between men and women consists in the application of different rules to comparable situations or of the same rule to different situations. Provisions that have particular relevance for the equality between men and women relate to equal pay,[21] employment conditions and vocational training,[22] pension schemes,[23] plus social benefits and issues of part time work.[24] For example, with regard to equal pay, the Court of Justice of the European Communities (CJEC) gives an extensive and updated interpretation, which would be relevant in cases at other courts.

Box 15.4. Equal Pay for Work of Equal Value

In the judgment of *Brunnhofer* on 26 June 2001,[25] the interpretation of equal pay and what constitutes pay in EU legislation is given. In addition to agreed salary and pension payments, a conglomerate of other elements shall be taken into account with regard to equal pay:

- a monthly salary supplement ensuring that not only pay in general, but each aspect of pay taken in isolation shall be considered;
- the classification of job categories is only one indication amongst others on which decisions as to whether or not employees are doing the same work or work of equal value are based;

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[21] *Defrenne v. Sabena*, (Defrenne II) 8 April 1976, Case 43/75; *Defrenne v. Sabena*, (Defrenne III) 15 June 1978, Case 149/77; *Stadt Lengerich and Others v. Helmig and Others*, 15 December 1994, Case 399/92.

[22] *Høj Pedersen*, 19 November 1998, Case 66/96; *Griesmar*, 29 November 2001, Case 366/99.

[23] *Dietz*, 24 October 1996, Case 435/93.

[24] *Jenkins v. Kingsgate*, 31 March 1981, Case 96/80, *Rinner-Kühn v. FWW*,13 July 1989,Case 171/88; *Bilka v. Karin Weber von Hartz*,13 May 1986, Case 170/84; *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*, 17 June 1998, Case 243/95. CJEC.

[25] *Brunnhofer*, 26 June 2001, Case 381/99, C.J.E.C.

- it is for employees to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex who is performing the same work or work of equal value;
- a difference in pay can be justified by circumstances not taken into consideration under the collective agreement, provided that it is based on objective reasons and is in conformity with the principle of proportionality.

Special Measures

While CEDAW defines the scope of temporary special measures, European Union current case law provides an extensive judicial decision base for the practical application of such measures. The special measures within EU Legislation provide possibilities of eliminating inequalities where such exist; for example, under-representation of women in certain professions or posts can be changed by selecting women instead of men amongst equally qualified candidates. The current interpretation (case law) defines under-representation as being when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.[26]

15.6. Relevant National Implementation Mechanisms

National Human Rights Institutions

National Human Rights Institutions, such as Ombudsinstitutions or National Human Rights Commissions, often monitor acts of the State and municipal authorities. Most of these institutions also receive individual complaints, but their decisions are not legally binding.

Some States have established specialized Ombudsinstitutions to focus on gender equality. For example, Sweden, Norway and Lithuania have established the gender equality Ombudsinstitutions to consider the issues of equality between men and women.

[26] *Kalanke v. Freie Hansestadt Bremen*, 17 October 1995, Case 450/93; *Marschall v. Land Nordrhein-Westfalen*, 11 November 1997, Case 409/95. CJEC.

Gender Mainstreaming

Gender mainstreaming is a tool aimed at incorporating gender issues generally in policy-making, law-making and implementation processes. It also constitutes part of the development assistance programmes and approaches. Gender mainstreaming can be defined in negative terms, i.e. what it is not. It does not mean just adding women to the list of participants in meetings and conferences, but it is a method of integrating views of men and women when finding solutions to a specific problem or issue.

Gender mainstreaming means challenging the *status quo* of existing systems and existing inequalities and changing attitudes, including use of language. It will include gender assessment consisting of analysis of the objectives for action, data and statistics, identification of gaps-issues. Other mainstreaming tools are gender equality policies and, where relevant, laws.

Political will and policies are the enabling tools of gender mainstreaming; without these it would not be efficient.

15.7. OSCE Commitments

The OSCE[27] recognizes that full and genuine equality between women and men is essential to achieving security, prosperity, and sustainable democracy. The OSCE commitments in the Human Dimension sphere with express reference to human rights and freedoms, including a commitment to work for equality between men and women, date from OSCE meetings in 1983.[28] The OSCE participating States have further acknowledged the obligation not only to create *de jure* equality of opportunity between men and women, but also *de facto* equality.[29]

The Office for Democratic Institutions and Human Rights (ODIHR) promotes equality in political and economic life, not just as an instrument to combat discrimination, but also as a means of ensuring democracy, the rule of law, and respect for human rights. The ODIHR assists participating States in their efforts to diminish the gen-

[27] For information on gender equality within the OSCE system, see the OSCE/OSDIHR website at http://www.osce.org/odihr/13374.html.

[28] Questions relating to Security in Europe, Madrid, 1983, para. 16, OSCE.

[29] The Moscow Meeting of the Conference on the Human Dimension (1991), Moscow 3 October 1990, para. 40–40(13).

der gap and ensure that equality between the sexes is achieved in law and in reality. The implementation of the Human Dimension commitments is monitored through the OSCE political mechanisms. The structure of summits, meetings, conferences, and seminars pursues two important endeavours: Firstly, to encourage the participating States to engage in a dynamic norm creating process; and secondly, to monitor and assess the implementations.[30]

While the OSCE commitments are of a political nature, the participatory process and open dialogue provide new possibilities for the participating States to take up any issue of concern in a political environment of goodwill and dialogue.[31] Compared to the mechanisms created by international treaties, such as CEDAW, ICCPR, and others, the forum of the OSCE gives more space for discussion of problematic issues and agreement of means and assistance in making the necessary changes.

General Equality Commitments

The strength of the arguments to achieve equality between the sexes has grown within the OSCE field. At the 1983 Madrid meeting, it was recognized that it is necessary to promote equality between men and women in political, economic, social, and cultural life;[32] there was express commitment to sign the CEDAW;[33] and, finally, recognition of the importance of equality between the sexes and equal participation in building democratic States based on the rule of law.[34]

Moreover, the Moscow meeting in 1991 expanded the commitments of the OSCE participating States, including to:

– comply with the CEDAW, including a withdrawal of reservations;

[30] See also **OSCE Human Dimension Commitments, a reference guide**, Warsaw, 2001, OSCE/ODIHR.

[31] See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 29 June 1990, Preamble, para. 11; Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 November 1990, para. 1; Charter for European Security, Istanbul, 19 November 1999, para. 7.

[32] Questions relating to Security in Europe, Madrid, 6 September 198, para. 16.

[33] Concluding Document of Vienna, Questions relating to Security in Europe, Vienna, 15 January 1989, para. 15.

[34] The Moscow Meeting of the Conference on the Human Dimension (1991), Moscow 3 October 1990, para. 40–40(13).

- effectively implement the obligations in international instruments, including development of policies in education, access to information and with regard to the collection of data;
- establish or strengthen national machinery related to gender equality;
- seek to eliminate all forms of violence against women;
- ensure women's participation in all spheres of life, decision-making, and State and civil society dialogue.

In 1998—as a preparation for the OSCE Human Dimension Implementation Meeting—a background paper for the participants was prepared on 'Women and Democratization'[35] with a view to re-emphasizing the difference between *de jure* equality between men and women, both internationally and domestically, and *de facto* equality. In addition to the stronger calls reflected earlier in the Moscow commitments, it includes recommendations for the OSCE to mainstream gender throughout its policies, programmes, and activities; and to improve cooperation with participating States, Ombudsinstitutions, National Human Rights Institutions and NGOs to develop tools to monitor problems and progress in the achievement of genuine equality. By making these calls, the report also recognizes the differences between the sexes and the respective action they may require, as well as denying superiority of either of the sexes.

Key Activities in Relation to Gender Policies

Along with the general commitments regarding participation of men and women in public, political, economic, and cultural life as stated above, the OSCE/ODIHR has provided for particular tools that can be used in the monitoring process.[36] Special attention is paid to the participation of women in elections.

Through OSCE commitments, the issue of violence against women is raised. While international legal documents focus on trafficking, war

[35] Women and Democratization. OSCE Human Dimension Implementation Meeting background paper; 26 October 1998; available at http://www.osce.org/odihr/documents/background/womenbac.pdf. This report is one of a series of papers prepared under the auspices of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe for the benefit of participants at the 1998 Implementation Meeting on Human Dimension Issues.

[36] Handbook for Monitoring Women's Participation in Elections, 13 July 2004, OSCE/ODIHR; Consolidated Summary of the OSCE ODIHR Human Dimension

crimes, or raising the issue of violence in relation to torture, inhuman treatment or health issues, OSCE provides a forum in which to discuss the problem, status, and possible means to eradicate the problem through the mechanism of the Human Dimension Meetings.[37]

The commitments in the field of trafficking call not only for the adoption of adequate legal norms, like criminalization of trafficking, but also for specific action to be taken with regard to the prevention, education, and protection of victims in the member States, as well as improving the capacity of the OSCE field operations to work on the prevention of trafficking.[38]

OSCE recognizes that the full and equal exercise by women of their human rights is essential in order to achieve a more peaceful, prosperous, and democratic OSCE area.[39] Thus, OSCE recognizes the importance of participation of men and women in decision-making processes on security issues, implementing its agreed principles of gender mainstreaming.

15.8. Council of Europe Action

Through its intergovernmental bodies of the Cabinet of Ministers and the Steering Committee for Equality between Women and Men (CDGE), CoE works towards setting common principles and standards to promote the full participation in society of women and men. CoE recognizes that new strategies are needed to address inequalities between men and women; therefore, gender mainstreaming[40] is used as a CoE strategy, and standards are developed in other areas, as well.

Seminar on Participation of Women in Public and Economic Life, 24 July 2003; Consolidated Summary of the OSCE/ODIHR Human Dimension Seminar on the Promotion of Women's Participation in Society, 14 October 1997.

[37] Final Report on the OSCE Supplementary Human Dimension Meeting "Preventing and Combating Violence against Women", 18–19 March 2002.

[38] Moscow 1990, para. 40(7); Charter for European Security, Istanbul 1999, para. 24; Ministerial Council Decision "Enhancing the OSCE's Efforts to Combat Trafficking in Human beings", Vienna 2000; see also Anti-trafficking country reports submitted to the Informal Group on Gender Equality and Anti-Trafficking in Human Beings, OSCE/ODIHR, 18 September 2002, and Talking points prepared by the ODIHR Anti-Trafficking Unit for the Meeting of the Informal Group on Gender Equality and Anti-Trafficking, 19 April 2004, OSCE/ODIHR.

[39] Charter for European Security, Istanbul, 1999, para. 24.

[40] CoE defines "gender mainstreaming" as "the (re)organization, improvement, development and evaluation of policy processes, so that a gender equality perspective

The standards are set based on examinations and CoE member State experiences concerning gender equality. The standards are given a practical application through conventions, policy guidelines, and practical tools for the implementation and cooperation platform for the exchange of experiences. These examinations and standards, describing the developments in Europe, play a substantial role in the decisions of the ECtHR and ECJ.

The standards and recommendations are developed in gender mainstreaming; including gender budgeting; balanced participation of men and women in political and public decision-making, including conflict-prevention and peace-building; prevention of violence against women; and trafficking in human beings.

15.9. Other International Instruments

UN Security Council Resolutions

In 2000, the UN Security Council adopted its landmark Resolution 1325 on Women, Peace, and Security.[41] The Resolution provides a solid basis for action to be taken towards recognizing women on an equal footing with men when making decisions about specific steps to be taken by the United Nations system, member States, and civil society actors. The activities relate to the areas of conflict-prevention and early warning; peace-making and peace-building; peace-keeping operations; humanitarian response; post-conflict reconstruction and rehabilitation; as well as disarmament, demobilization, and reintegration. The resolution stresses the importance of women's equal participation and full involvement in all efforts to maintain and promote peace and security. The resolution underscores the responsibility to protect women and girls from human rights abuses in conflict situations, including gender-based violence. It also emphasizes the vital importance of mainstreaming gender perspectives in all aspects of conflict prevention, resolution, and reconstruction.

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is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making." http://www.coe.int/T/E/Human_Rights/Equality/02._Gender_Mainstreaming/.

[41] Resolution 1325 (2000), Adopted by the Security Council at its 4213th meeting, on 31 October 2000, S/RES/1325 (2000).

UN World Conferences on Women

Four UN Women's World Conferences have taken place, each adopting declarations and action plans. In 1975, the first conference was held in Mexico; followed by Copenhagen in 1980, Nairobi in 1985, and Beijing in 1990. The Mexico conference set the general framework for the UN work on equality, and a UN Decade of Women 1975–1985 was declared. In 1979, the CEDAW convention was adopted; nevertheless, the Copenhagen conference showed a lack of agreement and general consensus on measures to be used to work for equality between the sexes. The Nairobi conference marked a considerable change in attitude; a strong action plan was agreed upon in Beijing in 1990 and has been followed up by States every five years and with regular reporting. Twelve main issues were raised for action in Beijing:

Box 15.5. The Beijing Platform for Action-Main Issues

The Beijing conference recognized women's human rights as universal, indivisible, inalienable, as well as requiring all necessary measures taken to eliminate discrimination against women and girls. "To this end, Governments, the international community and civil society, including non-governmental organizations and the private sector, are called upon to take strategic action in the following critical areas of concern:

1. The persistent and increasing burden of poverty on women.
2. Inequalities and inadequacies in and unequal access to education and training.
3. Inequalities and inadequacies in and unequal access to health care and related services.
4. Violence against women.
5. The effects of armed or other kinds of conflict on women, including those living under foreign occupation.
6. Inequality in economic structures and policies, in all forms of productive activities and in access to resources.
7. Inequality between men and women in the sharing of power and decision-making at all levels.
8. Insufficient mechanisms at all levels to promote the advancement of women.
9. Lack of respect for and inadequate promotion and protection of the human rights of women.
10. Stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media.
11. Gender inequalities in the management of natural resources and in the safeguarding of the environment.
12. Persistent discrimination against, and violation of the rights of the girl-child."[42]

[42] Report of the Fourth World Conference on Women, Beijing 4–15 September, 1995, UN, A/CONF.177/20, 17 October 1995. See Critical Areas of Concern and Strategic Objectives and Action.

Millennium Development Goals

These goals were agreed upon at the UN Millennium Summit in September 2000 based on developments since 1990.[43] It states eight goals with specific indicators to be achieved by 2015. In principle, each of the goals relates directly or indirectly to equality between men and women, or particularly women's rights. The Millennium Development Goals (MDG) seek to focus the efforts of the world community on achieving significant, measurable improvements in people's lives. They establish yardsticks for measuring results, not just for developing countries, but also for the rich countries that help to fund development programs and for the multilateral institutions that help countries implement them. The first seven goals are mutually reinforcing and are directed at reducing poverty in all its forms. The last goal—global partnership for development—concerns the means to achieve the first seven goals.[44]

Box 15.6. MDGs with Relevance for Equality between Men and Women

Goal/targets	*Special Issues in Relation to Girls and Women*
1 Eradicate Extreme Poverty and Hunger	
Reducing by half, before 2015, the proportion of people whose income is less than $1 a day and who suffer from hunger.	Feminization of poverty. Lack of recognition for domestic work. Slavery (domestic work, sexual services).
2 Achieve Universal Primary Education	
By 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling. It will be measured by net enrolment ratio in primary education, proportion of pupils starting grade 1 who reach grade 5, and literacy rate of 15- to 24-year-olds.	Due to reasons of poverty or culture, girls compared to boys are more frequently left at home or are not allowed to finish school due to their work at home. Illiterate women constitute 2/3 of illiterate people in the world.

[43] United Nations Millennium Declaration: Resolution/Adopted by the General Assembly: A/RES/55/2.

[44] For specific references on MDG and sexual and reproductive health, see http://www.unfpa.org/icpd/qanda.htm.

Goal/targets	*to Girls and Women*
3 Promote Gender Equality and Empower Women	
Target: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015. Measured by: ratio of girls to boys in primary, secondary, and tertiary education; ratio of literate females to males among 15- to 24-year-olds; share of women in gainful employment in the non-agricultural sector; proportion of seats held by women in national parliament.	As above, their gender may prevent girls from entering or finishing schools. Culture and traditions may preclude women from working in public, retaining them in unpaid work at home. For the same reasons, women may be excluded from participation in public life. Generally, women are underrepresented in national parliaments and leadership positions in various executive bodies and the judiciary.
4 Reduce Child Mortality	
Reduce by two-thirds, between 1990 and 2015, the under-five mortality rate.	While this goal relates mainly to health issues and health care, in many cultures the girl-child is not valued as much as the boy-child, and therefore may risk either being killed or under-nourished.
5 Improve Maternal Health	
Reduce by three-quarters, between 1990 and 2015, the maternal mortality rate.	Preventing unplanned and high-risk pregnancies and providing care in pregnancy, childbirth, and the postpartum period saves women's lives.
6 Combat HIV/AIDS and Other Diseases	
Halting and beginning to reverse the spread of HIV/AIDS by 2015. Halting and beginning to reverse the incidence of malaria and other major diseases by 2015.	Sexual and reproductive health care includes preventing and treating sexually transmitted infections, including HIV/AIDS. Timely health care opens for early diagnosis and treatment of other diseases and conditions. Exposure of women to trafficking for sexual exploitation purposes increases their risk of contracting sexually transmitted diseases including HIV/AIDS.

Goal/targets	*to Girls and Women*
7 Ensure Environmental Sustainability	
Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources. Halving, by 2015, the proportion of people without sustainable access to safe drinking water. Achieving, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.	Due to gender roles, women are often responsible for the daily chores of the household, including supply of water and collection of agriculture crops.
8 Global Partnership for Development	
Further developing an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development, and poverty reduction, both nationally and internationally).	Equal participation of men and women in the planning, implementation, and monitoring of the actions necessary for achievement of MDGs will ensure a sustainable and all-inclusive process.

15.10. Monitoring Equality: The Special Challenges

Mechanisms

CEDAW monitoring mechanisms (cf. chapter 1, *Box 5 and Box 6*) generally focus on the status and achievements of women. The reporting process is an important tool in assessing the progress made in improving women's situation. While the monitoring focuses on women, the reports may identify problem areas where men or women encounter problems and ensure involvement of men in achieving the necessary changes to improve equality. A gender approach to monitoring means, assessing the needs, interests, and perceptions of men and women, and the effects of the implementation of the Convention on men and women.

Special Issues

Recognizing differences between men and women, as well as among groups of men and women, will provide a clearer and more objective picture for the actual assessment of needs, perceptions, and effects of the rights' implementation. Issues of multiple discrimination,

may surface within such exercises, indicating that discrimination also appears on the grounds of race, social status, and political belonging.

Culture and traditions are essential elements when monitoring the implementation of rights and also various development activities. They contribute to defining the context in which the rights are to be assessed and are essential for understanding different perceptions by men and women in the assessment of their situation. Culture is a whole complex of distinctive spiritual, material, intellectual, and emotional features that characterize a society or a social group. It includes the modes of life, values and belief systems and the fundamental rights of a human being. Religion and its values therefore also constitute part of the culture, and are likewise subject to change and reinterpretation. Culture is constantly evolving due to external influences and different interests involved; including globalization, economic development, and deliberate policy and legislation changes.[45]

To assess whether a given traditional or cultural practice protects or violates rights of men and women equally, one can ask questions as to what the origin of the specific traditional practice is: who defines the practice; what is its rationale; and who benefits from it?

Use of gendered language may reinforce a certain understanding of the rights and the way they are perceived by men and women. The power of language shall not be underestimated; for example, the term 'Ombudsman' in English and many other languages still remains in the 'male' form, while it is possible to use the more neutral term 'Ombudsperson'. The transformation of the term 'chairman' into 'chairperson' or 'chair' is an example of how language has developed even as more women occupy positions where the term is used.

[45] See OECD Tip Sheet on Culture at www.oecd.org under Development Assistance Committee/gender.

15.11. Monitoring Checklist for Equality between Men and Women

Checklist – Equality between Men and Women

1. Legislation and regulations, policies and programmes
   - Is comprehensive legislation on equality between men and women in place?
   - Are specific fields of national legislation where special needs of men and women occur taken into consideration?
   - Does the State require gender mainstreaming (e.g. gender analysis) in all or specific legislation?
   - Is there a comprehensive gender equality policy?
   - Is gender mainstreaming required for the development of all policies of the State?
   - Does the State require the private sector to take into consideration gender mainstreaming (e.g. in employment relations)?

2. Monitoring the Right in Practice
   - Are there national complaint mechanisms for cases of discrimination?

   a. Does discrimination occur?
      - Is there differential treatment between men and women who are similarly situated?
      - Are differences and special needs among men and women taken into consideration?
      - Is the distinction objectively or reasonably related to the aim of the law or the practice?
      - Is the means employed proportionate to the aim sought to be achieved?

   b. Is there a discriminatory impact?
      - What are the facts/statistics on the situation of men and women with regard to the implementation of all rights listed in CEDAW?
      - Does the measure, law, or policy without justification have an adverse effect on men or women? Can men and women exercise the rights?

   c. Other factors
      - Is the language used in public administration neutral?
      - Do traditional practices exist in the given State that place men and women differently in the society? What are the grounds for such practice?

15.12. Instruments on Equality between Men and Women

Legally Binding Instruments

UN Instruments

International Covenant on Civil and Political Rights (ICCPR)

Section	Critical Substantive Points	Relevant Treaty Body Interpretative Statements
Article 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. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 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."	General Comment 18 (non-discrimination)

Article 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."	General Comment 4 (Equal enjoyment of civil and political rights by men and women) General Comment 28 (The equality of rights between men and women)
Article 23	"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The rights of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."	
Article 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."	

International Covenant on Economic, Social and Cultural Rights

Article 2	"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."	
Article 3	"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."	General Comment 16—the equal right of men and women
Article 7	"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular a) remuneration which provides all workers, as a minimum, with: a. fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women begin guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (…)"	

Convention on the Rights of the Child

Article 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."	

International Convention on the Elimination of All Forms of Discrimination against Women

Article 1	"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."	General Recommendations 1–25: 1, 2: Reporting 3: Article 5 on Traditional practices 4, 20: Reservations 5, 25: Temporary special measures
Entirety	The Convention articles provide for a full list of rights and suggested measures for the attainment of equality between men and women. While the Convention focuses on women's rights, the essential principle implied is to ensure equality between sexes. Article 4 defines special measures permissible for attainment of *de facto* equality. Article 5 addresses the issues of cultural and traditional practices and stereotypes.	6: Implementation and national machinery 12, 14, 19: Violence against women 13, 16, 17: Equal remuneration and unpaid women's work 14: Female circumcision 15, 18, 24: Health 21: Marriage 23: Political life

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Trans-national Organised Crime (2003)

Article 2	*Statement of purpose* "The purposes of this Protocol are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives."
Article 3	*Use of terms* "For the purposes of this Protocol: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) 'Child' shall mean any person under eighteen years of age."

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)

"Desiring, in conformity with the Charter of the United Nations, to promote universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Recalling that article 16 of the Universal Declaration of Human Rights states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses."

Convention Against Discrimination in Education

Article 1	"1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of access to education of any type or at any level; (b) Of limiting any person or group of persons to education of an inferior standard; (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man."
Article 2	"When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article I of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level."

Convention on the Nationality of Married Women

Entirety	The Convention was opened for signature pursuant to resolution 1040 (XI)1 adopted by the General Assembly of the United Nations on 29 January 1957. It entered into force 11 August 1958.

Convention on the Political Rights of Women (1952)

Entirety	Opened for signature and ratification by General Assembly resolution 640(VII), entered into force on 7 July 1954.

Equal Remuneration Convention (1951)

Entirety	Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value adopted by the General Conference of the International Labour Organization on 29 June 1951, entered into force on 23 May 1953.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)

Entirety	Opened for signatures and ratifications by General Assembly resolution 317(IV) of 2 December 1949, entered into force on 25 July 1951. The first convention to address the trafficking in persons.

Council of Europe (CoE) Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11

Section	Critical Substantive Points
Article 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."

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Entirety	"Article 1. 1. The enjoyment of any right set forth by law 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. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."	Explanatory Report

European Social Charter (revised)

Article 20	"With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields: access to employment, protection against dismissal and occupational reintegration; vocational guidance, training, retraining and rehabilitation; terms of employment and working conditions, including remuneration; career development, including promotion."
Article E	"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

CSCE/OSCE Instruments

Final Act of the Conference on Security and Co-operation in Europe, "Declaration on Principle Guiding Relationns between Participating States"

Section	Critical Substantive Points
Principle VII, paragraph 1	"The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."

Madrid, 1983 "Questions Relating to Security in Europe"

Paragraph 16	"[The participating States] stress the importance of ensuring equal rights of men and women; accordingly, they agree to take all actions necessary to promote equally effective participation of men and women in political, economic, social and cultural life."

Vienna, 1989 "Questions Relating to Security in Europe"

Paragraph 13(7) and 13(8)	"[The participating States will] 13(7)—ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, 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; 13(8)—ensure that no individual exercising, expressing the intention to exercise or seeking to exercise these rights and freedoms or any member of his family, will as a consequence be discriminated against in any manner (…)"
Paragraph 15	"The participating States confirm their determination to ensure equal rights of men and women. Accordingly, they will take all measures necessary, including legislative measures, to promote equally effective participation of men and women in political, economic, social and cultural life. They will consider the possibility of acceding to the Convention on the Elimination of All Forms of Discrimination against Women, if they have not yet done so."

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE 29 June 1990

Paragraph 5 and 5(9)	"5—[The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: (…) 5(9)—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 will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground."

Charter of Paris for the New Europe, Paris, 21 November 1990 ("Human Rights, Democracy and Rule of Law")

Paragraph 3 and 5	"Democracy is the best safeguard of (…) tolerance of all groups of society, and equality of opportunity for each person. (…) We affirm that, without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, freedom of expression, freedom of association and peaceful assembly, freedom of movement; No one will be: subject to arbitrary arrest or detention, subject to torture or other cruel, inhuman or degrading treatment or punishment; Everyone also has the right: to know and act upon his rights, to participate in free and fair elections, to fair and public trial if charged with an offence, to own property alone or in association, and to exercise individual enterprise, to enjoy his economic, social and cultural rights."

Document of the Moscow Meeting of the Conference on the Human Dimension of the OSCE, 3 October 1991

Paragraph 40–40(13)	"40—The participating States recognize that full and true equality between men and women is a fundamental aspect of a just and democratic society based on the rule of law. They recognize that the full development of society and the welfare of all its members require equal opportunity for full and equal participation of men and women. In this context they will 40(1)—ensure that all CSCE commitments relating to the protection and promotion of human rights and fundamental freedoms are applied fully and without discrimination with regard to sex;

40(2)—comply with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), if they are Parties, and, if they have not already done so, consider ratifying or acceding to this Convention; States that have ratified or acceded to this Convention with reservations will consider withdrawing them;

40(3)—effectively implement the obligations in international instruments to which they are Parties and take appropriate measures to implement the United Nations Nairobi Forward-looking Strategies for the advancement of Women (FLS);

40(4)—affirm that it is their goal to achieve not only *de jure* but *de facto* equality of opportunity between men and women and to promote effective measures to that end;

40(5)—establish or strengthen national machinery, as appropriate, for the advancement of women in order to ensure that programmes and policies are assessed for their impact on women;

40(6)—encourage measures effectively to ensure full economic opportunity for women, including non-discriminatory employment policies and practices, equal access to education and training, and measures to facilitate combining employment with family responsibilities for female and male workers; and will seek to ensure that any structural adjustment policies or programmes do not have an adversely discriminatory effect on women;

40(7)—seek to eliminate all forms of violence against women, and all forms of traffic in women and exploitation of prostitution of women including by ensuring adequate legal prohibitions against such acts and other appropriate measures;

40(8)—encourage and promote equal opportunity for full participation by women in all aspects of political and public life, in decision-making processes and in international cooperation in general;

40(9)—recognize the vital role women and women's organizations play in national and international efforts to promote and enhance women's rights by providing, inter alia, direct services and support to women and encouraging a meaningful partnership between governments and these organizations for the purpose of advancing equality for women;

40(10)—recognize the rich contribution of women to all aspects of political, cultural, social and economic life and promote a broad understanding of these contributions, including those made in the informal and unpaid sectors;

40(11)—take measures to encourage that information regarding women and women's rights under international and domestic law is easily accessible;

40(12)—develop educational policies, consistent with their constitutional systems, to support the participation of women in all areas of study and work, including non-traditional areas, and encourage and promote a greater understanding of issues relating to equality between men and women;

40(13)—ensure the collection and analysis of data to access adequately, monitor and improve the situation of women; these data should not contain any personal information."

Concluding Document of Budapest, Summit Declaration, 6 December 1994

Paragraph 7	"The CSCE's democratic values are fundamental to our goal of a community of nations with no divisions, old or new, in which the sovereign equality and the independence of all States are fully respected, there are no spheres of influence and the human rights and fundamental freedoms of all individuals, regardless of race, colour, sex, language, religion, social origin or of belonging to a minority, are vigorously protected."

Charter of European Security, Istanbul, 19 November 1999

Paragraph 23–24	"23. The full and equal exercise by women of their human rights is essential to achieve a more peaceful, prosperous and democratic OSCE area. We are committed to making equality between men and women an integral part of our policies, both at the level of our States and within the Organization. 24. We will undertake measures to eliminate all forms of discrimination against women, and to end violence against women, as well as sexual exploitation and all forms of trafficking in human beings. In order to prevent such crimes we will, among other means, promote the adoption or strengthening of legislation to hold accountable persons responsible for these acts and strengthen the protection of victims (…)"

Summit Declaration, Istanbul 1999

Paragraph 2	"2. [The participating States] reiterate unreservedly [their] commitment to respect human rights and fundamental freedoms and to abstain from any form of discrimination."

Other International Instruments

Universal Declaration on Human Rights

Section	Critical Substantive Points
Article 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."
Article 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."

Article 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."

Rome Statute of the International Criminal Court

Article 6 Genocide	"For the purposes of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent birth within the group; e) forcefully transferring children of the group to another group."
Article 7 Crimes Against Humanity	"1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) murder b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) torture g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or nay crime within the jurisdiction of the Court;

i) enforced disappearance of person;

j) the crime of apartheid;

k) other inhumane act of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. for the purpose of para. 1:

a)–b) (…)

c) 'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in person, in particular women and children;

d)–e) (…)

f) 'forced pregnancy' means unlawful confinement of women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) 'persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h)–i) (…)

3. for the purposes of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning differing from above."

Article 8 War Crimes	"1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes. 2. For the purposes of this Statute, 'war crimes' means: a) (… reference to Geneva Conventions of 1949) b) (…other serious violations of law and customs applicable in international armed conflicts…) i)–ix) (…) x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiment of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned not carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; xi)–xx) (…) xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in article 7, paragraph 2(f), enforced sterilisation, or any other form of sexual violence also constituting a grave breach of Geneva Conventions; xxiii)–xxvi) (…) c)–d) e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts: i)–v) (…)

vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in article 7, paragraph 2(f), enforced sterilisation, or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

vii)–x) (…)

xi) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiment of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned not carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

xii) (…)"

United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention Against Discrimination in Education

Article 1 "1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man."

UN Resolution 1325 (2000), Adopted by the Security Council at its 4213th meeting, on 31 October 2000

Entirety	Article 1–4 on participation of women.
	Article 5, 8 on gender mainstreaming and gender perspective.
	Articles 6–7 on gender sensitive training and special training in women's rights.
	Articles 9–10 on protection of rights of women and children in armed conflicts.
	Article 11 on prosecution of gender crimes.
	Articles 15–17 on the reporting and field missions.

International Labour Organization "Discrimination (Employment and Occupation) Convention"

Article 1	"1. For the purpose of this Convention the term 'discrimination' includes
	a. any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
	b. such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
	Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

Other UN Documents (constitute necessary background material for the adoption of CEDAW and other special instruments related to gender equality)

Declaration on the Elimination of Violence Against Women (1994)

Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts (1979)

Declaration on Elimination of Discrimination Against Women (1967)

15.13. References

Barnett, Hilaire, *Introduction to Feminist Jurisprudence*. (London: Cavendish Publishing Limited, 1998).

Barnett, Hilaire, *Source Book on Feminist Jurisprudence*. (London: Cavendish Publishing Limited, 1997).
The two books by Barnett listed above review the various issues related to gender equality and law, like impact of culture and patriarchy on women's rights; education; and the role of women in wars. It gives an overview of political and legal theories from a gender perspective.

Oosterveld, Valerie, *When Women are the Spoils of War: Analysis of the war crimes and inclusion of the sexual violence*. (1998). http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm

OSCE, *OSCE Human Dimensions Commitments: a reference guide*. (Warsaw: OSCE/ODIHR, 2001).
The OSCE Commitments related to all areas within the OSCE Human Dimension are listed and quoted for easy reference. It describes the general provisions of human rights protection and implementation of OSCE Commitments; and looks at the specific fields, like equality between men and women, trafficking in persons. A chronological compilation of the Commitments is provided in Part B of the book.

Rai, Shrin M. (ed.), *Mainstreaming gender, democratising the state? Institutional mechanisms for the advancement of women*. (Manchester: Manchester University Press, 2003).
This book provides research and discussion on the various available mechanisms in promoting gender equality and advancement of women.

Tickner, Ann, *Gendering World Politics: Issues and Approaches in the Post-Cold War Era*. (New York: Columbia University Press, 2001).
This book reviews various issues related to international relations and gender. It covers gender issues in the dimensions of security, peace, war, democratization processes, and introducing feminist perspectives to the academic dimension of international relations.

Watson, Renate and Nicole Weber (eds.), *Women 2000: An Investigation into the Status of Women's Rights in Central and South-Eastern Europe and the Newly Independent States*. (Vienna: International Helsinki Foundation for Human Rights, 2000).
Analysis of the situation with regard to women's rights is given. Of particular assistance to the monitoring would be Annex 1: Questionnaire for the survey carried out as part of the research.

Electronic Resources

http://www.acdi-cida.gc.ca/equality
Canadian International Development Agency provides various training programmes and tools, as well as reports and research on gender equality. It also provides external links to gender mainstreaming and other resources useful in development cooperation.

http://www.bridge.ids.ac.uk/
BRIDGE supports gender advocacy and mainstreaming efforts by bridging the gaps between theory, policy, and practice with accessible and diverse gender information in print and online.

http://www.coe.int/T/E/Human_Rights/Equality/
CoE website providing detailed information on the CoE activities in the field of gender equality; specifically violence against women, trafficking in human beings, participation in political life, and the role of men working with gender equality. Here you can access all CoE recommendations, conventions, good practices, and conference materials in the respective fields of interest.

http://europa.eu.int/comm/employment_social/gender_equality/index_en.html
The European Union website provides information on the EU policies and legislation, work of the EU institutions, and other relevant information. Special sites are created under the Commission and Parliament reflecting gender issues.

www.icrc.org
International Committee of the Red Cross site provides information on gender aspects in armed conflicts, conflict prevention, and gender-specific war crimes.

www.idea.int, www.ipu.org
Websites on political participation of women/men.

www.oecd.org
Under the section of the Institutions/Development Assistance Committee, links to issues, including gender, are provided. Here you can find various publications on gender in development and tip-sheets with gender references to many OECD operation fields.

http://www.un.org/womenwatch/daw/index.html
This UN website provides information on women's rights, relevant international documents, as well as country reports under the CEDAW convention. Links to relevant UN and other institutions and networks are provided.

www.undp.org/gender/
This website provides various tools and resources on gender mainstreaming.

http://www.womenaction.org/index.html
WomenAction is a coalition network of members from around the world. It was formed as a result of the working group discussions on the Beijing Plus Five overall framework; NGO access and participation problems; NGO alternative or shadow reports on the implementation of the Beijing Platform for Action.

www.womenlobby.org
European Women's Lobby aims at promoting women's rights and equality between women and men in the European Union. EWL is active in different areas such as women's economic and social position, women in decision-making, violence against women, women's diversity, etc. EWL works mainly with the institutions of the European Union: the European Parliament, the European Commission and the EU Council of Ministers.

GLOSSARY

Accession: Accession is the usual method by which a State, which has not taken part in the negotiations or signed the treaty in question, may subsequently consent to be bound by its terms. Accession has the same legal effect as **ratification**.

Adoption: The act by which a treaty text is recognized by a group of States or by a competent body, such as the Committee of Ministers in the **Council of Europe** and the General Assembly in the **UN**, and subsequently opened for **signature** and **ratification** by **States parties**. When adopted, the text of the treaty is definitive.

Article: The term used to describe the various clauses that make up treaties, **convention**s and **covenant**s.

CAT: Acronym for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

CEDAW: Acronym for the Convention on the Elimination of All Forms of Discrimination against Women.

CERD: Acronym for the Committee for Elimination of Racial Discrimination, **treaty body** for the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**).

Civil rights: Examples include the right to privacy, freedom of expression, and freedom of belief. Civil rights are put in place in order to ensure the individual a certain level of freedom of action and freedom from State interference in private and public life, as well as other fundamental guarantees, e.g. the right to a fair trial.

CMW: Acronym for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, abbreviated as the Convention on Migrant Workers.

Collective rights: Human rights apply to individuals, but in some instances also to groups of people. An example is the rights of minorities and indigenous peoples. Collective rights are held by individual members of a group by virtue of their belonging to that group; as opposed to individual rights, which each individual human being holds, regardless of whether that person belongs to a certain group.

Committees: The bodies that oversee the **implementation** of many human rights treaties. In the **UN**, there are seven of these: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women; the Committee against Torture; the Committee on the Rights of the Child; and the Committee on Migrant Workers. Under the **Council of Europe** there are, *inter alia*,

the European Committee on Social Rights; the European Committee for the Prevention of Torture; and the Advisory Committee on the Framework Convention for the Protection of National Minorities.

Communication: A communication is the term used in some human rights systems to refer to allegations or complaints of **State party** violations of the rights enshrined in certain treaties. In the **UN** system, individual communications may be submitted in relation to **HRC**, **ICERD**, **CAT**, **CEDAW**, and **CMW**, provided that the involved **State party** has acknowledged that right for its citizens.

Concluding observation: The observations and recommendations issued by a **treaty body** after giving consideration to a **State party's** report.

Consultative status: Large **NGO**s can apply for recognition as an NGO that the **UN** will consult about human rights matters. Some UN bodies, such as the **Human Rights Council** and **Sub-Commission**, only allow access to NGOs with consultative status.

Contracting States: States bound by a common contract or treaty. Synonym for **member States** or **States parties**.

Convention: Synonym for treaty.

Country rapporteur: A specialist appointed, for instance, by the **Human Rights Commission**, to report on the human rights situation in a given country.

Council of Europe: A regional organization comprising 46 democratic countries of Europe. One of the main objectives of the organization is to protect and promote human rights. It is based in Strasbourg, France.

Court of Justice of the European Communities: Meets in Luxembourg and ensures compliance with the law in the interpretation and application of the treaties of the European Union.

Covenant: Synonym for treaty. Particularly used in relation to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights.

CPT: Acronym for the Committee for the Prevention of Torture, **treaty body** of the **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**. The Convention is also often (incorrectly) referred to by the same acronym.

Crimes against humanity: The gravest breaches of international humanitarian and human rights law. Defined in the **Rome Statute** (1998) as intended systematic or widespread attack on a civilian population; including murder, extermination, enslavement, grave sexual violence, and torture.

Customary international law: The legal norms that have developed through the customary interaction between **States** over time.

Declaration: Declarations may have several meanings. They are notifications by which a State clarifies the interpretation or the scope it gives to a treaty or to a provision. They may also refer to a policy statement adopted by international bodies, e.g. the **UN**, and are as such essentially statements of intent.

Discrimination: Unfair differential treatment whereby individuals or groups of people are excluded from obtaining certain rights and privileges on an

equal footing with the rest of society. One of the primary principles of human rights is that States may not exclude persons or limit their access to equal treatment based, say, on their race and ethnicity, religion and faith, gender, sexual orientation, political convictions, or other status. However, under certain circumstances, positive measures may be applied, so that exposed groups and individuals, e.g. women or minorities, are ensured the enjoyment of human rights on an equal basis with the majority of society.

Dualist system of application: System whereby national implementation of an international human rights treaty is done by transformation. The dualist system does not ascribe formal legal status to the international treaty in the domestic system, and consequently the rights enshrined in the treaty are not adjudicative (i.e. directly applicable in domestic courts).

Entry into force: A treaty enters into force when a sufficient number of States have expressed their consent to be bound by the treaty by **ratification** or **accession**. The specific number required is stated in the treaty text. Only when this number of States have adopted the treaty does it have a legal purview and becomes binding for the treaty members.

European Commission: The executive organ of the European Union based in Brussels, which monitors the proper application of the Union treaties and the decisions of the Union institutions.

European Commission of Human Rights: Until November 1998, this international body under the **Council of Europe** examined the admissibility of all individual or State complaints against a member State in accordance with the **European Convention on Human Rights**.

European Convention on Human Rights: Treaty by which the **member States** of the **Council of Europe** undertake to respect **fundamental freedoms** and rights.

European Court of Human Rights: Based in Strasbourg. The judicial organ established by the **European Convention on Human Rights**. It is composed of one Judge for each **State party** to the Convention and ensures, in the last instance, that **contracting States** observe their obligations under the Convention. Since November 1998, the Court has operated on a full-time basis.

Explanatory report: Since 1965, each newly adopted treaty under the **Council of Europe** has an explanatory report. **Article** by article, the explanatory report comments upon the meaning of the provisions of the treaty. Since 2001, all the explanatory reports are made public. An explanatory report, however, does not constitute an authoritative interpretation of the treaty.

Fundamental freedoms: These are human rights which involve the basic freedoms traditionally protected in constitutional law, such as freedom from torture, freedom of expression, and freedom of association.

General comment: A **UN treaty body's** interpretation of the content of the treaty's human rights provisions, or its methods of work. General comments often seek to clarify the reporting duties of **States parties** with respect to certain provisions and to suggest approaches to implementing

treaty provisions. Also called "General recommendation" (in relation to **CERD** & **CEDAW**).

Geneva Conventions and Additional Protocols: The four Conventions which were adopted in 1949 in Geneva by the International Red Cross Committee and the two Additional Protocols from 1977. The core documents of international **humanitarian law**. The Geneva Conventions are supposed to protect victims of armed conflicts and secure their human rights. These count both for wounded and sick members of the armed forces, prisoners of war, and civilians.

Genocide: One of the most severe of all breaches of human rights, often committed during times of war or crisis. The intention is to destroy, partially or entirely, a group of citizens blamed for the critical condition of the country. This group may be defined nationally, ethnically, racially, or religiously, and is separated and eliminated from society (according to the Convention on the Prevention and Punishment of the Crime of Genocide, Article 2). Since genocide is an international crime, those responsible can be brought before an international criminal court or tribunal, as it has happened in relation to for example the Former Yugoslavia and Rwanda.

Horizontal effect: The State's responsibility to secure that the individual is protected not only against unjustified State interference with her/his human rights, but also against such interferences by others.

Humanitarian law: A part of international law. Main **instruments** are the **Geneva**.

Conventions and Additional Protocols. Based on the principle that States must protect the most basic human rights in situations of war between States or armed conflicts within States (internal armed conflicts). The protection includes help to the victims of acts of war and limitation of the means of war, in order to decrease the number of casualties, human suffering, and material damages as far as possible.

Human Rights Commission: The Commission was a standing organ under the Economic and Social Council (ECOSOC). The Commission's functions were taken over by the **Human Rights Council** in 2006.

Human Rights Council: The Council was established under the **UN** General Assembly in 2006. It replaces the now defunct **Human Rights Commission**. Its agenda and programme of work provides it with the opportunity to discuss all thematic issues and situations relating to human rights. The Council has a **mandate** to review all **UN member States** within a periodic cycle of four years (as at 2007). This will be undertaken by a working group composed of members of the Council. The periodic reviews will include **recommendations** to the concerned State, and the working group may receive in-put from **treaty bodies**, **rapporteurs** and **NGO**s for the review process.

The **special rapporteurs** and **special representatives** are reporting to the Council, and their **mandate**s and procedures are planned to be reviewed and streamlined by the Council as one of it's coming tasks (as at 2007).

Human Rights Council Advisory Committee: replacing the former **Sub-Commission on the Promotion and Protection of Human Rights**, will be established to support the **Human Rights Council's** work. Functioning as a think tank, the Committee will provide expertise and advice and conduct substantive research and studies on thematic issues of interest to the Council at its request. The Advisory Committee will be made up of eighteen experts serving in their personal capacity.

Human rights defenders: Activists or others who work to promote human rights.

ICC: Acronym for the International Criminal Court. The Court is a permanent international criminal court dealing with the most serious of international crimes, including **genocide** and **crimes against humanity**. The Court was established in 2002 in accordance with the so-called **Rome Statute**, and is based in The Hague, the Netherlands.

ICCPR: Acronym for the International Covenant on Civil and Political Rights.

ICESCR: Acronym for the International Covenant on Economic, Social and Cultural Rights.

ILO: The International Labour Organization.

Implement: Put into practice, apply.

Individual cases: Term used in the **UN** treaty system where some human rights conventions allow for individuals, or representatives on their behalf, to complain against alleged **State party** violations of the rights in the specific convention. This control function is vested with the **treaty body** and it must be acknowledged specifically by the State party. The concluding opinions of the treaty bodies in individual complaints cases are not legally binding on the State party against which the complaint is filed. Nevertheless, they have a high status in the current interpretation of the right in question.

Instruments: The generic term for all the different documents that embody human rights standards: **Declarations**, **Covenants**, **Conventions**, Basic Principles, etc.

Interdependence: Due to historical and political reasons, human rights have traditionally been categorized as civil and political rights on the one hand, and economic, social and cultural rights on the other. In current human rights thinking, this division is toned down while the interdependence of all human rights is emphasized.

International Bill of Human Rights: The two **UN Covenants** in conjunction with the **Universal Declaration of Human Rights** are sometimes called the International Bill of Human Rights.

International Court of Justice (**ICJ**): Judicial body of the United Nations which meets in The Hague.

International (**public**) **law**: International law includes both a 'public' and 'private' component, although the term is often used as a synonym for 'public international law.' International law (i.e. public international law) concerns the behaviour of States towards each other during times of peace and war. International law has three primary sources: international treaties,

custom, and general principles of law (cf. Article 38 of the Statute of the **International Court of Justice**). The value and authority of international law is to a large extent dependent upon the voluntary participation of States in its formulation, observance, and enforcement.

Jurisdiction: The power to exercise authority; for instance, the power of a court to judge or a government's authority to rule and legislate. Jurisdiction also refers to a limited territory wherein, say, a State exercises its authority.

Mandate: The permission and authority given to a body, organization, or officer to carry out their functions. The mandate is usually specified in a **resolution** passed by the authorizing body.

Margin of appreciation: The lawful limitation of human rights by States; gives **States parties** room for balancing individual human rights with legitimate societal interest, also opening a certain space for adapting the implementation to local conditions.

Member States: The **contracting States**, or **States parties** to a treaty.

Monist system of application: System whereby national **implementation** of an international human rights treaty is done by automatically adopting the treaty on an equal footing with or above domestic law.

NGO: Non-governmental organization. This includes voluntary groups, community groups, pressure groups, campaigns, charities, trade unions, and virtually any other group that is not part of the government. It does not include commercial organizations, although a group representing for example small businesses would also be recognized as an NGO.

NHRI: National Human Rights Institution. Independent, public institutions established in accordance with the so-called Paris Principles (adopted by the **UN** General Assembly 1993). Their **mandate** is to promote and protect human rights at the domestic level.

ODIHR: Acronym for Office for Democratic Institutions and Human Rights. ODIHR is a part of the **OSCE** and is based in Warsaw, Poland. It is active particularly in the fields of election observation, democratic development, human rights, tolerance, non-**discrimination**, and rule of law.

Office of the High Commissioner for Human Rights: The office within the **UN** that deals with human rights. Based in Geneva, Switzerland.

Opening for signature: When a treaty is adopted by the competent organ of an organization it is opened for signature. When a State signs a treaty it is an indication that the government will consider and eventually prepare for **ratification** of the treaty.

Optional Protocol: An addition to a human rights instrument that **States parties** can ratify if they wish to, but are not required to. Many of the human rights conventions have optional protocols. These may establish a higher level of protection in relation to one or more rights enshrined in the **convention**, or they can add further rights to those already listed in the convention. An optional protocol can also broaden the control machinery of a convention; for instance by establishing a complaint procedure for individuals over alleged State violations of the treaty rights.

OSCE: Acronym for the Organization for Security and Co-operation in Europe. The OSCE is a regional security organization with 55 participating

States in Europe, the Caucasus, Central Asia and North America. Its secretariat is located in Vienna, Austria.

Party: Parties to a treaty are the States, which have **ratified** the treaty and thus have consented to be bound by the treaty.

Periodic report: A report made by a government to one of the **committees** that monitor human rights treaties explaining how it has **implemented** the relevant **convention**. The intervals of the periodic reports are most often specified in the treaty text. The intervals are usually two, four, or five years.

1503 Procedure: A mechanism under the UN where communications (complaints) alleging gross and systematic human rights violations are examined. Governments' responses to the allegations are obtained. All initial steps in the process are confidential; yet, if a pattern of abuses in a particular country remains unresolved in the early stages of the process, it can be brought to the attention of the world community through the Human Rights Council.

Protocol: A protocol is a legal **instrument**, which complements the main treaty.

Rapporteur: Reporter. A term used in the **UN** system. A rapporteur is usually a member of a committee or a working group who has been charged with reporting to that body on a particular matter. See also **Special Rapporteur** and **Country Rapporteur**.

Ratification (**to ratify**): Ratification, acceptance, and approval all refer to the act whereby a State establishes its consent to be bound by a treaty. Then, the **State party** must respect the provisions of the treaty and **implement** it by amending domestic legislation and practice. Once a State has ratified a treaty at the international level, it must give effect to the treaty domestically. Upon **ratification**, the State becomes legally bound by the treaty.

Reservation: A reservation is a statement made by a State when **signing** or **ratifying** a treaty, whereby it excludes or modifies the legal effect of certain provisions of the treaty in their application to that State. Reservations cannot be contrary to the object and purpose of the treaty.

Resolution: A document adopted by the States in an international organization, such as the **Council of Europe** or the **UN**. States are not obliged to follow a resolution, but the resolution is usually supposed to give a branch of the international organization the competence to undertake a concrete action, such as writing a report or starting a campaign.

Rome Statute: The international treaty, adopted in 1998, outlining the **mandate** and function of the International Criminal Court (**ICC**).

Rules of Procedure: In the **UN**, the formal rules adopted by a **treaty body** to govern the way in which it goes about its business. Each committee is empowered by the relevant treaty to adopt its own rules of procedure. The rules of procedure usually cover such matters as election of officers and procedures for adopting decisions; especially where no consensus can be reached.

Session: Meeting. Usually used to describe the whole period of days or

weeks during which a particular committee, working group, or other body meets. Sessions are often described numerically to indicate how often the particular body has met since it was set up. Confusingly, the sittings of such bodies each morning and afternoon are also often referred to as sessions.

Signature (to sign): Signature of a treaty is an act by which the State expresses its interest in the treaty and its intention to become a **party**. The State is not legally bound by the signature. A signature is the first step towards **ratification**.

Special Rapporteur: Someone appointed to report to a human rights body, usually the **UN Human Rights Council**, on a particular issue or country. The Special Rapporteur will usually be a human rights expert who either serves on the body itself or is appointed by the body.

Special Representative: A Special Representative is equal to a **Special Rapporteur**, but is appointed by the Secretary-General to the **UN** rather than by the **Human Rights Commission** or **Sub-Commission** (the former is, as of 2006, replaced by the **Human Rights Council**, the latter by the **Human Rights Council Advisory Committee**).

State(s) party: A State party to a treaty is a State that has consented to be bound by that treaty by an act of **ratification** whereby that treaty has **entered into force** for that particular State. This means that the State is bound by the treaty under **international law**.

The Sub-Commission: The **UN** Sub-Commission on the Promotion and Protection of Human Rights. Is from 2007 replaced by the **Human Rights Council Advisory Committee.**

Treaty body: In **UN** terminology, a committee of independent experts appointed to monitor the **implementation** by **States parties** of the core international human rights treaties. They are called treaty bodies because each is created in accordance with the provisions of the treaty, which it oversees (except the ICESC). The treaty bodies receive support from the United Nations Secretariat and they report to the General Assembly. Also referred to as the "committee" or "treaty-monitoring body."

UN: The United Nations. Global association of governments facilitating cooperation in international law, security, economic development, and social equity. Its **mandate** and main organs are described in the UN Charter.

Universal Declaration of Human Rights: Adopted by the **UN** in 1948 in order to strengthen the protection of human rights at the international level. The UDHR is not a binding treaty; nevertheless, it laid the basis for the development of the Covenants for Civil and Political Rights and Social, Economic and Cultural Rights, and it outlines important principles found in many **conventions**.

Vienna Convention on the Law of Treaties: A treaty, done in Vienna in 1969, outlining the means and methods of interpretation of international treaties between States. To a large extent, the treaty only codified what was already generally accepted as **customary international law**. Hence, it is widely recognized as stating principles for **international public law** to be observed even among States that have not **ratified** the Convention.

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