

**BUILDING HUMAN RIGHTS INTO PRACTICE**

***A Training Manual on  
International Human Rights Law***

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## I. Introduction: How this Manual works

1. This manual is aimed primarily at those within government in Russia who are responsible for implementing international human rights law. It describes the international law framework for protecting and promoting human rights, both at the United Nations and the Council of Europe. There is a particular emphasis on the European Convention on Human Rights (ECHR). Key themes are then developed. This involves explaining how human rights standards work. These include requirements of legality, positive obligations, non-discrimination, proportionality and the prohibition on retrospective criminal laws. Specific issues are also considered. These are equality as the basis for human rights protection, states of emergency, extra-territorial application and the non-State actor.
2. The manual then goes on to consider the rights contained in the ECHR and other international human rights treaties which are core to the rule of law. These are the right to life, protection from torture and inhuman and degrading treatment and punishment, the right to liberty and detention conditions, fair trial and sentencing. Issues arising out of asylum, *refoulement*, expulsion, rendition, extradition and sanctions regimes are also identified.
3. Finally, the manual explores the democratic and participatory rights essential to a society rooted in human rights values and the rule of law, such as freedom of speech, assembly and association. Privacy rights and the right to manifest religious belief are similarly investigated. Privacy rights are also examined in the context of evidence collection and surveillance operations.

### *Sources of Human Rights within the Manual*

4. The human rights standards at the core of this manual and training programme are those derived from the Council of Europe mechanisms to protect and promote human rights and the UN human rights framework.
5. The Council of Europe has, for over fifty years created a sophisticated body of human rights law and legal principles that can be readily applied. The Council of Europe's chief mechanism to protect human rights is the European Court of Human Rights, which is charged with the responsibility of interpreting and implementing the European Convention on Human Rights (ECHR). Much reliance will therefore be had on the judgments of the European Court of Human Rights, although the broader human rights framework within the Council of Europe will also be examined. Both the UN and the Council of Europe systems for protecting human rights will be explained below.

6. Additionally, where appropriate, other regional human rights bodies, such as the African Union and the Inter-American system, will also be drawn upon. As will the relevant decisions of domestic courts.

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

### *The United Nations and the Birth of the Universal Human Rights System*

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

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

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

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

the international community and they originate from the UN as an expression of global values.<sup>3</sup>

### ***The Universal Declaration of Human Rights***

6. The Universal Declaration of Human Rights (UDHR) is premised on the fundamental principle that human rights are based on the "inherent dignity of all members of the human family" and are the "foundation of freedom, justice and peace in the world".<sup>4</sup>
7. The UDHR recognises that to be able to guarantee human dignity, both economic and social, as well as civil and political, rights need to be included. It contains:
  - the right to life, liberty and security of person;
  - the right to an adequate standard of living;
  - the right to seek and to enjoy in other countries asylum from persecution;
  - the right to own property;
  - the right to freedom of opinion and expression;
  - the right to education,
  - freedom of thought, conscience and religion and
  - the right to freedom from torture and degrading treatment, among others.
8. Although the Declaration is not a legally binding document, it has inspired more than 20 major human rights instruments, which together constitute an international standard of human rights. Many of its provisions are also considered to be reflective of customary international law, and therefore binding on states that have not signed up to some of the instruments subsequently adopted.
9. These instruments include, at the global level:

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<sup>3</sup> These values were reaffirmed as recently as 1993 at the Vienna UN Conference on Human Rights, which pledged:

"Universal respect for and observance of human rights and fundamental freedoms for all... the universal nature of these freedoms is beyond question..."

And also:

"While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind..."

<sup>4</sup> The Universal Declaration of Human Rights was adopted on December 10, 1948, by 56 members of the United Nations 'as a common standard of achievement for all people and nations'. The vote was unanimous, although eight nations chose to abstain. These included, for obvious reasons South Africa, but also the USSR and five others including Saudi Arabia abstained.

- The International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- The International Covenant on Civil and Political Rights (ICCPR).

10. Both of which are legally binding treaties and with the Universal Declaration, constitute the International Bill of Rights. Russia has ratified both. They are therefore binding on Russia as a matter of international law.

### ***The Human Rights Covenants***

11. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966 and entered into force in 1976. Unlike the UDHR, they legally bind the signatories to these Covenants. Russia has ratified both of these Covenants. There are additional Protocols to these Covenants that provide for additional rights and mechanisms of accountability.

12. The ICCPR details the basic civil and political rights of individuals, and duties attach to the state. Among the rights of the individual are:

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

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

14. It guarantees the rights of children and prohibits discrimination based on race, sex, colour, national origin, or language. The Covenant permits governments to temporarily suspend some of these rights in cases of civil emergency only, and lists those rights, which cannot be suspended for any reason (this issue will be dealt with below).

15. The ICCPR is given practical value because it also establishes the UN Human Rights Committee (HRC), to consider reports submitted by parties on the measures they have adopted which give effect to the rights set forth in the Covenant. It can also receive and consider communications from individuals claiming to be victims of violations of the rights set forth in the Covenant, if the

country under consideration has ratified the Optional Protocol which permits such petitions.

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

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

17. As with all the main UN human rights treaties, each nation that has ratified the Covenant is required to submit periodic reports on its implementation of the rights contained within it.

### ***Specific Issue Human Rights Treaties***

18. The UDHR has inspired a number of other human rights conventions.<sup>5</sup> These include conventions to prevent and prohibit specific abuses, such as:

- Torture (CAT);<sup>6</sup> and
- Enforced disappearances (CPED)<sup>7</sup>

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

- Racism (CERD);<sup>8</sup>
- Disabled persons (CRPD);<sup>9</sup>
- Migrant workers and their families;<sup>10</sup>
- Women (CEDAW);<sup>11</sup> and

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<sup>5</sup> These Conventions may also have additional Protocols adding additional rights and procedures.

<sup>6</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT). This has been ratified by Russia.

<sup>7</sup> This has not yet been either signed or ratified by Russia

<sup>8</sup> The Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD). This has been ratified by Russia.

<sup>9</sup> Convention on the Rights of Persons with Disabilities, 2006. This has been ratified by Russia.

<sup>10</sup> Convention on the Protection of the Rights of all Migrant Workers and their Family Members, 1990. This has not been ratified by Russia.

- Children (CRC).<sup>12</sup>

20. These treaties are given a practical value as some of these treaties also provide for the establishment of committees to monitor compliance with their obligations, usually by receiving reports from States or, in some cases (and subject to specific acceptance by states) through a system of individual petition or complaint. These include<sup>13</sup>:

- The Human Rights Committee (ICCPR)
- The Committee on Economic, Social and Cultural Rights (ICESCR)
- The Committee on the Elimination of Racial Discrimination (CERD)
- The Committee on the Elimination of Discrimination Against Women (CEDAW)
- The Committee against Torture (CAT)
- The Committee on the Rights of the Child (CRC)

21. Russia is required to report to all of these Committees. Russia has also ratified the right of individual petition to the Women's Convention (CEDAW).

### ***Additional UN Mechanisms to Protect and Promote Human Rights***

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

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

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

25. UPR is a peer review mechanism. It is a dialogue between Member States on the Human Rights Council and the state under review. The process is intended to be cooperative, constructive, non-confrontational and non-

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<sup>11</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). This has been ratified by Russia.

<sup>12</sup> Convention on the Rights of the Child, 1989 (CRC). This has been ratified by Russia.

<sup>13</sup> There are also Committees responsible for the Enforced Disappearances Convention and the Migrant Workers Convention

- political. There is nothing binding about the review process. There is no obligation to accept the recommendations of the outcome report. There are no punitive measures.
26. As well as the treaty bodies identified above and UPR, the UN has also developed additional procedures to protect and promote human rights mandated under the Charter itself. These are important because they are applicable to all members of the UN without reference to whether they have become parties to particular treaties.
27. However, it must be recognised that the human rights principles that emerge under these charter mechanisms by and large do not possess the same quality of law as the binding international human rights treaties. That said, the principles emerging from the charter bodies are particularly valuable in relation to developing human rights policy, even if they do not, in the strict sense of the expression, have the force of law.<sup>14</sup>
28. Of particular relevance are the establishment of thematic special rapporteurs. These include, for example on torture; disappearances; summary or arbitrary executions; religious intolerance; mercenaries; internally displaced persons; violence against women; education; extreme poverty and health. There is also a rapporteur on promoting and protecting human rights whilst countering terrorism.
29. Thematic rapporteurs have a broad mandate to investigate and report on the causes and consequences of the violations of the particular right in question. They thus attempt to identify commonalities in violations, draw broad conclusions, and make recommendations on conditions applicable to the right in issue. They may however also visit particular States and intervene with governments when they feel it appropriate.
30. An example of the way Special Rapporteurs can work is the forceful statement, the UN Special Rapporteurs and Independent experts made expressing alarm at the growing threats against human rights in the counter-terrorism context and threats that necessitate a renewed resolve to defend and promote these rights. They have also noted the impact of this environment on the effectiveness and independence of the UN special procedures. They have pointed out that, although they share in the unequivocal condemnation of terrorism, they have profound concerns about the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which

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<sup>14</sup> See, however, the section below on customary international law.

affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social.<sup>15</sup>

31. Special procedures within the UN system can be taken against human rights violating States. These might:

- Decide the State in question should be subject to ‘advisory services’, which falls short of condemnation but nevertheless makes public its concern.
- Adopt a resolution which might ask for further information; ask for a governmental response; criticise the government; ask the government to take specified actions.
- Appoint a country-specific rapporteur, independent expert, envoy or delegation to consider the situation. There are special rapporteurs, for example, for Sudan, Iran, Myanmar, the Palestinian Occupied Territories and Syria.
- Ask the UN Secretary-General to appoint a Special Representative to the State in question.
- Call upon the UN Security Council to take action as part of its chapter VII mandate with respect to the maintenance of international peace and security. The Security Council can impose economic sanctions, specifically targeted sanctions (such as an arms embargo) or even authorise ‘all necessary means’ to deal with the situation in question.

32. The various mandates (rapporteurs, experts, working parties) have three main functions:

- fact-finding and documentation;
- publicity; and
- conciliation.

### ***Regional Human Rights Instruments***

33. Along with the universal treaties that aim at worldwide membership, there also exist regional human rights systems, based on treaties whose membership is restricted to states within a particular region.<sup>16</sup> These are:

- European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950) adopted by the Council of Europe<sup>17</sup>

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<sup>15</sup> Joint statement by the Special Rapporteurs/Representatives, Expert and Chairpersons of the working groups of the special procedures of the United Nations Commission on Human Rights, 20 June 2003, E/CN.4/2004/4.

<sup>16</sup> In addition to a European, American and African human rights intergovernmental organisations, there is also a largely dormant Arab one. There is no regional human rights mechanism within Asia.

<sup>17</sup> This Convention entered into force in 1953 and is important in several respects: it was the first comprehensive regional treaty, it established the first international complaints procedure and the first

- American Convention on Human Rights and Duties of Man (1969) adopted by the Organisation of American States<sup>18</sup>
- African [Banjul] Charter of Human and People's Rights (1981) adopted by the Organisation of African Unity (now the African Union)<sup>19</sup>

34. Of these regional treaties and bodies, this manual's focus will be the European Convention on Human Rights (ECHR) and how it has been interpreted by the European Court of Human Rights. That Court gives legally binding judgments. Essentially the ECHR puts in place a complaints based system. Where relevant, reference will be made to the other regional bodies and their case law.

35. Whilst the focus of these organisations in this manual is the main human rights treaties that they implement, it should also be pointed out that each of them have adopted further treaties, guidelines and other "soft law". For example, within the Council of Europe, to take just two institutions, the work of the Committee for the Prevention of Torture (CPT) and the Commission on Racism and Intolerance (ECRI) provide a detailed resource that is of direct bearing to the development of human rights.<sup>20</sup>

### ***The Council of Europe***

36. The Council of Europe provides a major source of law for this manual. It is therefore necessary to briefly describe how the main human rights institutions within the Council of Europe work.

#### *Council of Europe Framework*

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

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international court for the determination of human rights issues, and it has generated extensive jurisprudence.

<sup>18</sup> The Organisation of American States was created in 1948 and, in 1969 the Convention Rights and Duties of Man was adopted. While military and authoritarian governments in Europe have been rare, in Latin America they were the norm until changes in the 1980's. A significant part of the Commission's work has addressed systematic violations of human rights in the absence of effective national mechanisms and a lack of cooperation with the government concerned.

<sup>19</sup> The Charter's preamble sets it apart from other regional and universal rights instruments. It takes 'into consideration the virtues of [African States'] historical tradition and the values of African civilisation.' It was established to promote 'human and peoples rights' and thus includes several collective or peoples' rights referred to as 'third generation' rights that include peoples' rights to 'national and international peace and security' and 'to a generally satisfactory environment favourable to their development'. The Charter is the first human rights treaty to include a list of duties. These include duties to ones 'family and society, the state, and other legally recognised communities and the international community'.

<sup>20</sup> Where relevant these bodies within regional institutions will be examined.

applications to join. There are currently 47 member States. Russia joined in 1995.

38. The key human rights instruments of the Council of Europe are<sup>21</sup>:

- European Convention for the Protection of Fundamental Rights and Freedoms (ECHR), 1950 and 14 Protocols
- European Social Charter (ESC), 1961, Additional Protocol of 1988, Amending Protocol of 1991, Additional Protocol of 1995 providing for a system of collective complaints
- The European Social Charter is gradually being 'replaced' (for those States which have ratified it) by the Revised European Social Charter (Strasbourg, 3 May 1996, entered into force 1 July 1999)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 (and 2 Protocols of 1993 on relatively less important technical matters)
- Framework Convention for the Protection of National Minorities, 1995

39. The Council of Europe framework distinguishes between civil and political and economic and social rights. Civil and political rights are contained within the ECHR while economic and social rights are in the European Social Charter.

40. The ECHR is the cornerstone of the Council of Europe system for the protection of human rights. All member States of the Council of Europe must be parties to the ECHR. Russia ratified the ECHR in 1998.

### ***The European Convention for the Protection of Fundamental Rights and Freedoms***

41. The ECHR contains a catalogue of the traditional civil and political rights:

- Right to life (article 2)
- Freedom from torture (article 3)
- Freedom from slavery or servitude (article 4)
- Right to life and liberty (article 5)
- Right to a fair trial (article 6)
- Non-retroactivity of the criminal law (article 7)
- Right of privacy (article 8)
- Freedom of thought, conscience and religion (article 9)
- Freedom of expression (article 10)
- Freedom of peaceful assembly (article 11)
- Right to marry and found a family (article 12)
- Freedom from discrimination (article 14)

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

42. The rights guaranteed under the ECHR have been supplemented by subsequent Protocols:

- Protocol No. 1, 1952: right to property, education and free elections. This is ratified by Russia.
- Protocol No. 4, 1963: freedom of movement; freedom of expulsion from territory of which a national; prohibition of collective expulsion of aliens. This is ratified by Russia.
- Protocol No. 6, 1983: abolition of death penalty. This is not ratified by Russia.
- Protocol No. 7, 1984: non-expulsion of aliens except in accordance with law; right to review of conviction or sentence for criminal offences by a higher court; compensation for conviction where subsequently reversed or pardoned through a miscarriage of justice; protection against double jeopardy; equality of spouses during and on dissolution of marriage. This is ratified by Russia.
- Protocol No. 12, 2000: non-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. The Protocol entered into force on 4 April 2005. This is not ratified by Russia.
- Protocol No. 13, 2002: abolition of death penalty in all circumstances. This is not ratified by Russia.

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

44. Many of these rights are the same as those contained within the International Covenant on Civil and Political Rights (ICCPR). However, there are differences. These include:

- The ICCPR has a freestanding prohibition of discrimination (Article 26) while the ECHR does not. Although such a right is contained in ECHR Protocol 12, this Protocol has been ratified by only a handful of countries.
- The ICCPR guarantees the right to self-determination (Article 1) and the individual rights of minorities (Article 27) while the ECHR does not.
- Through the Protocols, the ECHR has guaranteed the right to property and greater rights for aliens and has abolished the death penalty, even in time of war. The right to education (Protocol No. 1) is more often seen as an economic and social right and is included in the International Covenant on Economic, Social and Cultural Rights rather than the ICCPR.

## *Procedures*

45. The ECHR is now enforced through a permanent, full-time European Court of Human Rights that sits in Strasbourg (that Court will be referred to throughout this manual as the European Court or the Court).<sup>22</sup>
46. The Court consists of Judges of an equal number of States parties to the ECHR. The Court sits in Committees of three Judges, which can reject cases without a fully reasoned decision when they are clearly inadmissible. To rule on the admissibility of more complex cases or on the merits of admissible cases, the Court sits in Chambers comprising seven Judges. A Grand Chamber of seventeen Judges sits in certain situations.
47. The European Court has jurisdiction in two types of cases:
- (a) Inter-State complaint: Any State party may refer an alleged breach of the Convention or substantive Protocols by another State party. This procedure has been little used, although cases have been brought, for example, by Ireland against the United Kingdom; by the Scandinavian States against Greece during the military regime; by Denmark against Turkey; and by the Cyprus against Turkey. Georgia and Russia have also taken cases against each other.
  - (b) Individual complaint: If a case can satisfy the admissibility criteria, then individuals within States parties have the right to make a complaint to European Court.
48. Execution of the Court's judgments is overseen by the Committee of Ministers, a political body composed of government representatives of all the Member States.

## **Other Council of Europe Human Rights machinery**

### *European Committee for the Prevention of Torture*

49. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides, as its name suggests, a mechanism for the prevention of torture rather than for exercise of jurisdiction over those accused of torture. It establishes a European Committee that, through visits to the penal and other institutions within States parties, examines the treatment of those deprived of their liberty with a view to strengthening (if necessary) the protection of such persons from torture. The

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

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

50. Visits to any state are normally scheduled in advance but occasional ad hoc visits may also take place. Once it is in a State, the CPT can visit any place where people are deprived of their liberty without giving advance notice. Its meetings are private, as are its discussions and reports. The report may be published if the State fails to co-operate and the Committee decides by two third majority to do so.

#### *European Committee of Social Rights*

51. The function of the European Committee of Social Rights is "to judge the conformity of national law and practice with the European Social Charter." It operates two monitoring procedures: a reporting system and collective complaint system (e.g. by NGOs). Note that in its constituent instruments the Committee is called a Committee of experts/Committee of independent experts.

#### *European Commissioner for Human Rights*

52. The Commissioner plays a pivotal role in formulating human rights policy. He also visits, and reports on, Member States.

### III. Fundamental Human Rights Principles

#### *Sources of Human Rights*

1. Human rights are principally, but not exclusively, guaranteed through law. Human rights are recognised as being inherent within all people and they are mainly identified and articulated through human rights treaties. Once these treaties have been adopted, signed and ratified they are binding upon the State's party to the treaty and the rights contained within them have the force of law.
2. As a legal principle, treaties therefore are the strongest assertion of rights,<sup>23</sup> with the exception of certain rights guaranteed through customary international law, such as the prohibition on torture and slavery which are recognised as being peremptory norms and therefore the most fundamental. These are explained below.
3. Treaty law (due to its binding nature often referred to as hard law) is however not the only source of human rights law. Other sources include declarations such as the Universal Declaration on Human Rights,<sup>24</sup> guidelines, rules and regulations. These latter sources are often referred to as soft law. Whilst these may be adopted under the auspices of an international organisation, such as the UN or the Council of Europe, they are not intended to create legal obligations on the State parties. They are however authoritative sources of rights and how they should be applied.
4. Further sources of soft law include statements from those responsible for implementing human rights treaties, such as the general comments and the decisions of the Human Rights Committee under the ICCPR. Although these are highly respected, they are technically not hard law. This is to be contrasted with decisions of international courts such as the European Court of Human Rights whose judgements are binding on the State party to the litigation and whose case law has to be followed by all other parties to the European Convention on Human Rights. These judgments ought therefore to be considered as hard law.

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

#### *Customary International Law*

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<sup>23</sup> What amounts to a treaty is itself a legal term of art. Other words for treaties include convention, covenant and charter. What is essential is that there is an intention to create a legal relationship between the parties and those that are the subject matter of the treaty. For further information please see the Vienna Convention on the Law of Treaties 1969

<sup>24</sup> That Declaration although initially agreed as a non-binding instrument, over time is now considered to have assumed the quality of customary international law

5. Before turning to the detail of how international human rights standards work, it is first necessary to understand the relevance of customary international law and its importance as a source of guidance.
6. Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. It results from a general and consistent practice of states followed out of a sense of legal obligation, so much so that it becomes custom. As such, it is not necessary for a country to sign a treaty for customary international law to apply.
7. As such customary international law must:
  - Be derived from a clear consensus among states;
  - As exhibited both by widespread conduct; and
  - A discernible sense of obligation.
8. Customary international law can not be declared by a majority of States for their own purposes; it can be discerned only through actual widespread practice. For example, laws of war were long a matter of customary law before they were codified in the Geneva Conventions and other treaties.
9. A particular category of customary international law, *jus cogens* refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. Examples of this are torture, and crimes against humanity. *Jus cogens* is explained below.
10. It is generally held that there are two essential elements to customary international law:
  - General Practice
  - *Opinio Iuris*

### *General Practice*

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

### *Opinio juris*

12. Concurrency of practice is clearly not sufficient, in and of itself, for a practice to be regarded as legally or morally obligatory (consider e.g. the practice of 'rolling out the red carpet' for foreign dignitaries). In addition, there must be evidence of the States concerned regarding themselves as being legally obliged to act in that manner. *Opinio juris*, therefore, is the 'subjective' or 'mental' element of custom, and one that is critical for a concurrent practice to be regarded as legally binding.
13. In addition to these two elements, a third factor is frequently stressed: that the principle in question be of a 'fundamentally norm-creating character' such as to stipulate, in relatively clear terms, what is required of states. Some rights such as the right to development may well fail on this particular test.

### *Ius cogens*

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

### ***Human rights as the guarantor of human dignity***

16. The rationale of human rights can be summarised as the guarantee of human dignity. If special measures are necessary to protect human dignity, such as the adoption of emergency powers, by definition, those measures must comply with human rights. It was for these reasons that the founding drafters of the UDHR identified the specific rights contained within it, which were then put into binding legal force in the two later Covenants.<sup>25</sup>

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<sup>25</sup> It is worth recalling that those drafters were responding to some of the worst atrocities committed in the history of the world against human dignity. Therefore the mechanisms that they devised had to be able to resist any potential future holocaust or other like carnage that had been committed across the globe as had occurred throughout the 1930s and 1940s. Protecting democratic societies from the threat of terrorism was therefore very much in the minds of those who drew together the values of the UDHR. The UDHR and the human rights instruments that were inspired by it therefore are designed to counter such threats to democratic values.

17. As part of that guarantee of human dignity, human rights standards are also concerned to ensure that power is exercised in an accountable manner. As such dignity, human rights and the rule of law are intimately and intrinsically linked. Power, in this context, to all intents and purposes means the State, however, it is not limited to the State. There are arguments that it is not just the State that exercises power and violates human rights standards but that non-State actors, such as the actions of terrorist groups are also a violation of human rights.<sup>26</sup>

18. Human rights standards seek to realise their aims of dignity and accountability in four ways:

- Firstly, human rights identify certain core values which are essential to the realisation of human dignity. As we have seen these range from protection from torture to private life, from the right to a fair trial to an adequate standard of living.
- Second, the extent to which these rights can be balanced or even derogated from, taking into account the public interest is considered.
- Third if particular rights can be lawfully interfered with, the legality, necessity and proportionality of that interference is measured, taking into account protection from discrimination.
- Finally, where there is a reasonable assertion that an individual's human rights are (or maybe) being violated, that individual is entitled to an effective remedy.

19. Internationally recognised human rights standards therefore require the government policy and decision-maker to factor in to that process certain key universal principles. This imposes a level of discipline and rigour upon government agencies, which if they ignore, or misapply those human rights standards, ought to be held accountable before an independent and impartial court.

20. As a general principle, the more severe the potential human rights violation, the greater the human rights scrutiny to be carried out by both decision-maker and court. Human rights standards require a targeted response. If a particular mischief is identified which needs to be addressed, for example incitement to religious violence, the control imposed by those human rights standards should mean that only that particular problem is addressed and others are not affected.

21. What the State considers to be in its best interests will not necessarily trump human rights. Policies to secure the State's interests must be compatible with human rights. For example, in the context of counter terrorism, under extreme

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<sup>26</sup> This issue relating to the accountability of non-State actors for human rights violations will be dealt with below.

circumstances there may be a requirement to lawfully derogate from human rights standards. But, at the same time, this requirement for a targeted or proportionate response may mean that it is inappropriate to adopt counter terrorism or emergency measures and, in fact, the normal workings of the criminal law are suitable to respond to the particular issue.

22. State policy and practice will therefore only be effective when it has understood and integrated human rights within it.

## **Implementing Human Rights**

23. The guiding spirit of the application of human right standards is that their enjoyment is not limited to citizens of States parties. They are available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who find themselves in a State party's territory or subject to its jurisdiction.

24. The procedural mechanisms that international human rights standards use to guarantee substantive rights are:

- Legality
- The Rule of Law
- The Right to an Effective Remedy
- Non-Retroactivity of Criminal Penalties

25. Each of these obligations is dependent upon the other and is mutually reinforcing. The right to an effective remedy and non-retrospective criminal penalties are specifically acknowledged within international human rights treaties, whereas principles of legality and the rule of law have been read into those treaties.

### **The requirement of legality**

26. The first obligation imposed by human rights standards is the requirement that any interference with human rights standards must have a clear legal basis.

27. There must be a legal basis in national law for an interference, and the law must be accessible and sufficiently precise. This requirement is intended to avoid the risk of arbitrariness on the part of the State.<sup>27</sup> What this means is that:

- An individual must be able to know or find out what the law is that permits an interference with their human rights and they must be able to regulate their conduct in accordance with it.

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<sup>27</sup> *Amuur v France*

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

## The Rule of Law<sup>28</sup>

28. As a general principle of human rights law, this requirement for legality imports the rule of law (*nullum crimen, nulla poena sine lege*). Human rights law and the rule of law are, as concepts, therefore indissociable. The rule of law also requires a clear legal basis for an interference with human rights standards. It also insists that the law applies to everyone and that no one is exempt, or above the law, whoever they maybe, or for whatever reason they have acted.
29. Essentially the rule of law can be summed up as all persons (individuals, institutions and government) are subject to the same law. Once this principle is accepted, it acknowledges the supremacy of law and establishes that it is law, not those that are in power, that provides the framework for government. Plato said that “Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state”.<sup>29</sup>
30. The rule of law requires both citizens and governments to be subject to known and accessible laws. In turn this affirms the principle of equality before the law and fundamental guarantees such as the presumption on innocence. A primary feature of the rule of law is that laws should not be made in respect of particular persons.

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<sup>28</sup> See Report on the Rule of Law, Adopted by the Venice Commission, 86<sup>th</sup> plenary session, (Venice, 25-26 March 2011)

<sup>29</sup> Plato, Laws, Book IV, 715 d; *Complete Works*, Cooper, Jonh *et al.*, Hackett Publishing Company Inc., 1997, Indiana, p. 1402. For an account of the origins of the concept of Rule of Law in the ancient world see M. Loughlin, *Swords and Scales* (2000), chap. 5; B. Tamanaha, *On the Rule of Law: History, Politics and Theory* (2004), chap. 1.

31. The rule of law presupposes the absence of wide discretionary authority in those that rule, so that they cannot make their own laws but must govern according to the established laws. Those laws ought not to be too easily changeable. Stable laws are a prerequisite of the certainty and confidence which form an essential part of individual freedom and security.
32. Separation of powers between the executive, legislative and judicial branches of government is at the heart of the rule of law. Law, the executive administration and prerogative decree are distinct. A failure to maintain the formal differences between these leads to a concept of law as nothing more than authorisation for power, rather than the guarantee of liberty, equally to all. The rule of law has been variously interpreted, but it must be distinguished from a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements. Over time, the essence of the rule of law in some countries was distorted so as to be equivalent to “rule by law”, or “rule by the law”, or even “law by rules”. These interpretations permitted authoritarian actions by governments and do not reflect the meaning of the rule of law today.
33. The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognise that during recent years due to globalisation and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens.
34. The rule of law can be summarised as:
- Law must be made in a clearly defined and public way;
  - The law must be accessible and so far as possible intelligible, clear and predictable;
  - Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
  - The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
  - The law must afford adequate protection of fundamental human rights;<sup>30</sup>
  - Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;

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<sup>30</sup> Not all human rights may be essential components of the rule of law, but all the human rights identified in this Manual are inherent to the rule of law.

- Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- Adjudicative procedures provided by the State should be fair; and
- The State must comply with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

## **The Right to an Effective Remedy**

35. To be meaningful, human rights have at their core, the right to an effective remedy for a violation of human rights standards.<sup>31</sup> This obligation is designed to combat impunity and to ensure that rights are practical and effective and not rendered worthless and insignificant because they can be ignored.
36. Where a human right is being violated, or an aggrieved individual considers, with arguable grounds, a right is being violated, that person must be able to challenge the alleged violation. If it is established that there has been a breach that person must be granted an appropriate resolution. This remedy may or may not involve compensation.
37. The right to an effective remedy is not dependent upon there having been a violation of a right. The right of challenge is autonomous and does not require any substantive breach. At the very least, this process must be before an independent and impartial body, whose decision can be reviewed by a fully functioning court, whose procedures satisfy the right to a fair trial.
38. In sum, the right to an effective remedy requires the provision of a domestic remedy to deal with the substance of an “arguable complaint” and to grant appropriate relief. For example, in a case concerning the solitary confinement of a terrorist leader for over eight years, the right to an effective remedy was in issue because he was not able to challenge the ongoing nature of his detention.<sup>32</sup>
39. The European Court of Human Rights found, under the circumstances, that the nature of the solitary confinement did not violate the applicant’s substantive human rights, however they went on to hold that having regard to the serious repercussions which solitary confinement has on the conditions of detention, an effective remedy before a judicial body is essential.
40. Under the domestic law at the time it was not possible for the applicant to complain about the decisions to prolong his solitary confinement. Neither could the applicant challenge any procedural irregularities in relation to that detention.

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<sup>31</sup> See Article 8, UDHR; Article 2(3), ICCPR; Article 13, ECHR

<sup>32</sup> *Ramirez Sanchez v France*

41. At the time of the applicant's detention, decisions to place a prisoner in solitary confinement were internal administrative measures in respect of which no appeal lay to the administrative courts.

42. The European Court of Human Rights accordingly considered that there was a violation of the right to an effective remedy on account of the lack of a mechanism in domestic law that would have allowed the applicant to challenge the decisions to prolong his solitary confinement.

43. Other examples where the right to an effective remedy has been violated include:

- Failing to provide adequate procedures to complain about, or obtain compensation for, killings by security forces;
- Not carrying out thorough enquiries into alleged ill-treatment by security forces;
- Not establishing complaints procedures regarding the interception of telephone calls;
- Overly lengthy criminal proceedings;<sup>33</sup>
- Not allowing a prisoner to challenge the refusal to forward his correspondence;<sup>34</sup>
- Failing to provide adequate procedures for enforcing compensation orders made by the domestic courts;<sup>35</sup>
- Failing to provide compensation for non-pecuniary damage;<sup>36</sup>
- Failing to provide a remedy for the repeated transfers and body searches of a high security prisoner;<sup>37</sup>
- Not providing a remedy unlawful deportation;<sup>38</sup>
- Rendering the appellate process meaningless by transferring the appellants to another country before the hearing;<sup>39</sup>
- Failing to provide a means of challenge for conditions of detention in a punishment cell;<sup>40</sup>
- Failing to provide compensation for poor living conditions in a social care home for people with mental disorders.<sup>41</sup>

## Retrospectivity

44. A key aspect of the principle of legality is the outlawing of retrospective criminal laws and penalties.<sup>42</sup> Such absolute protection is found in all the major human

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<sup>33</sup> *McFarlane v Ireland*

<sup>34</sup> *Frérot v France*

<sup>35</sup> *Driza v Albani; Ramadhi v Albania*

<sup>36</sup> *Martins Castro and Alves Correia de Castro v Portugal*

<sup>37</sup> *Khider v France*

<sup>38</sup> *Abdolkhani and Karimnia v Turkey*

<sup>39</sup> *Al-Sadoon and Mufdhi v UK*

<sup>40</sup> *Payet v France; Rahimi v Greece*

<sup>41</sup> *Stanev v Bulgaria*

rights treaties, under Article 7 ECHR and Article 15 ICCPR.<sup>43</sup> Therefore in a number of cases the Human Rights Committee has found a violation of the prohibition of retrospective criminal law where people were convicted and sentenced for membership of subversive organisations, which were political parties that were subsequently banned.<sup>44</sup>

45. This prohibition in international human rights law only applies to criminal proceedings resulting in a conviction, or the imposition of a criminal penalty. It does not apply to extradition,<sup>45</sup> deportation,<sup>46</sup> the rules governing parole,<sup>47</sup> changes in the law of evidence,<sup>48</sup> preventative detention that does not rely on a criminal conviction<sup>49</sup> or civil proceedings generally.<sup>50</sup>

46. The prohibition on retrospectivity also prohibits the prosecution of an accused person under a law, which has fallen into desuetude when the offence was committed.<sup>51</sup> However, it does not entitle an accused person to benefit from an alteration in the law that has taken place between the commission of an offence and the trial.<sup>52</sup> In this respect it differs from the ICCPR Article 15(1), which expressly requires the accused to be given the benefit of any subsequent change in his favour.

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<sup>42</sup> See for example, *Korbely v Hungary*

<sup>43</sup> Article 15, ICCPR states that:

1. No one shall be held guilty of any criminal offence on account of any act or omission that 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 7, ECHR states that:

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

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

<sup>44</sup> *Weinberger Weisz v Uruguay*

<sup>45</sup> *X v Netherlands*

<sup>46</sup> *Moustaquin v Belgium*

<sup>47</sup> *Hogben v UK*

<sup>48</sup> *X v UK*

<sup>49</sup> *De Wilde, Ooms and Versyp v Belgium*

<sup>50</sup> *X v Belgium; X v Sweden*

<sup>51</sup> *X v Federal Republic of Germany*

<sup>52</sup> *X v UK; G v France*

47. Article 7(2) creates an exception for war crimes, treason and collaboration with the enemy making it clear that conduct regarded as criminal under the general principles of law recognised by civilised nations can be lawfully prosecuted.<sup>53</sup>
48. A helpful illustration of how the prohibition on retroactive criminal law works involves cases where officers of the German Democratic Republic (GDR) were prosecuted, following the reunification of Germany, for shooting people who had sought to escape to the West. The applicants in those cases argued that they had acted lawfully at the time according to the laws of the GDR.
49. In a string of cases before international courts and tribunals, these arguments were rejected. It was held that the fact that there were no prosecutions did not mean the law permitted them to take the actions that they took. This was particularly the case because the GDR was a party to the International Covenant on Civil and Political Rights, which guarantees the right to life.<sup>54</sup>
50. Furthermore, even if their actions had been lawful as a matter of law in the GDR, it is likely that Germany could have relied upon the fact that shooting people under those circumstances would be considered “criminal according to the general principles of law recognised by the community of nations.”
51. A further example of where the defence’s argument of the application of retrospective criminal laws was rejected was in relation to the use of child soldiers in Sierra Leone. The Special Court set up to try war crimes arising out of the conflict in Sierra Leone during the 1990s held that by 1997, the state of customary international law was such that the recruitment of under-15 year olds engaged individual criminal responsibility.<sup>55</sup>
52. The second limb of Article 7 prohibits a retroactive increase in the penalty applicable to an offence.<sup>56</sup> This can include the substitution of one kind of punishment for another, for example where an alien’s prison sentence was replaced with an order for his deportation.<sup>57</sup>

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<sup>53</sup> For an example of where the exception was held not to apply, see *Kononov v Latvia*

<sup>54</sup> *Baumgarten v Germany*

<sup>55</sup> *Prosecutor v Sam Hinga Norman* (Case SCSL – 03 – I), Appeals Chamber, 31 May 2004

<sup>56</sup> *Ecer and Zeyrek v Turkey; Moreno v Spain; M v Germany*

<sup>57</sup> *Gurguchiani v Spain*

## IV. How Human Rights Work: General Application

The principles of interpretation for civil and political rights are explained below.

### ***Civil and Political Rights***

1. The European Convention on Human Rights (ECHR) is a classic example of a civil and political human rights treaty. Although that treaty also contains some rights which are considered to be economic and social rights, such as the right to education and the right to property. Other rights such as the right to private life also have an impact on economic and social rights, including issues around health and housing.

### **“Living Instrument”**

2. Essential to the understanding of how civil and political human rights work is the principle that they must be given an evolutive or a dynamic interpretation. The European Court of Human Rights has therefore repeatedly referred to the fact that the ECHR is a ‘living instrument’.<sup>58</sup>
3. Therefore human rights change over time: for example, although the ECHR contains no reference to a safe environment the Court has recognised that in order to protect private, family and home life an individual needs to have a safe environment and therefore the Court has read into those rights such protection.<sup>59</sup> As a consequence, that Court does not see itself as expressly bound by any doctrine of precedent
4. What the European Court of Human Rights has done is, therefore, not to create new rights, but to develop the scope of existing rights.
5. Human rights standards are intended to guarantee, not rights that are theoretical or illusory, but rights which are ‘practical and effective’.

### **“Practical and Effective”**

6. Human rights standards are intended to guarantee, not rights that are theoretical or illusory, but rights which are ‘practical and effective’.<sup>60</sup> As far as international tribunals are concerned merely asserting the existence of rights is not sufficient to satisfy this test of “practical and effective”.

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<sup>58</sup> *Tyrer v UK*

<sup>59</sup> *Guerra v Italy*

<sup>60</sup> This principle is endorsed by the ICCPR’s Human Rights Committee, which in General Comment 31 affirms that the ICCPR be “accessible, effective and enforceable.”

7. Rights have to be genuinely accessible. Therefore in a key case concerning access to court involving a particularly unpleasant divorce, the unavailability of legal aid for a women with no ability to pay for legal advice, meant that in reality she had no access to court, even though in theory such a right existed.<sup>61</sup>
8. This obligation to ensure the practicality and effectiveness of rights is directly linked to the right to an effective remedy and the rule of law.

### **The nature of civil and political rights**

9. In order to understand how rights work it is essential to recognise that different types of rights permit different types of interference with them. Therefore, it can be legitimate under certain circumstances to lawfully interfere with an individual's rights.
10. Civil and political rights can be categorised into different types of rights.
  - Absolute rights permit no qualification or interference under any circumstances.
  - Absolute necessity is the only test permissible prior to the use of lethal force
  - Limited rights can be limited within the constraints spelt out within the Article itself
  - Qualified rights are intended to be balanced either between the individual on the one hand and the community on the other, or between two competing rights.
  - Reasonable in the public interest in relation to interfering with property rights.

#### *Absolute rights*

11. The classic absolute right is the prohibition on torture, inhuman, or degrading treatment.<sup>62</sup> Once the threshold of torture, inhuman or degrading treatment has been met there can never be a justification for interfering with the right.
12. For example, in *A v UK* a step-father was prosecuted for assault on his step-son. The step-father had beaten the child on numerous occasions with a garden cane. At his trial the step-father accepted that he had beaten the child but sought to rely upon the defence which existed in English law at that time or lawful chastisement – i.e. it was necessary to beat the child in order to keep the child under control. The jury accepted that defence and the step-father was acquitted.

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<sup>61</sup> *Airey v Ireland*

<sup>62</sup> Article 3, ECHR: Protection against torture is contained in a similarly worded provision in Article 7, ICCPR

13. Those then representing the child took the case to the Strasbourg Court and the Strasbourg Court held that the treatment the child had been subjected to amounted to degrading treatment, and therefore there could be no defence, or justification, for subjecting the child to that level of treatment. As such, once the step-father had admitted beatings of that severity, English law should not have permitted him to have a defence to it.
14. Furthermore, interrogation techniques in relation to suspected terrorists in Northern Ireland were held to amount to inhuman and degrading treatment. As such, not even national security could justify exposing individuals to that level of treatment.<sup>63</sup>
15. Another example of the need of the State to protect people from torture is *Chahal v UK*. The applicant was a Sikh terrorist from India who was in the UK. The UK authorities wanted to deport him. It was accepted that if he were to be deported to India he would be at serious risk of torture. The European Court therefore said that, due to the absolute nature of the right to protection from torture, the UK government could not return someone to be exposed to that sort of treatment even when national security issues were at stake and even where the Indian government provided assurances.
16. Other examples of absolute rights include the obligation to protect life and protection from slavery.

### *Limited rights*

17. The right to liberty, is a good example of a limited right.<sup>64</sup> The right is asserted in the first paragraph of the Article, but then it goes on to state that there may be limits to it, and it spells those limits out. For example, the right to liberty can be taken away from an individual following conviction by a competent court.
18. The right to a fair trial<sup>65</sup> is absolute to the extent that the trial taken as a whole must be fair; however, there are certain specific and implied limits that have been read into it.

### *Qualified rights*

19. Qualified rights are those rights where the right is first asserted— for example, the guarantee of freedom of expression or freedom of association – and then permissible restrictions can be applied. The relevant Articles then go on to qualify the right and to explain that it can be lawful to interfere with it if it is necessary in a democratic society to do so and that there is a legal basis for such an

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<sup>63</sup> Ireland v UK

<sup>64</sup> Article 5, ECHR

<sup>65</sup> Article 6, ECHR

interference. Therefore, it can be lawful to place limits on the right to freedom of expression, the right to private life, the right to protest and join trades unions, and the right to manifest religious belief. The burden of proof is on the individual to establish that there has been an interference with their rights. That burden then shifts, and it is for the State to justify the interference.

20. Self-evidently, these rights can conflict with each other; the obvious example being that one person's right to private life may be another person's right to freedom of expression. A fair balance has to be struck between the two competing interests. Qualified rights can only be lawfully interfered with if the tests of legality, necessity, proportionality and non-discrimination have been satisfied.<sup>66</sup> By understanding how to lawfully qualify rights it is possible to understand how civil and political rights work as a whole.

### *Derogable and non-derogable rights*

21. An additional way of categorising rights is to divide them between those rights which can be lawfully derogated from at times of war and national emergency, and those rights that permit no derogation under any circumstances. The State has to specific steps if it needs to derogate. These are considered below.

### **Restricting rights**

22. To make lawful an interference with any qualified rights, the State must be able to satisfy four tests:

- Legality,
- Necessity,
- Proportionality and
- Non-discrimination.

23. The final test, the prohibition on discrimination, is to be considered in relation to all claims of a human rights violation.

### *Legality: is there a legal basis for the interference?*

24. As has already been discussed, what this means is that an individual must be able to know or find out what the law is that permits an interference with their Convention rights and they must be able to regulate their conduct in accordance

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<sup>66</sup> In the text of the ICCPR a number of Articles refer to limiting rights in different ways, such as if it is necessary in a democratic society or non-arbitrary. The test for both is ultimately the test of proportionality.

with it.<sup>67</sup> The test of legality therefore requires foreseeability, accessibility and precise laws.<sup>68</sup>

*Is there a recognised ground for restricting rights?*

25. The second test requires being able to justify the interference by reference to the recognised grounds, or aims and purposes, for restricting rights within the Article itself. These generally include national security, public order or safety, protecting the rights and freedoms of others, prevention of disorder and crime, and protecting health and morals.
26. These enumerated aims or purposes are not to be interpreted loosely. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR provide a helpful explanation of how these aims and purposes should be defined.
27. Public safety, for example should be characterised as “protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property”.<sup>69</sup> The same principles state that national security may be invoked by States to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.<sup>70</sup>
28. National security cannot be involved as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order<sup>71</sup> or used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.<sup>72</sup>
29. Public order is defined as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”.<sup>73</sup> Limitations are permitted for the protection of the rights of others. This provision is to be read in the light of article 20, paragraph 2, of ICCPR, which prohibits any advocacy of national, racial or religious hatred, and Article 5, which excludes

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<sup>67</sup> See above for a detailed analysis of principles of legality at pages 51-52

<sup>68</sup> In *Gillan v UK*, stop and search powers under terrorism legislation were found to be too imprecise to satisfy the test of legality.

<sup>69</sup> These were developed in 1984 by a panel of 31 international experts who met at Siracusa, Italy, to adopt a uniform set of interpretations of the limitation clauses contained in ICCPR. While they do not have the force of law, they offer important, authoritative guidance as to the meaning of the terms contained in the Covenant, especially in areas not covered by a general comment of the HRC. See E/CN.4/1985/4, annex, para.33.

<sup>70</sup> *Ibid.* para.29.

<sup>71</sup> *Ibid.* para.30 and M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> ed. (Kehl/Strasbourg/Arlington, N. P. Engel, 2005), p.506.

<sup>72</sup> Siracusa Principles, para.31.

<sup>73</sup> *Ibid.* para.22.

from the protection of the Covenant activities or acts “aimed at the destruction of any of the rights and freedoms recognised” in the Covenant.<sup>74</sup>

30. To ensure the legality of the interference, the State has to be able to justify that the interference with the right is authorised by one or more of the stated grounds in the Article at issue.<sup>75</sup> However the exercise does not end there, the State then has the additional obligation to prove that not only does the interference have a justification, but that it is also necessary in a democratic society.

*Is it “necessary in a democratic society”?*

31. The third test requires a balancing act to be made of the rights of the individual on the one hand and State or community interests on the other. In order to make that assessment the government should justify its actions by making them establish that the interference is necessary in a democratic society.

32. ‘Necessary’ does not mean indispensable, but neither does it mean ‘reasonable’ or ‘desirable’.<sup>76</sup> What it implies is a pressing social need for the restriction on the right and that pressing social need must accord with the requirements of a democratic society. The essential hallmarks of such a society are tolerance, pluralism and broad-mindedness.

33. Although individual interests must on occasion be subordinated to those of the perceived majority, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

*Is it proportionate?*

34. The principle of proportionality is not mentioned in the text of human rights treaties, but it is the foremost theme in the application of human rights.

35. What proportionality requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially proportionality requires a court ultimately to determine whether a measure of interference which is aimed at promoting a legitimate public policy is either:

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<sup>74</sup> Ibid. See also communication No. 117/1981, *M.A. v Italy*, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex XIV, para.13.3, where, in relation to the reorganisation of the dissolved Italian fascist party, the HRC stated “the acts... were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 22 (2) and 25 of the Covenant.”

<sup>75</sup> See for example Article 19(3), ICCPR on Freedom of Expression which points out that, “It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.

<sup>76</sup> *Sunday Times v UK*

- Unacceptably broad in its application; or
- Has imposed an excessive or unreasonable burden on certain individuals.<sup>77</sup>

36. Factors to consider when assessing whether or not an action is disproportionate are:

- Have relevant and sufficient reasons been advanced in support of it?
- Was there a less restrictive measure?
- Has there been some measure of procedural fairness in the decision making process?
- Do safeguards against abuse exist?
- Does the restriction in question destroy the “very essence” of the right in question?

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

- Impair as little as possible the right in question.
- Be carefully designed to meet the objectives in question.<sup>78</sup>
- Not be arbitrary, unfair or based on irrational considerations.

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

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

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

*Is it discriminatory?*<sup>79</sup>

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<sup>77</sup> In General Comment 31, the Human Rights Committee has affirmed the notion of proportionality to the application and implementation of the ICCPR, adding that, “In no case may the limitations be applied or invoked in a manner that would impair the essence of a Covenant right.”

<sup>78</sup> Although in relation to some interferences with human rights, a certain degree of latitude will be given to the State party. For example in *Hatton v UK*, the European Court found no violation of human rights in relation to the right to respect for privacy and home life in the context of aircraft noise and night flights. The Court accepted the economic imperative of such activity and therefore acknowledged that the interferences fell within the State’s margin of appreciation.

<sup>79</sup> Equality and non-discrimination is examined in detail below

41. As part of the test for assessing the legality of an interference with human rights, the issue of discrimination must be addressed, even if there has been no violation of the substantive right at issue. The principle of equality and its relationship with human rights is dealt with below.

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

- It has no objective and reasonable justification;
- It does not have a very good reason for it; and,
- It is disproportionate.

43. If these tests cannot be made out, and there is a difference of treatment, that difference of treatment will amount to discrimination and will be unlawful.

### ***Issues arising under the Civil and Political Rights***

*Waiver of rights: can you give up your rights?*

45. Some human rights can be waived, but only in limited circumstances; and certain rights can never be waived, such as the right to liberty and protection from torture. Other human rights may be waived but that waiver must be established in an unequivocal manner. For example, it can be lawful to waive your rights in the employment context.

*Autonomous concepts*

46. Certain specific human rights terms are autonomous concepts, regardless of how a State may choose to define them. The definition of 'criminal charge' is, for example, an autonomous concept, as are notions of civil rights and obligations. Therefore a State cannot simply redefine detention as an administrative matter and non-criminal, thereby escaping the obligations of the criminal law. The courts must look behind the definition asserted by the State and decide for themselves whether criminal safeguards ought to apply.

*Horizontal application*

47. In theory, human rights are designed to regulate conduct between the individual and the State. The reality is, however, that they have been held to apply on a number of occasions in relation to disputes between two private parties.

48. The mere fact that a public authority is not directly responsible for a breach of an individual's human right does not render human rights inapplicable.<sup>80</sup>

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<sup>80</sup> *X & Y v Netherlands; Costello-Roberts v UK; Rommelfanger v Germany*

49. In certain circumstances public authorities come under a duty to protect private individuals from breaches of their human rights by other private individuals.<sup>81</sup>

### *Positive obligations*

50. Human rights treaties impose a negative duty not to interfere with rights, but they can also impose positive obligations. The extent of this obligation will vary according to such factors as the nature of the right at issue, the importance of the right for the individual and the nature of the activities involved.<sup>82</sup>

51. Positive obligations tend to impose resource provision. Positive obligations also impose a duty on the State to put in place a legal framework that provides effective protection for human rights. In certain circumstances a positive obligation may arise and the authorities are required to take positive steps to prevent breaches of human rights. This is particularly the case where rights such as the right to life or protection from torture are at stake.

52. However, such an obligation must not be interpreted in a way that imposes an impossible or disproportionate burden on the authorities. The doctrine of positive obligations cannot be used as a mechanism for restricting the human rights of others.

### *The Margin of Appreciation*

53. This is a doctrine applied by the European Court when applying the ECHR. It is not intended to have domestic application when national courts are enforcing the ECHR.

54. Essentially, the margin of appreciation is applied when the Strasbourg Court, as an international tribunal, defers to the national authorities and accepts that they are in a better position to implement human rights standards domestically and are thus able to take account of relevant local factors that in and of themselves do not violate human rights. Under these circumstances, and particularly in relation to questions of morality and local custom, the European Court will provide a cursory assessment to ensure that it is appropriate to apply the margin of appreciation. If it is, they may defer to the national authorities.<sup>83</sup>

### *Prohibition of the abuse of rights*

55. Rights, such as freedom of expression, cannot be exercised to destroy the rights of others.<sup>84</sup> The general purpose of this principle is to prevent totalitarian groups

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<sup>81</sup> *A v UK; M.C. v Bulgaria*

<sup>82</sup> *Plattform Ärzte für das Leben v Austria*

<sup>83</sup> *Lautsi v Italy, ABC v Ireland*

<sup>84</sup> This is contained in Article 5, ICCPR and Article 17, ECHR.

from exploiting in their own interests the principles enunciated by human rights treaties. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms.

56. Any measure taken under this principle must be strictly proportionate to the threat to the rights of others.<sup>85</sup> This issue is addressed in detail in the section on freedom of expression.

### ***Limiting rights: a revision exercise***

- *Absolutely prohibited*: certain rights, notably the prohibition on torture and ill-treatment, slavery, the arbitrary taking of life and retrospective criminal penalties can never be interfered with under any circumstances.
- *Absolute necessity*: is the test to justify the use of lethal force under the right to life. It is the strictest test and requires the highest degree of supervision by the courts and justification on the part of those who exercise lethal force.
- *Strict necessity*: is the test used to limit the right to a fair trial and the right to liberty where the Articles protecting those rights permit limits to them.
- *Necessary in a democratic society*: the qualified rights require a balancing exercise. The extent to which it may be necessary to interfere with one of those rights will depend upon the rights in issue, the extent of the interference and, from the perspective of the European Court of Human Rights, whether the doctrine of the margin of appreciation has been applied.
- *Reasonable in the public interest*: interferences with property rights will be lawful if it is reasonable to do so in the public interest. The test of reasonableness requires the least justification and consequently the least judicial supervision.

### ***Economic and Social Rights***

57. For completeness this section will briefly consider the justifiability and the enforcement of economic and social rights.

### ***Principles applicable to the guarantee of economic, social and cultural rights under the ICESCR***

58. The extent to which economic, social and cultural rights are justiciable is a controversial issue. A number of courts, such as the South African Constitutional

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<sup>85</sup> *Lehideaux & Isorni v France*

Court, are confident in their approach to implementing such rights.<sup>86</sup> Other jurisdictions, most notably the USA, consider economic, social and cultural rights to be more in the nature of political commitments and aspirations rather than rights that can be enforced through litigation.

59. Whether or not courts are the best forums to guarantee economic, social and cultural rights, what is clear is that these rights can be interpreted and applied. The approach to implementing economic, social and cultural rights differs from the way in which civil and political rights work, but they can be equally practical and understandable. The committee responsible for implementing the ICESCR has produced extensive analysis of the ways in which the Covenant guarantees are to be given substance. This is explained below.
60. States Parties to the Covenant are under three broad duties in relation to the rights protected under the Covenant: the duties to respect, to protect and to fulfil.
61. *The obligation to respect* does not require positive state action, only that the state refrain from interference. So for example, there would be a violation of the right to housing if the State engaged in arbitrary forced evictions.
62. *The obligation to protect* can require that the state protect individuals from interference with socio-economic rights from non-State actors. This would apply, for example, where private companies were providing unsafe working conditions to employees.
63. *The obligation to fulfil* can require that the State takes positive measures to ensure that Covenant rights are protected, through legislation, administrative measures, or budgetary allocations. This could require, for example, detailed policies and programmes to be put in place to ensure that all citizens had adequate access to healthcare.

### **Progressive realisation of rights**

64. Outside of certain core minimum obligations, ESC rights are not required to be implemented in full immediately; rather, full implementation is dependent on the economic circumstances of the State. The notion of progressive realisation is derived from Article 2(1), ICESCR which states:

"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 realisation of the rights recognised in the present Covenant

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<sup>86</sup> See for example: *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (SA Constitutional Court); *Minister of Health and Others v Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (SA Constitutional Court).

by all appropriate means, including particularly the adoption of legislative measures."

### **Minimum core obligations**

65. There are certain core obligations within ESC rights which may be complied with immediately, regardless of economic resources, and which are not subject to the principle of progressive realisation. These are:

- Non-discrimination in the application of ESC rights
- Right to freedom from arbitrary forced evictions

### **Analysing the Content of ESC rights**

#### *Availability*

66. The basic content of ESC rights such as healthcare, education, benefits etc must be made available to all on a non-discriminatory basis.

67. Further relevant standards will be:

- Sufficiency: e.g. sufficient levels of benefits
- Quality: e.g. healthcare of an adequate quality

#### *Accessibility*

68. Where services forming part of the basic content of ESC rights are made available, they must be accessible to all. The concept of accessibility includes:

- Physical accessibility: e.g. disabled access to schools; benefit offices within a reasonable geographic distance of claimants
- Economically accessible: e.g. medical care available free of charge where necessary or at a reasonable cost
- Non-discrimination and accessibility to vulnerable groups

#### *Acceptability*

69. Cultural acceptability: for example, education provided must be broadly culturally acceptable and appropriate to parents and children.

#### *Quality*

70. For the rights to be effective they must also guarantee the appropriate quality. Medicines for example should not be out of date.



## V. Specific Issues

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

### ***The Importance of Equality and Protection from Discrimination in International Human Rights Law***

2. The importance of equality should never be underestimated. It can, with confidence, be asserted that a guarantee of equal treatment is essential to democracy and that democracy is founded on the principle that each individual has equal value. At the end of this Manual is an explanation of how the prohibition of discrimination works under the ECHR.
3. Along with protection from discrimination on the grounds of sex, the protection against race, religious and ethnic discrimination is the cornerstone of international human rights law's commitment to equality. Equality lies at the heart of post war human rights protection and access to equality and the rooting out of unjustified discrimination has been the motivation behind the emergence of modern human rights standards. Principles of equality should be seen as the thread that draws together human rights, and the values of a democratic society, which flow from them.
4. The following is a brief analysis of how human rights law strives to guarantee equality.

### ***How is Equality Protected by International Human Rights Law?***

5. Given that the United Nations was born in the aftermath of the defeat of Nazism, it is no surprise that one of the four principles on which the United Nations was founded is that of non-discrimination. The UN Charter of 1945 proclaims that the United Nations' purposes include:

'...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, UN Charter).

6. As has already been identified, the specific content of those rights has been codified and explained in a number of human rights treaties and declarations since then.
7. The World Court, the International Court of Justice, has made it clear that 'to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origins ... is a flagrant violation of the purposes and principles of the [UN] Charter'.<sup>87</sup> In respect of racism, that Court has held that one of the fundamental norms of international law binding on all States includes protection from racial discrimination'.<sup>88</sup>

### *Different Approaches to Protecting Against Discrimination*

8. All human rights treaties include an equality guarantee, as do most domestic constitutional frameworks. Similarly at the national level, there are often comprehensive laws forbidding discrimination. However, there are various ways of seeking to ensure equality and non – discrimination. Some of these are more effective than others. For example, all human rights treaties provide for formal equality or consistency in treatment by prohibiting unjustified differential treatment. This is known as 'direct discrimination'. Others also impose an obligation on States to secure substantive equality by, in particular, prohibiting unjustified conditions, which, whilst neutral in appearance, disadvantage certain protected groups, thus making 'some progress in the accommodation of diversity'.<sup>89</sup> This is known as 'indirect discrimination'. The non-discrimination guarantee in the European Convention on Human Rights (Article 14), for example, is now understood to prohibit neutral measures which adversely affect certain minority groups.<sup>90</sup>
9. Some human rights treaties go even further and expressly require positive action on the part of States to eliminate discrimination on prohibited grounds.<sup>91</sup> However, certain treaties protect equality only in the enjoyment of identified substantive rights (commonly described as ancillary' protection).<sup>92</sup> This means that instead of a free standing right to equality, protection against discrimination is available only in relation to the application of the other rights protected by the relevant treaty. This can have the effect of making equality and non-discrimination more marginal.

### *Is Protection Against Direct Discrimination Enough?*

<sup>87</sup> *Namibia (South West Africa) Case* (1970), ICJ Reports, (1971) at 57.

<sup>88</sup> *Barcelona Traction Case (Second Phase)*, ICJ Reports (1970) at 514-517.

<sup>89</sup> "Discrimination and Human Rights, The Case of Racism" [2001] page 24, Ed Sandra Fredman.

<sup>90</sup> See, for example, *Thlimmenos v Greece* [2000] 9 BHRC 12.

<sup>91</sup> Examples include the International Convention on the Elimination of All Forms of Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): See further below.

<sup>92</sup> E.g. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950].

10. It is generally understood that mere formal equality – that is a requirement that there be no difference in treatment as between persons in like situations (or ‘direct discrimination’) - is not sufficient to guarantee real equality. Simple equality of treatment, without regard to the differences between the persons or groups of persons concerned, may operate so as to entrench existing disadvantages. Thus, a prohibition on wearing head gear at work imposed on all employees is, formally speaking, equal treatment (so long as no exceptions are made) but can readily be seen as disadvantaging those groups for whom the wearing of head gear might have some religious or cultural significance.

### *Protecting Against Indirect Discrimination*

11. Protection against ‘indirect’ discrimination provides a better opportunity to challenge entrenched discrimination arising out of structural factors. Indirect discrimination is perhaps best explained by a policy, rule or practice that is essentially neutral on its face, in that in theory it applies to everyone, which, however, may be indirectly discriminatory if it has a disparate impact on people belonging to a particular group.<sup>93</sup>

12. This concept of ‘indirect’ discrimination is now well recognised, including in the sphere of race and ethnicity discrimination, and is reflected in EU legislative measures on, amongst other things, race, ethnicity and religious discrimination.<sup>94</sup>

13. Nevertheless the concept of ‘indirect’ discrimination has its limits. The concept of indirect discrimination, though prohibiting conditions that disadvantage certain groups, does not require positive measures to ensure that any existing disadvantage or difference is overcome or accommodated.

14. Additionally the ‘indirect discrimination’ model only prohibits ‘unjustified’ discriminatory conditions. The defence of ‘justification’ has sometimes lent itself

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<sup>93</sup> It is perhaps best explained by looking at the US Supreme Court case that formulated the principle. In *Griggs v Duke Power*, an employer had an open policy of excluding black applicants from employment. This was replaced by a requirement that candidates have high school qualifications or pass a literacy test. The employment concerned was in the main unskilled and the qualifications sought were not necessary for the carrying out of the work. The effect of applying the qualifications, however, was to disadvantage black candidates as against white. The reason for that was the continuing effects of discrimination in the education system against black pupils, such that a disproportionate number failed to achieve a high school qualification or reach a standard of literacy sufficient to pass the test imposed. Thus, whilst black candidates and white candidates were treated – in a formal sense – equally, black candidates were disadvantaged by the criterion applied and the workforce remained resolutely almost completely white. The US Supreme Court held that such treatment could be discriminatory if the result was such that fewer candidates could comply with the requirement, unless the requirement was necessary for the proper performance of the job.

<sup>94</sup> Council Directive 2000/43/EC ‘implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’ and Council Directive 2000/78/EC ‘establishing a general framework for equal treatment in employment and occupation’.

to accommodating the interests of the dominant community at the expense of the minority.

### *Racial Profiling as Indirect Discrimination*

15. Racial profiling is the inclusion of race, ethnicity, nationality or religion in the profile of a person considered likely to commit a particular crime or type of crime. It occurs when police, or the security services, create databases, investigate, stop, frisk, search or use force against a person based on such characteristics instead of evidence of a person's criminal behaviour. Although historically associated with the black communities, post 9/11, Arabs, Muslims and South Asians have also been increasingly subjected to such profiling.
16. Racial profiling may be directly discriminatory, but it is more likely to be applied in an indirectly discriminatory manner. For example, stop and search powers may exist for everyone, however those who are perceived to be Arab might be disproportionately stopped.
17. The German Constitutional Court has held in a case challenging racial and other profiling that such profiling could only be compatible with Germany's Basic Law if there is a 'concrete' danger to highly protected rights such as the life and security of the German Federation, or the life of a specific person. The court, therefore, held that such racial profiling could not be used preventatively to avert danger in the absence of a concrete and identifiable risk to either the person or the State.
18. The court went on to hold that the general level of threat that has been in place since 11 September 2001 was not, in and of itself, sufficient to justify the use of racial profiling. The court also held that the threat must be specific beyond a general level and relate to the preparation or realisation of actual terrorist attacks.

### *Using Positive Action to Tackle Entrenched Discrimination*

19. An obligation to bring about change by the imposition of a positive duty so as to tackle structural disadvantage goes further towards securing substantive equality. Such an approach is sometimes considered controversial because of the assumption that positive duties, or affirmative action, violate conventional principles of equality. Yet, it does represent the high point in the protection against discrimination and such obligation can be found in a number of international human rights treaties, which specifically acknowledges the need for temporary special measures to combat institutionalised discrimination in the short term.

### *Inter-sectionality*

20. It is important to recognise that discrimination may occur on multiple grounds. People do not possess a single defining characteristic and it may not be clear

whether a person has suffered discrimination because of his religion, or her ethnic identity or race, or her sex or gender, or for a mix of different prejudices. Further, a woman may experience discrimination in different ways from a man, or the same discriminatory act may have with different consequences. Without awareness of the ways of so-called inter-sectionality, forms of discrimination may pass unnoticed, or be ignored because of an assumption that the way a woman has treated has nothing to do with her race and ethnicity. It may also conceal discrimination from within her own community.

### *Protecting Group Rights and not just the Individual*

21. Further, many of the international human rights treaties, particularly those which emerged during the 1990s, address 'group' rights. The protection of minority groups (as opposed to individuals within them) is contentious. By 'minority group rights' we refer to those rights which are conferred upon individuals but as members of a group and which are enforceable by them, as members of that group (and which go beyond mere non-discrimination) and those rights which are conferred upon the group itself which cannot be enjoyed by an individual member alone (political representation rights being the most obvious example).<sup>95</sup>
22. A commitment to protecting group rights is not however straightforward. However, there is some principled purpose to the protection of minority group rights. Mere non-discrimination (even indirect discrimination) prohibitions assume what can only be described as an essentially assimilationist model. This is because it is assumed that members of minority groups wish to achieve no more than the absence of disadvantage arising out of their membership of a minority group, rather than any positive protection or promotion of the existence of the group itself. This assimilationist model does little to protect and promote the existence of minority groups.
23. The Council of Europe has also adopted the Framework Convention for the Protection of National Minorities.<sup>96</sup> That Convention is the most comprehensive document in this area. Russia has ratified this Convention.

### *The Link Between Freedom of Religion and Race and Ethnicity Discrimination*

24. There is no doubt that there exists a clear link between non-discrimination on grounds of race and ethnicity and religious freedom. While the right to religious freedom is obviously important as a free standing right it has a close relationship with the general rule against discrimination; experience demonstrates that those who most need the protection that religious freedom provides are members of religious minorities who are frequently also racial or ethnic minorities.

### ***Human Rights within a State of Emergency***

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<sup>95</sup> Article 27, ICCPR protects group rights

<sup>96</sup> Adopted in 1994 and entered into force on 1 February 1998.

25. Under exceptional circumstances, it may be possible to derogate from certain obligations under international human rights standards. Article 4, ICCPR<sup>97</sup> and Article 15, ECHR<sup>98</sup> allows States to go beyond simply limiting rights where it is lawful to do so, to derogating from them or suspending them in times of emergency that threaten the life of the nation. Any policies which are being contemplated which go beyond what is provided for by human rights standards will need to be considered in the context of a derogation and whether it will be lawful to derogate under the circumstances. That said, lawful derogation might be required. It is essential therefore to be able to understand how and when to lawfully derogate from international human rights standards.

#### *Derogations are a temporary measure*

26. As a starting point, the power to derogate in human rights treaties should be dealt with a temporary measure that permits the suspension of certain rights in times of emergency. These rights should only be suspended in order to be able to return to a situation of normalcy as soon as possible. Once that objective has been realised the human rights treaty should be restored in full.

#### *Certain rights are non-derogable*

27. Both Article 4, ICCPR and Article 15, ECHR (and their equivalent provisions in other international human rights treaties<sup>99</sup>) acknowledge that certain rights are non-derogable, regardless of the situation. As broad principles, these are the:

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<sup>97</sup> Article 4, ICCPR states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social class. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant through the intermediary of the Secretary General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

<sup>98</sup> Article 15, ECHR reads:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

<sup>99</sup> The African Charter of Human and Peoples Rights contains no derogation provision

- The right to life
- Protection from torture, inhuman and degrading treatment and punishment
- Protection from slavery
- Protection from retrospective criminal penalties and law

28. However additional rights have been added to this list of non-derogable rights, some of which are contained explicitly in the ICCPR. These are explained below.

29. Because the ability to derogate from human rights standards could undermine the entire purpose and value of international human rights protection, those bodies responsible for the implementation and protection of human rights treaties, such as the Human Rights Committee and the European Court of Human Rights have laid down certain principles that must be satisfied for a derogation to be lawful.

30. These can be summarised as follows:

- Principle of exceptionality
- Principle of publicity
- Principle of proportionality
- Principle of consistency
- Principle of non-discrimination
- Principle of notification

31. By being required to meet these obligations in relation to the power to derogate and the nature of that derogation, the human rights treaty itself places constraints and limits on what a government can do. The fact that States can suspend certain rights is not the same as allowing arbitrary action.

32. From an examination of international human rights case law on derogation the following factors concerning the power to derogate can be extrapolated.<sup>100</sup>

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<sup>100</sup> In *Brannigan and McBride*, the applicants had been arrested under the Prevention of Terrorism Act 1984 and detained for six days and four days respectively, without being brought before a court. The European Court of Human Rights therefore found that the requirement of promptness had not been respected. However, the UK government pointed out that the failure to observe these requirements of Article 5 had been met by their derogation under Article 15, ECHR. The Court, therefore despite finding a breach of Article 5(3), also accepted that the derogation from that provision was within the ambit of Article 15 of the European Convention. The UK had therefore acted lawfully.

These cases need to be compared with more recent Turkey cases. In *Aksoy v. Turkey*, the Court, whilst agreeing with Turkey that there was a public emergency which threatened the life of the nation, considered that the measure taken, with regard to unsupervised detention, could not be justified as being strictly required by the exigency of the situation. In *Aksoy*, the applicant was detained for fourteen days without judicial supervision, which the Court considered unnecessary. The Court pointed out that, "This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his

- Courts will be reluctant to overrule the executive in relation to the existence of an emergency threatening the life of the nation;
- However the courts will not give government a carte blanche and will retain the power to review the need to derogate;
- Certain rights are non-derogable;
- The derogation needs to be made publicly and its nature, extent and purpose explained;
- The derogation can be reviewed;
- That review includes scope, duration, and manner of implementation;
- Once it has been established that there is a threat to the nation requiring derogation, that response must still be a proportionate and necessary one. If it goes too far, the derogation will be unlawful.

### ***Reviewing the extent of non-derogable rights***

#### **General Comment 29**

33. In July 2001 the Human Rights Committee addressed the issue of derogation and adopted General Comment Number 29.<sup>101</sup> This General Comment sets out a number of non-derogable rights. The Human Rights Committee notes, “The fact that some of the provisions of the Covenant have been listed in Article 4 (paragraph 2), as not being subject to derogation does not mean that other Articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists”.

34. The Human Rights Committee points out that even during states of emergency, “States parties may in no circumstance invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law”.

35. In General Comment 29 the rights that, as a matter of international law, cannot be made subject to lawful derogation, beyond those already contained in Article 4, ICCPR are:

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Article 10 of the ICCPR);

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right to liberty but also to torture.” Making reference to *Brannigan and McBride* the Court noted that safeguards in Northern Ireland had protected against “arbitrary behaviour and *incommunicado* detention”. The Court in *Aksoy*, acknowledged “that the investigation of terrorist offences undoubtedly presented the authorities with special problems,” but, it went on to say, “in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.”

<sup>101</sup> Human Rights Committee, *General Comment Number 29: States of Emergency (Article 4)*, UN. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001

- Prohibitions against taking of hostages, abductions or unacknowledged detention;
- Protection of specific minority rights such as prohibition against genocide;
- Deportation or forcible transfer of populations which would constitute a crime against humanity; and
- Engaging in propaganda for war or advocacy of “national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”.

36. The Human Right Committee goes further and also points out that the requirement of an effective remedy under Article 2(3) constitutes a treaty obligation inherent in the Covenant as a whole. Therefore, General Comment 29 states that, while States may take measures strictly required by the exigencies of the situation, they must comply with this “fundamental obligation” by “providing a remedy that is effective.”

37. At the same time, the Committee explains that it is inherent that the rights explicitly recognised as being non-derogable must be secured by procedural guarantees, including judicial guarantees. As such, the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Therefore, Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. General Comment 29 then concludes by pointing out:

- Safeguards related to derogation are based on the principles of legality and the rule of law inherent in the Covenant as a whole
- Certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict
- There is no justification for derogation from these guarantees during other emergency situations
- Principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency
- Only a court of law may try and convict a person for a criminal offence
- The presumption of innocence must be respected
- In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention (ie habeas corpus), must not be diminished by a State party’s decision to derogate from the Covenant

38. The UN Working Group on Arbitrary Detention has said:

‘With regard to derogations that are unlawful and inconsistent with States’ obligations under international law, the Working Group reaffirms that the fight against terrorism may undeniably require specific limits on certain guarantees, including those concerning detention and the right to a fair trial. It nevertheless points out that under any circumstances and whatever the threat, there are rights

which cannot be derogated from, that in no event may an arrest based on emergency legislation last indefinitely, and it is particularly important that measures adopted in states of emergency should be strictly commensurate with the extent of the danger invoked. On all these points the Working Group refers to Human Rights Committee general comment No. 29 on derogations from the provisions of the International Covenant on Civil and Political Rights during a state of emergency.<sup>102</sup>

### ***Extra-Territorial Application of International Human Rights Standards***

39. Human rights treaties secure rights to all within the jurisdiction. What amounts to jurisdiction for the purposes of these treaties depends upon the extent of control that a Member State has in relation to territory, even territory outside its geographic boundaries.<sup>103</sup> The HRC has made it clear that the ICCPR has extra-territorial reach where persons are within the power or effective control of the State Party, even if not situated in the territory of the State Party.<sup>104</sup> Similarly, the International Court of Justice (ICJ), in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* held that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory”. It is under these principles that the ICCPR and all other human rights treaties ratified by the United States were considered to extend to the actions of the United States in relation to persons detained at Guantanamo Bay.<sup>105</sup>
40. A State’s human rights obligations do not necessarily cease at their frontiers.<sup>106</sup> This is particularly the case where a State’s armed forces are deployed overseas, for example in a peacekeeping operation. It is now becoming standard practice for the UN treaty bodies to ask Member States what measures are in place to ensure that their armed forces abroad act compatibly with their treaty obligations.
41. Similarly the UN Mission in Kosovo (UNMIK), which took over the responsibility of administering the functions of government of that region, has accepted that it has assumed responsibility for the guarantee of human rights in Kosovo. This is a radical development as technically, for the purposes of international human rights law, the UN is not a State actor that can be held responsible for the guarantee of human rights. However, in June 2006 UNMIK reported to the UN HRC on its implementation of the ICCPR in Kosovo.

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<sup>102</sup> Report of the Working Group on Arbitrary Detention (E/CN.4/2004/3)

<sup>103</sup> see *Loukidou v Turkey; Bankovic v Belgium & Others*

<sup>104</sup> General comment 31, 29 March 2005.

<sup>105</sup> “Situation of detainees at Guantanamo Bay”, E/CN.4/2006/120.

<sup>106</sup> The ICCPR is more explicit than the ECHR in relation to jurisdiction and extra-territoriality. Article 2(1) reads, “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.”

### ***When does a State Party to a human rights treaty exercise its jurisdiction so as to trigger its obligations under that Treaty?***

42. Article 1, ECHR: Member States must ensure the rights and freedoms to everyone “within their jurisdiction.” An exercise of jurisdiction must be established to determine whether that State’s ECHR obligations have been triggered.
43. ECHR jurisprudence has recognised that, although jurisdiction is primarily *territorial* in nature, the concept of “jurisdiction” is not restricted to the national territory of a Member State.
44. The acts of the State performed or producing effects outside its territory can amount to an exercise of jurisdiction in exceptional circumstances. These circumstances include, among others, where a State agent exercises control and authority over an individual, for example when taking them into custody, where a state exercises effective control over a territory as a consequence of military action, or where the State, outside its territory, exercises all or some of the public powers normally exercised by a sovereign government.<sup>107</sup> In *Al-Skeini v UK*, the UK was therefore under the procedural obligation to investigate the deaths of civilians killed by British soldiers in Iraq.

### ***Authority and Control over Persons***

45. This test triggers a State’s ECHR obligations where persons “are found to be *under the former State’s authority and control through its agents* operating—whether lawfully or unlawfully—in the latter State.” A State will have exercised its jurisdiction when State agents exert their *actual* authority and control over other persons or property when acting outside the member state’s own territorial borders. It is the extent of the State agent’s control over the individual person or property that is relevant.

### ***Effective Control over Territory as a Consequence of Military Action***

46. Convention obligations may attach to extraterritorial actions by a Member State where, “as a consequence of military action—whether lawful or unlawful-- [the State] exercises *effective control* of an area outside its own territory”.
47. As described above, the case of *Al-Skeini* is now the definitive position of the law on the extra-territorial scope of the ECHR.

### ***Additional Exceptions to the Territorial Jurisdiction Doctrine***

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<sup>107</sup> *Al-Skeini v UK*. This case discusses the further exceptions and principles of extra-territorial jurisdiction in detail.

48. The Court has also recognised additional instances in which a State's extraterritorial action can constitute an exercise of its jurisdiction for the purposes of Article 1.

49. A state's jurisdiction may extend to:

- Its nationals living abroad;<sup>108</sup>
- To its registered ships and aircraft;
- To its diplomatic and military persons, in whatever territory they may be;
- Extradition or expulsion (these cases are not technically state action *taken abroad*, but rather actions taken territorially and having extraterritorial effects)

50. The actions taken to exert control over Ocalan took place not only outside Turkey, but outside the *espace juridique* of the ECHR.

51. In *Issa and Others v Turkey*, the Court recognised that Turkish military troops acting against Iraqi Kurdish shepherds in northern Iraq could conceivably constitute an exercise of Turkey's jurisdiction.

52. The concept of 'espace juridique' (i.e. a limitation to the ECHR to the Council of Europe) is too excessively narrow.

53. A *third* ground in which extraterritorial actions may constitute an exercise of jurisdiction.

54. In addition [to the two bases for extraterritorial jurisdiction discussed above], **the acquiescence or connivance of authorities of a Contracting State in the acts of private individuals which violate the Convention Rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention** (emphasis added). Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention. This is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community.<sup>109</sup>

### **Accountability of Non-State Actors**

55. Technically, human rights standards and obligations only attach to States. Human beings are the beneficiaries of human rights and States parties have the corresponding obligation to guarantee the rights contained in human rights treaties. It is incumbent, therefore, upon the State to have in place comprehensive laws, both criminal and civil to deal with the consequences of terrorism as well as to protect from it. Failure to have in place such provisions would be a violation of human rights obligations imposed upon the State.

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<sup>108</sup> *Stocke v Germany*, app. No. 11755/85, ECommHR, 12 October 1989.

<sup>109</sup> *Isaak v Turkey*

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

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

- where the State has privatised State activity or the State permits that activity to be carried out in the private sector, the State can be held accountable for violation of human rights under those circumstances.<sup>110</sup>
- where a violation of human rights occurs between two private individuals, the State cannot escape its liability in connection with those violations, if the laws governing the activity that caused the violation are inadequate.<sup>111</sup>
- the State cannot also hide behind its responsibilities by merely asserting the activities which violated an individual's rights were carried out by private parties, or non-State actors.<sup>112</sup>

58. This last principle has since been adopted by the African Commission on Human and Peoples' Rights in a case concerning the behaviour of an oil consortium between the State oil company and Shell in Nigeria.<sup>113</sup> In finding a number of

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<sup>110</sup> For example, in a case involving the treatment of a child in an English private school (*Costello Roberts v UK*), the European Court of Human Rights had no hesitation in finding that the UK could be held accountable for the actions of a private school, even though no State agency was involved in the possible violation because the provision of education is an essential State activity, and the State cannot opt out of its responsibilities in ensuring its provision is guaranteed in compliance with human rights standards.

<sup>111</sup> For example in *MC v Bulgaria* For example, the laws governing rape and sexual assault in Bulgaria were considered insufficient to guarantee a complainant's rights to protection from degrading treatment and physical and emotional integrity. This was because they required that evidence of resistance was necessary before a case would be prosecuted. The UK government was also found to have violated the protection from inhuman and degrading treatment because the then state of English law permitted the defence of lawful chastisement of children, even when the nature of that chastisement amounted to inhuman or degrading treatment, protection from which is an absolute right (*A v UK*).<sup>111</sup>

<sup>112</sup> As will later be examined, in a case against Honduras, the Inter-American Court of Human Rights held that Honduras had violated the American Convention of Human Rights in failing to investigate the disappearances which the State argued had been carried out by non-State actors. The Court found a failure on the part of Honduras to fulfill the duties it assumed under the Convention, which obligated it to ensure the victim had the free and full exercise of his human rights - *Velasquez Rodriguez v Honduras*

<sup>113</sup> The Commission found that 'the Nigerian government had given the green light to private actors, and oil companies in particular, to devastatingly affect the well being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of the African Charter.' In relation to the right to food, guaranteed by the African Charter, the

violations of the African Charter of Human and Peoples' Rights, the Commission pointed to the positive obligation of States with regard to private actors.

59. The European Court of Human Rights has also examined this notion of the State's positive obligations in relation to the failure to protect through proper regulation against a violation of the Convention. Spain was found to have violated the right to private and family life when a local authority failed to regulate the operation of a waste treatment plant,<sup>114</sup> and Italy violated the right to private life where it failed to provide relevant information about pollution from a factory.<sup>115</sup> In a case that was declared inadmissible on other grounds, the European Court of Human Rights had no difficulty in finding the law in the UK was inadequate to protect interferences with privacy by one private party over another.<sup>116</sup>
60. An alternative way of examining the issue of non-State actors is to categorise them as falling within four distinct groups,<sup>117</sup>
61. The first of which are those who are mandated by government to act, either with the knowledge of government or their acquiescence. These include paramilitary groups, militias and death squads. Insofar as the government is directly implicated, its legal responsibilities are engaged.
62. The second category encompasses private contractors or consultants who carry out functions that the State would otherwise have to carry out. This includes prison management and law enforcement. The HRC has made it clear that under the ICCPR the State's obligations require that the criminal law should apply to these agencies when violating certain key human rights, notably the prohibition on torture and ill treatment.
63. The third category involves those who commit crimes, including murder, that can give rise to State responsibility in circumstances where the State has failed to take all appropriate measures to deter, prevent and punish the perpetrators, as well as to address any attitudes or conditions in society which encourage or facilitate such crimes. Examples falling into this category include so-called honour killings and killings directed at groups such as homosexuals and members of minority groups. Trades unionists might be another example. An isolated killing may not give rise to any government responsibility, but once a pattern becomes clear, through its inaction, the government will be conferring a degree of impunity upon the killers and failing to satisfy its positive obligations.

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Commission held that 'the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent people's efforts to feed themselves.' 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 20<sup>th</sup> Session, 13 – 27 October 2001

<sup>114</sup> *Lopez Ostra v Spain*

<sup>115</sup> *Guerra v Italy*

<sup>116</sup> *Spencer v UK*

<sup>117</sup> "Extrajudicial, summary or arbitrary executions", E/CN.4/2005/7, 22 December 2004.

This will, therefore, also be relevant, as already discussed, in relation to disappearances and the requirement of “due diligence” upon the State to investigate.

64. The fourth and final group are those involved in armed opposition. As has already been discussed, despite the extent of these groups’ activities, as a matter of strict interpretation of human rights law they cannot be classified as human rights violators, regardless of the atrocities that they may carry out. Mechanisms, therefore, need to be developed to enable these groups to support international human rights obligations and to be held accountable against them.

# VI. Key Human Rights Standards and Security

## 1 The Right to Life

### *The primacy of the right to life*

1. The right to life is fundamental and non-derogable. The right to life is given particular pre-eminence in international law because all other rights are rendered meaningless in its absence. This does not mean that the right to life is considered to be the most important right, in relation to which all other rights are subordinate and less protected. Rather, the pre-eminence of the right to life is recognised as a value which then infuses the entirety of human rights. To this extent, the right to life is intimately associated with concepts of human dignity.
2. It is of course self-evident that without the right to life it is not possible to enjoy other human rights. Evidence of the importance the UN attaches to the right to life can be seen in the 1982 UN General Assembly Resolution stating that the safeguarding of the right to life is an essential condition for the enjoyment of the entire range of economic, social, cultural as well as civil and political rights.<sup>118</sup> The right to life is contained in Article 6 of the ICCPR<sup>119</sup> and Article 2 of the ECHR.<sup>120</sup>
3. Together with the protection from torture, the right to life enshrines the basic values of democratic societies, and its interpretation must be guided by the recognition of its importance. Consequently, its provisions must be strictly construed. The pre-eminence of the right to life has been consistently reaffirmed by international agencies, courts and tribunals. This is particularly the case where excessive use of force is used by law enforcement agencies.<sup>121</sup>

### *The negative obligation to refrain from taking life*

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<sup>118</sup> GA Res. 37/189A

<sup>119</sup> Article 6(1) of the ICCPR provides:

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.

<sup>120</sup> Article 2 of the ECHR provides:

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.

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.

<sup>121</sup> This is evident in the case of *Guerrero v Colombia (HRC)*, which concerned the excessive use of force by the Colombian police that resulted in the deaths of seven people who were not proven to have been connected with any suspected offence.

4. The right to life does recognise certain strictly regulated categories of permissible deprivations. These are dealt with below in detail. It is essential that law enforcement agencies understand the limited circumstances where it can be lawful to use lethal force. These can be summarised as:
  - Self-defence;
  - Arrest;
  - The prevention of escape; and
  - The quashing of an insurrection or riot.
5. These justifications for the use of lethal force are explicitly recognised in the ECHR and are commonly accepted under national law. However, these justifications are subject to the test of absolute necessity, which amounts to a very high threshold proportionality test. In relation to powers of arrest, it is only in exceptional circumstances where resort to lethal force should be used. Therefore, simply because someone is resisting arrest, even for a serious offence, will not justify resorting to the use of lethal force without the further justification for its use that the individual concerned is also about to use comparable force against others. This principle would apply equally to those involved in a riot. Essentially lethal force is unlawful except when it is used in self defence against potentially lethal force or to protect others from being subject to potentially lethal force. Under those circumstances, where there is such a risk, it is the option of last resort. Permissible deprivations may also be governed by subsidiary rules such as the UN Code of Conduct for Law Enforcement Officials.
6. The right to life, therefore, clearly imposes a negative obligation on the State to refrain from taking life. Any death caused by an agent of the State using force beyond that which is absolutely necessary or for a reason other than those identified above will amount to a violation of the right to life and will be unlawful. It should be noted that the right to life is not concerned only with intentional killings, but may also be violated where force is permitted which may result, as an unintended outcome, in the deprivation of life.<sup>122</sup>
7. Where it is alleged that loss of life was caused by a State agent, the Strasbourg Court has held that this must be proved beyond reasonable doubt.<sup>123</sup> However, where an individual dies in custody and the State fails to provide a satisfactory explanation, the conclusion may be that the death occurred as a result of the acts or omission of the State authorities in the absence of further, positive proof. In such circumstances, a violation of the right to life can be proved solely by circumstantial evidence and strong, clear inferences.<sup>124</sup> This approach may also apply in cases of disappearances, discussed in detail below.

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<sup>122</sup> *McCann v UK*

<sup>123</sup> *Yasa v Turkey*

<sup>124</sup> *Varnava v Turkey; Baysayeva v Russia*

8. As to the burden of proof, where there is a death in custody the burden of proof falls on the State to identify the cause of death.<sup>125</sup> Similarly, where a death results from the use of force by the State, the onus is on the State to prove that the use of force was no more than absolutely necessary.<sup>126</sup> Where the State fails to provide a convincing explanation, a violation of the right to life may be proved without further, positive proof. Where the death does not occur in state custody or as a result of State force, the burden of proof is borne by neither party.
9. The right to life can also in exceptional circumstances be violated by the State where the victim does not die but where the force used by State agents was potentially deadly and put the victim's life at risk.<sup>127</sup>

### **Extra-judicial executions**

10. The targeting and elimination of known terrorists is counter-productive and also undermines the right to life. The killing of "known terrorists" places no verifiable obligation upon the State to demonstrate in any way that those against whom lethal force was used were, indeed, terrorists or to demonstrate that every other alternative had been exhausted. Furthermore, the use of extra-judicial and arbitrary executions creates the potential for an endless expansion of the relevant categories within it to include any enemies of the State, social misfits, political opponents, or others.<sup>128</sup>
11. In its concluding observations, the HRC has expressed concern with respect to the alleged use of so-called "targeted killings" of suspected terrorists. The Committee has emphasised that State parties, "should not use 'targeted killings' as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities.... Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted."<sup>129</sup>

### ***The positive obligations to safeguard life***

12. The responsibility under the right to life is not limited to this negative obligation. The right to life also creates positive obligations on the State. Those positive measures might include steps to reduce infant mortality and to increase life expectancy especially through the elimination of malnutrition and epidemics.

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<sup>125</sup> *Salman v Turkey*

<sup>126</sup> *Bektas v Turkey*

<sup>127</sup> *Makaratzis v Greece; Petrov v Bulgaria*

<sup>128</sup> See Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2005/7.

<sup>129</sup> Concluding observations of the Human Rights Committee: Israel (CCPR/CO/78/ISR), 21 August 2003, para. 15.

13. In particular, appropriate steps should be taken to safeguard the lives of those within the jurisdiction.<sup>130</sup> This may involve the provision of information regarding a possible risk to life caused by actions of the State,<sup>131</sup> and this obligation may extend to discouraging individuals from causing serious risks to their own health.<sup>132</sup>
14. This obligation includes a duty on the State to provide an administrative regime that effectively protects life. The State is under a duty to put in place:
- An appropriate legal and administrative framework defining the limited and restricted circumstances in which State agents may resort to lethal force, including the use of firearms, arrest operations, State agent restraint techniques, etc;
  - Appropriate training and guidance for State agents regarding the use of force, and the relevant concepts under the right to life, including absolute necessity, the proportionality of response, and the pre-eminence of respect for human life as a fundamental right;
  - Suitable systems of work and sufficiently competent employees to protect life, e.g. in hospitals.
15. In addition, the State must ensure the existence of a judicial system that<sup>133</sup>:
- Investigates deaths on its own motion where there is any evidence of third party involvement, even though there is no arguable violation by State agents<sup>134</sup>;
  - Is capable of establishing the facts and causes of a death, holding accountable those at fault and providing appropriate redress to the victim(s);
  - Enables any citizen to access an independent and effective investigation into the facts of death, irrespective of the involvement of the State;
  - Can determine civil liability for deaths, including those that do not involve State culpability, e.g. deaths caused by medical negligence or traffic accidents.
16. Further, the positive obligation under the right to life requires that the law must properly prohibit and punish killings, and that unlawful killing must be subject to criminal sanctions, regardless of who carried out the killings. This is the case even where a State agent is responsible for the taking of a life, where that use of lethal force cannot be justified and was not absolutely necessary. All deaths must be properly investigated, and the law must be effectively implemented.

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<sup>130</sup> *LCB v UK*

<sup>131</sup> *LCB v UK*

<sup>132</sup> *Barret v UK; Oneryildiz v Turkey*

<sup>133</sup> *Ciechonska v Poland; Railean v Moldova; Dodov v Bulgaria*

<sup>134</sup> *Rantsev v Cyprus*

17. This positive obligation to protect life may under certain circumstances require the State to protect certain individuals from identifiable threats to their lives. On a day-to-day level, these threats may arise from other private individuals, environmental hazards or even from themselves.
18. The extent of the positive obligation to protect life is not limitless. An appropriate balance must be struck. If law enforcement agencies fail to act, for example, by opting not to arrest someone who then goes on to take a life this will not necessarily violate the right to life. In *Osman v UK*, the Strasbourg Court found no violation of the right to life where the police did not arrest an individual who was harassing a family and who then went on to shoot and kill the father of that family. The police, under the circumstances, had no reason to believe such a tragic event might occur. The Court found that the police could not be criticised for having failed to use their powers of arrest when they reasonably believed that they lacked the necessary standard of suspicion to exercise those powers.
19. The principle that can be adduced from this case is that if it can be shown that the authorities failed to take reasonable steps to avoid a real and immediate risk to life of which they were aware or ought to have been aware, the right to life may be violated.<sup>135</sup> However, this does not extend to providing protection for an indefinite period or to prevent every possibility of violence. This principle may also require prison authorities to protect a prisoner from the risk to life posed by another prisoner<sup>136</sup>, or require prison and judicial authorities to protect the public from the risk to life posed by specified prisoners.<sup>137</sup>
20. In *Watts v UK*, the applicant complained that her transfer from her existing care home to another care home would reduce her life expectancy. The Court held that a badly managed transfer of elderly residents of a care home could well have a negative impact on their life expectancy as a result of the general frailty and resistance to change of older people. It followed that the right to life was “applicable”. The operational duty was, therefore, capable of being owed in such circumstances, but for various reasons, the claim failed on the facts.
21. State deprivation of liberty carries a risk of suicide against which the State must take general precautions.<sup>138</sup> Once an individual is being detained by the State, there is an obligation to ensure their health and wellbeing. This includes protecting them from committing suicide and minimising the opportunities to do so.<sup>139</sup> The same positive obligation is owed to military conscripts.<sup>140</sup> In addition, the State is under a duty to provide those in State detention with adequate

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<sup>135</sup> *Osman v UK; Renolde v France*

<sup>136</sup> *Edwards v UK*

<sup>137</sup> *Medova v Russia*

<sup>138</sup> *Tanribilir v Turkey; Salman v Turkey*

<sup>139</sup> *Keenan v UK; Renolde v France*

<sup>140</sup> *Kilinc v Turkey*

medical care to safeguard their lives.<sup>141</sup> In *Makharadze and Sikahulidze v Georgia* the Court found the authorities had failed to protect the life of a prisoner suffering from tuberculosis and had failed to provide an inquiry into his death. The Government had also failed to comply with the Court's interim measure requiring the applicant prisoner be transferred to a civilian hospital with the necessary facilities.

22. In *Mammadov v Azerbaijan*, the applicant's wife set fire to herself during an attempt by police officers to evict the applicant and his family from accommodation that they were occupying. The Court made it clear that it was necessary to determine whether "this specific situation" triggered the state's operational duty, "that is whether at some point during the course of the operation the state agents became aware or ought to have become aware" that there was a risk of suicide. The court continued, "in a situation where an individual threatens to take his or her own life in plain view of state agents and, moreover where this threat is an emotional reaction directly induced by the state agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been."

23. The right to life should be understood as creating two obligations; a substantive obligation in relation to the guarantee of life itself and a procedural obligation where there has been a loss of life. Both requirements are considered to be of equal importance.

### ***Independent Scrutiny of Loss of Life***

24. The obligation to ensure that law protects everyone's life includes a procedural aspect whereby the circumstance of a deprivation of life receives public and independent scrutiny.<sup>142</sup>

25. Intentional killing must be subject to criminal sanctions, as must unintentional killing that results from the use of force in circumstances that cannot be justified. Where death is caused by reckless or negligent acts, whether this must be subject to criminal sanctions partly depends upon the circumstances of the death.

26. Effective criminal law provisions must be put in place to prevent, punish and deter the commission of offences that deprive people of their lives. Domestic law must also regulate the permissible use of lethal force by agents of the State. Relevant laws designed to protect life must be practical, effective and must be enforced, although there is a degree of discretion on the prosecuting authorities

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<sup>141</sup> *Jasinskis v Latvia; Tarariyeva v Russia*

<sup>142</sup> *McCann v UK; Yasa v Turkey; Gulec v Turkey; Ergi v Turkey*

in determining whether to prosecute. However, this degree of discretion must not nurture a culture of impunity amongst law enforcement officers. Therefore:

- A decision on the part of the State not to prosecute or to carry out an inadequate investigation will engage the right to life;<sup>143</sup>
- Where an acquittal is based on a defence outside the scope of the accepted justifications of the use of lethal force this will amount to a violation of the right to life;<sup>144</sup>
- There is a duty on States to punish those agents who kill unlawfully;
- A clear disproportion between the gravity of the offending behaviour and the punishment subsequently imposed will violate the right to life.<sup>145</sup>

### **Obligation to investigate deaths**

27. Where it is arguable that the State has violated the right to life, i.e. that State agents were responsible for the death, the State is under a procedural obligation to conduct an official investigation into the death. 'Arguable' is a low threshold.

28. The obligation to investigate deaths arises automatically where an individual has been killed by State force, in cases of suicide or near suicide in State detention, or where a military conscript commits suicide.<sup>146</sup> The obligation arises irrespective of how the authorities found out about the death, whether State agents were involved, or the circumstances surrounding the death. This procedural obligation is also not confined solely to circumstances where an individual has lost his life as a result of an act of violence. For example, in *McShane v UK*, the right to life was held to be engaged in relation to negligent driving of an armoured vehicle into a rioting crowd in Northern Ireland.

29. It is not necessary that a formal complaint has been lodged. The mere knowledge of a killing on the part of the authorities gives rise to an obligation to carry out an effective investigation.<sup>147</sup> The State cannot require a complaint from the deceased's relatives in order for the investigation to commence, but must act of its own motion.

30. Failure to investigate properly a death will amount to a violation of the right to life, and such a violation will be in addition to any violation found in relation to the killing itself.<sup>148</sup> There are therefore two aspects to the right to life. There is a procedural element as well as a substantive one. Merely paying compensation in the absence of an investigation is not sufficient to satisfy either.<sup>149</sup>

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<sup>143</sup> *Jordan v UK; Oneryildiz v Turkey*

<sup>144</sup> As spelt out in Article 2(2), ECHR

<sup>145</sup> *Bektas v Turkey*

<sup>146</sup> *McCann v UK; Slimani v France*

<sup>147</sup> *Ergi v Turkey*

<sup>148</sup> *Cakici v Turkey*

<sup>149</sup> *Jordan v UK*

## Disappearances

31. 'Enforced disappearance' refers to the systematic practice of abduction and secret detention. This unacknowledged detention can include torture and eventual killing. As such a number of human rights are engaged including:
- The right to life;
  - The right to liberty;
  - Protection from torture;
  - Due process rights such as *habeas corpus*, and the requirement of legality; and
  - The right to an effective remedy.
32. Enforced disappearance refers to the whole spectrum of situations in which people may be held in unacknowledged detention, including situations in which killings are rare. It is not necessary that victims are killed, but they are exposed to the possibility of being seriously harmed or ultimately killed.<sup>150</sup> It is for this reason that enforced disappearances are dealt with under the protection of the right to life.
33. Even where there is no direct evidence that a person has been abducted and detained by agents of the State, where the State fails to investigate properly a disappearance, this will amount to a failure to guarantee human rights, including protection from torture and the right to life.<sup>151</sup>
34. Even during an emergency that threatens the life of the nation, enforced disappearances can never be justified, because they deny the detainee any form of procedural safeguard and are likely to result in death and/or torture. For a loss of liberty to fall within the definition of an enforced disappearance, the perpetrator must have been aware that the arrest, detention or abduction would remain unacknowledged, or that information would be refused about the whereabouts or fate of the person concerned. The perpetrator must have intended to remove that person from the protection of the law for a prolonged period of time.
35. Where an individual has disappeared after being taken into custody and there is no concrete evidence that agents of the State had killed the individual, there is an old authority which indicates that a violation of the right to life may not have occurred.<sup>152</sup> However, in the event of such a disappearance, the disappeared's next of kin will have standing under the right to life to have the disappearance investigated. Protection from inhuman and degrading treatment will also be relevant. The rights of victim's families are particularly important, including their

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<sup>150</sup> For a detailed analysis see Marks S., Clapham A., *International Human Rights Lexicon*, Disappearances, p.121, OUP 2005

<sup>151</sup> *Velasquez Rodriguez v Honduras*, (Inter-American Court of Human Rights)

<sup>152</sup> *Kurt v Turkey*

right to a fair trial to have those responsible for the disappearance prosecuted and punished.

36. At the UN level disappearances are now governed by the UN Convention for the Protection of All Persons from Enforced Disappearance (CPED). The text was adopted by the UN General Assembly on 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010.

37. "Enforced disappearance" is defined in Article 2 of the Convention as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

38. Article 1 of the Convention further states 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 for enforced disappearance."

39. The widespread or systematic use of enforced disappearance is further defined as a crime against humanity in Article 6.

40. Parties to the convention undertake to:

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

41. The Convention is governed by a Committee on Enforced Disappearances.

Parties are obliged to report to this Committee on the steps they have taken to implement the Convention. The Convention includes an optional complaints system whereby citizens of parties may appeal to the Committee for assistance in locating a disappeared person. Parties may join this system at any time, but may only opt out of it upon signature.

## Procedural safeguards required for an effective investigation

42. In relation to the scope of the investigation, the right to life requires that agents of the State must be accountable for their use of lethal force. Their actions, therefore, must be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances.<sup>153</sup>

43. For the right to life to be satisfied an investigation must comply with the following procedural safeguards:

- It must be public;
- It must be carried out by an independent body. This requirement may be violated where the initial or preliminary hours or days of the investigation are not carried out by an independent body, even though the investigation is then transferred.<sup>154</sup> The lack of independence does not have to affect the quality of the investigation for the right to life to be violated<sup>155</sup>;
- It must be effective, i.e. capable of (a) ascertaining the circumstances, including the broader planning and control of operations, (b) identifying any shortcomings in the regulatory systems, (c) identifying the State officials or authorities involved.<sup>156</sup> To be effective, the investigation's conclusions must also be based on proper analysis of the evidence and must be consistent and reasoned<sup>157</sup>;
- It must be thorough, prompt and rigorous. The requirement of promptness is fact-specific; 7-day delay in interviewing the main suspects may violate the right to life<sup>158</sup>, while a delay of 3 years in completing an investigation may also be a violation.<sup>159</sup> If the investigation is insufficiently thorough, even in difficult security conditions, there may be a breach of the right to life<sup>160</sup>;
- It must be capable of imputing responsibility for the death;
- If agents of the State are responsible, it must be capable of determining whether the killing was or was not justified;
- If initiated on the basis of a criminal complaint, the complainant must be able to take part in the proceedings; and
- It must enable effective involvement of a next-of-kin.

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<sup>153</sup> The procedural safeguards required for an investigation into a loss of life were spelt out in the Strasbourg decision of *Jordan v UK* (the *Jordan* Criteria). That case involved the failure to properly investigate deaths arising out of the troubles in Northern Ireland.

<sup>154</sup> *Ramsahai v The Netherlands*; *Brecknell v UK*

<sup>155</sup> *Brecknell v UK*

<sup>156</sup> *Oneryildiz v Turkey*; *Jasinskis v Latvia*; *Al-Skeini v UK*

<sup>157</sup> *Shevchenko v Ukraine*

<sup>158</sup> *Bektas v Turkey*

<sup>159</sup> *Esmukhambetov v Russia*

<sup>160</sup> *Al-Skeini v UK*

44. Any investigation must also be capable of considering any systemic failures that could have caused the death, for example the planning and organisation of a rescue operation<sup>161</sup> and the planning of anti-terrorist police operations.<sup>162</sup> The duty to conduct a broader investigation into systemic failings is not dependent on positive evidence of the existence of such failings.<sup>163</sup>
45. The need for independence is particularly important where agents of the State are involved.<sup>164</sup> A different regime and investigatory system in such cases involving the use of lethal force by State agents will be treated with suspicion. For example, where decisions to prosecute are not taken by the public prosecutor but by administrative councils this will violate the right to life.<sup>165</sup>
46. Investigations must be wide-ranging and rigorous. For example, the right to life has been violated where authorities have failed to:
- Ascertain possible eye witness accounts or take statements from potentially relevant witnesses;
  - Question suspects at a sufficiently early stage of the inquiry;
  - Carefully scrutinise State agents' explanations for their resort to force;
  - Search for corroborating evidence;
  - Take into account obvious evidence;
  - Carry out a proper autopsy and scrutinise its conclusions as to the cause of death;
  - Test for gunpowder traces;
  - Call expert evidence;
  - Call evidence relating to the planning and control of events leading to the death;
  - Visit the scene of the incident;
  - Guard against the risk of conferring and collusion between State agents involved in the use of force before making their first statements, even if there is no evidence of such contact.
47. The investigation must be even more thorough where the official use of firearms was responsible for death.<sup>166</sup>
48. The procedural obligation continues to apply in extremely difficult security conditions, e.g. British troops' involvement in South-Eastern Iraq, but it must be applied realistically.<sup>167</sup> However, despite the requirement for realistic application, all reasonable steps must be taken to satisfy the *Jordan* criteria for an effective

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<sup>161</sup> *Andronicou & Constantinou v Cyprus*

<sup>162</sup> *McCann v UK*

<sup>163</sup> *Al-Skeini v UK*

<sup>164</sup> *Kilic v Turkey*

<sup>165</sup> *Gulec v Turkey*

<sup>166</sup> *Ramsahai v The Netherlands*

<sup>167</sup> *Al-Skeini*

investigation, and the facts of *Al-Skeini* demonstrate that the State cannot simply rely on the difficult security situation.

### ***Absolute necessity and the permitted exceptions to the right to life***

49. The exceptions to the right to life are exhaustive and must be construed narrowly.<sup>168</sup> They are the internationally recognised circumstances where it may be lawful to use lethal force.
50. In order to fall within the permitted exceptions, the use of force must be no more than absolutely necessary for the achievement of one of the justifications for the use of lethal force.
51. The use of the word absolutely provides for a stricter test than applied when determining whether a State interference is “necessary in a democratic society”. The use of force must be a strictly proportionate response, i.e. the minimum necessary to achieve the aim pursued.

### **In defence of any person from unlawful violence<sup>169</sup>**

52. Self-defence can be a defence for the taking of life. The State will be required to supply sufficient evidence that agents came (or would have come) under armed attack at the scene of an incident. Although self-defence can be a lawful justification for the use of fatal force, it has to be the option of last resort. Therefore if earlier opportunities to arrest suspects are not taken and the result is that security forces then have to rely upon the use of lethal force, there will be a violation of the right to life.<sup>170</sup>
53. State policy supporting the practice of assassinations on grounds of self-defence will violate the right to life even where the State claims that it is not possible to arrest and try suspects. Failure to attempt arrests, even in hostile territory, inevitably gives rise to suspicions that a State lacks evidence to place such persons on trial and therefore prefers to dispose of them arbitrarily.<sup>171</sup>
54. The European Court of Human Rights has accepted that a person defending him or herself cannot weigh precisely the level of force that is absolutely necessary. However, higher standards are expected of State agents, who should be trained

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<sup>168</sup> As explicitly stated in Article 2(2), ECHR

<sup>169</sup> Article 2(2)(a), ECHR

<sup>170</sup> In *McCann* the UK government’s assertion that they were defending the general public from a terrorist threat was not held to be within the meaning of absolute necessity because the suspected terrorists had been allowed to enter Gibraltar in the first instance.

<sup>171</sup> The UN Human Rights Committee has not allowed Israel’s justification of its policy and practice of assassinations on grounds of self-defence. Israel has claimed that it is not possible to arrest and try suspects, particularly where they are in areas controlled by the Palestinian Authority. See the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 (E/CN.4/2004/6).

to consider the right to life if considering resort to force and who are expected to exercise caution, e.g. shooting to wound, not kill.

55. An honest but mistaken belief that the use of lethal force was absolutely necessary will still constitute a violation of the right to life where this belief was not based on good reasons.<sup>172</sup> However, the European Court of Human Rights has indicated that it will not substitute its own assessment for that of an officer who was required to act in the heat of the moment to avert an honestly perceived danger to his life<sup>173</sup>, suggesting that State agents are afforded a degree of latitude on whether their honest but mistaken belief was a sufficient justification for the taking of life.

#### **In order to effect a lawful arrest or to prevent the escape of a person lawfully detained<sup>174</sup>**

56. The Court has emphasised the need for proper warnings to be given before potentially lethal force is used.<sup>175</sup> All opportunities to surrender must be given and the use of force must be the option of last resort. It is unlikely that the use of force under these circumstances will be absolutely necessary, unless failure to use it will result in serious violence or harm to others. At the same time there needs to be clear policy concerning when lethal force can be used. The following principles can be derived:

- The lethal shooting by soldiers of suspected terrorists who drove through a checkpoint without stopping was absolutely necessary in order to give effect to the lawful arrest;<sup>176</sup>
- It was not absolutely necessary to use firearms to arrest a non-violent offender who posed no threat to anyone. Under those circumstances, the use of firearms would be unlawful even if it meant the loss of an opportunity to effect an arrest;<sup>177</sup>
- The lack of legal and administrative safeguards attaching to the use of firearms where the applicant was shot several times, although not killed, by police officers after going through a red light was a violation of the right to life.<sup>178</sup>

57. This exception to the right to life does not render lawful the killing of an individual seeking to escape from unlawful detention, assuming the authorities knew, or should have known, that the detention was unlawful. Similarly, a death caused

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<sup>172</sup> *McCann v UK; Gul v Turkey; Caraher v UK*

<sup>173</sup> *Giuliani & Gaggio v Italy*

<sup>174</sup> Article 2(2)(b), ECHR

<sup>175</sup> *Ogur v Turkey*

<sup>176</sup> *Kelly v UK*

<sup>177</sup> *Nachova v Bulgaria; Kakoulli v Turkey*

<sup>178</sup> *Makaratzis v Greece*

during an attempted arrest enacted without lawful basis will violate the right to life.

### **In action lawfully taken for the purpose of quelling a riot or insurrection<sup>179</sup>**

58. There is no established definition in international human rights law of a riot or insurrection. But where hundreds or thousands of people are throwing projectiles at the security forces this can be a justification for reliance on the use of lethal force. However, for the use of such force to be absolutely necessary those projectiles must be likely to cause death or serious harm to the law enforcement officers. Throwing stones at fully armed and protected officers is unlikely to justify resort to lethal force. Appropriate riot control procedures and equipment must be used.<sup>180</sup> In relation to prison uprisings, the proportionality of the use of fatal force will be strictly applied. Therefore, when lethal force was used to contain a prison uprising involving serious and violent offenders resulting in extensive loss of life, the manner of the use of lethal force was found to be excessive and disproportionate and consequently a violation of the right to life.<sup>181</sup>

### ***Prior to the use of lethal force, the following must be taken into account***

59. The European Court, has categorically stated that the right to life is non-derogable and has stressed that the use of lethal force even in the counter-terrorism context, including in situations of armed conflict, must be necessary and proportionate.

60. The use of force must be a strictly proportionate response. Merely asserting prevention of terrorism will not necessarily be sufficient to justify the use of fatal force. For example, in *McCann v UK*, a case involving the shooting of three members of the IRA in Gibraltar who at the time were unarmed but were genuinely suspected of being about to detonate a bomb, the European Court of Human Rights held that where deliberate lethal force is used the most careful scrutiny must be applied. This is in relation not only to the actions of the agents of the State who actually administer the force, but equally important are the planning and control of the actions under examination.

61. Therefore, in *McCann* whilst those who shot the terrorists were not considered to have violated their right to life, those who had planned the operation did violate it. This is because at the point at which lethal force was used the security services were genuinely of the belief that they had no option but to rely upon it. However, the operation was planned in a way that violated the right to life because there had been numerous opportunities to arrest which had not been acted upon.

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<sup>179</sup> Article 2(2)(c), ECHR

<sup>180</sup> *Gulec v Turkey*

<sup>181</sup> *Neira Alegria v Peru* (Inter American Court)

62. A similar conclusion was found in *Finogenov and Others v Russia*. The Court held that the use of gas by Russian security forces during the Dubrovka theatre siege to overcome terrorists holding hostages did not amount to a breach of Article 2, but that the planning and implementation of the rescue operation was inadequate and that there had been an ineffective investigation into the incident.

63. When planning security operations which may or do result in the use of lethal force the following should be taken into account:

- The right to life of the general population and also of the suspects;
- Precautions must be taken to avoid or minimise to the greatest extent possible incidental loss of civilian life;
- The training given to those involved;
- The calculations of risk made.

64. Violations of the right to life have been found when the civilian population is exposed to cross-fire between the security forces and a paramilitary organisation, where insufficient precautions had been taken to protect lives.<sup>182</sup>

65. Equally, the fact that a rescue operation fails, resulting in deaths, will not violate the right to life if it has been planned in a manner which sufficiently sought to minimise any risk to life.<sup>183</sup>

### ***The Right to Life and Armed Conflict***

66. Even in situations which could be categorised as an armed conflict, the right to life remains relevant. Therefore where people have been killed by the armed forces seeking to suppress an armed insurrection failure to properly investigate the loss of life will violate the right to life. The simple assertion that the loss of life was a legitimate consequence of fighting is insufficient. The fact that a criminal file has been opened and an investigation is commenced but then closed will not necessarily, in and of itself, satisfy the procedural requirements of the right to life. The following principles can be identified:<sup>184</sup>

- Applying the standard of proof of beyond reasonable doubt, the failure by a government to disclose in full the criminal investigation file without a satisfactory explanation could give rise to the drawing of inferences against the State. If no justification is given for the use of lethal force there is a violation of the right to life, even in the context of an armed conflict.

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<sup>182</sup> *Ergi v Turkey*

<sup>183</sup> *Andronicou & Constantinou v Cyprus*

<sup>184</sup> *Khashiyev and Akayeva v Russia; Isayeva, Yusupova and Bazayeva v Russia; Isayeva v Russia*. It is noteworthy that no state of emergency had been declared in Chechnya at the material time, and no derogation has been entered under Article 15, ECHR. Accordingly, the Convention applied in full, and the military operations had to be judged against a normal legal background.

- In relation to aerial attacks, the use of indiscriminate and excessive force cannot be considered compatible with the standard of care prerequisite to an operation involving the use of lethal force.
- Even assuming that the military operations pursued a legitimate aim, that of defence from unlawful attack, such operations must be planned and executed with the requisite care for the lives of the civilians.
- In relation to the procedural obligations regarding the right to life the failure to conduct an effective investigation, violates those rights. Considerable delays and other flaws in the investigation process will contribute to that violation.

### ***Territorial application of the procedural obligation imposed by the right to life***

67. The State is under a duty to meet the obligations imposed by the right to life within its jurisdiction. The State's jurisdiction is primarily territorial, but the acts of the State performed or producing effects outside its territory can amount to an exercise of jurisdiction in exceptional circumstances. These circumstances include, among others, where a State agent exercises control and authority over an individual, for example when taking them into custody, or where the State, outside its territory, exercises all or some of the public powers normally exercised by a sovereign government.<sup>185</sup> In *Al-Skeini v UK*, the UK was therefore under the procedural obligation to investigate the deaths of civilians killed by British soldiers in Iraq.

68. In other exceptional circumstances, the specific facts of a case will require an enhanced investigation, e.g. where the investigation was needed in order to consider possible police corruption and people trafficking, even though those matters did not cause the death.<sup>186</sup>

### ***Issues arising out of the right to life***

#### **Amnesty and Impunity**

69. Whether an amnesty is compatible with the right to life will depend upon the relevant factors in each circumstance.<sup>187</sup> The victim's rights and the rights of the next of kin will need to be taken into consideration. There could be circumstances where the granting of an amnesty has the effect of violating the right to life of the victim. A general amnesty for officials involved in human rights violations may violate the rights of victims to a fair trial.<sup>188</sup>

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<sup>185</sup> *Al-Skeini v UK*. This case discusses the further exceptions and principles of extra-territorial jurisdiction in detail.

<sup>186</sup> *Rantsev v Cyprus*

<sup>187</sup> In *Dujardin v France* it was held that an amnesty to persons convicted or suspected of homicide did not violate the right to life because in the circumstances it reflected a proper balance between the interests of the State and the general need to protect life.

<sup>188</sup> *Chumbipuma Aguirre v Peru, Inter American Court*

## The Death Penalty and the Right to Life

70. Across the Council of Europe, the death penalty is no longer a lawful sentence.

### *The Position under the ECHR*

71. The right to life guaranteed by Article 2(1) ECHR envisages circumstances whereby the use of the death penalty may be lawful. However, Protocol 6 to the ECHR abolishes the death penalty except in respect of acts committed in time of war. Protocol 13 goes further and abolishes the death penalty under all circumstances. It will therefore now be unlawful to deport or extradite somebody to a country where the individual is likely to be executed. Following the Grand Chamber decision in *Ocalan v Turkey*, the Strasbourg Court has limited the availability of the death penalty to the extent that it is now to all intents and purposes prohibited across the Council of Europe in all circumstances.

72. The European Court of Human Rights has stated that the second sentence of Article 2(1) did not prevent the Court from finding that the death penalty is included within inhuman and degrading treatment.<sup>189</sup>

## Deportation

73. The right to life may be engaged where an individual may be deported to somewhere where their death may be particularly cruel and hastened, although this is more likely to engage protection from inhuman and degrading treatment.<sup>190</sup> Extradition to a country where the individual faces a real risk that he or she will face the death penalty violates the right to life, and may amount to inhuman and degrading treatment.<sup>191</sup> The issue of deportation is dealt with in full in the next section.

## Additional Issues Relating to the Right to Life

74. The right to life also relates to the right to die and euthanasia, although the Court has said that it is not possible to deduce a right to die out of the right to life.<sup>192</sup> Similarly abortion can raise issues relating to the right to life. The Court has sought to avoid these.<sup>193</sup> Essentially, this is an issue that the Court has left to the domestic authorities.<sup>194</sup>

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<sup>189</sup> *Al-Saadoon v UK*

<sup>190</sup> *D v UK*

<sup>191</sup> *Al-Saadoon*

<sup>192</sup> *Pretty v UK*

<sup>193</sup> *A, B, C, v Ireland*

<sup>194</sup> *Tysi c v. Poland, R.R. v Poland*

## **2. The Absolute Prohibition of Torture, Inhuman and Degrading Treatment and Punishment**

1. The prohibition of torture is treated as a pre-emptory norm of international law (*jus cogens*) and is a non-derogable right. This means that it is accorded the highest status of law in the international legal order and the prohibition of torture applies universally. The need to protect against torture in international human rights law is not disputed. There are specific treaties in the UN and at the Council of Europe level that protect against it (such as the Convention Against Torture). Similarly, torture committed as part of a widespread or systematic attack against civilians is a crime against humanity, as identified by the International Criminal Court.
2. Protection against torture, inhuman or degrading treatment or punishment is essential to the scheme of the application of human rights standards. Taken together with the right to life, it forms the essential elements for guaranteeing human dignity. As such, it can never be possible to justify subjecting someone to torture or inhuman or degrading treatment or punishment – even in war or national emergency. The prohibition of torture is a pure absolute right and is expressed as such in the ECHR.<sup>195</sup>

### ***The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)***

3. In acknowledgement of the importance of the protection from torture in international law and policy, the UN has adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to combat treatment and punishment that amounts to torture, cruel, inhuman and degrading treatment.<sup>196</sup> The Russian Federation has ratified this UN treaty.<sup>197</sup>
4. It requires States parties:
  - To incorporate the crime of torture in their domestic legislation;
  - To punish acts of torture by appropriate penalties;
  - To undertake a prompt and impartial investigation of any alleged act of torture;
  - To ensure that statements made as a result of torture are not invoked as evidence in proceedings (except against a person accused of torture as evidence that the statement was made); and

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<sup>195</sup> Article 3 ECHR provides: “No one shall be subject to torture or to inhuman or degrading treatment or punishment”. A similar provision exists in Article 7, ICCPR

<sup>196</sup> The UN CAT was adopted in 1984 and entered into force in 1987.

<sup>197</sup> The Russian Federation ratified CAT on 3 March 1987. It has not signed or ratified the Optional Protocol to the CAT (UN Treaty Collection as at 15 February 2012).

- To establish an enforceable right to fair and adequate compensation and rehabilitation for victims of torture or their dependants.
5. No exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture. The same applies, in the case of an individual offender, to an order from a superior officer or a public authority.
  6. States parties are prohibited from returning a person to another State where he or she would be at risk of torture (principle of non-*refoulement*). They must ensure, on the other hand, that an alleged perpetrator of torture present in any territory under their jurisdiction is prosecuted or extradited to another State for the purpose of prosecution.<sup>198</sup>

### ***International Framework***

7. The UN CAT, Article 7, ICCPR and Article 3, ECHR provide the main international human rights law framework to protect against torture or inhuman and degrading treatment and punishment. The Council of Europe also has its own regional mechanism to combat torture under its own Convention Against Torture. That Convention is implemented by its own Torture Committee, amongst the powers of which is the right to carry out impromptu spot checks on places of detention.
8. Essentially the way that international law combats torture falls into two categories. These are not mutually exclusive.
  - The first is the so called extradite or prosecute rule, thus combating impunity.
  - The second is a more recent development and is more concerned with the prevention of torture through on-site monitoring. This is possible under the European Convention for the Prevention of Torture (ECPT) and a 2002 Protocol to the UN Torture Convention. Both mandate their supervisory bodies to visit places of detention and empower them to make recommendations to protect against torture, inhuman and degrading treatment. The Russian Federation has not yet ratified the Optional Protocol to CAT, but it is party to the ECPT. In 2012, as part of its programme of periodic visits, the European Committee for the Prevention of Torture intends to visit the Russian Federation.<sup>199</sup>

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<sup>198</sup> See also the Rome Statute of the International Criminal Court (1998). The definition of torture includes the systematic or widespread practice of torture and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” constitute crimes against humanity. Torture is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

<sup>199</sup> See e.g. <http://www.cpt.coe.int/en/states/rus.htm>

9. The importance and value of these bodies for standard-setting cannot be overemphasised. The CPT, which has been operating since 1987, has set down a comprehensive set of basic standards that are of universal application.
10. This preventative approach complements that of the UN Special Rapporteur on torture who is able to raise specific allegations with governments and prepare reports on issues relevant to the eradication of torture.

***Protection from Torture, Inhuman and Degrading Treatment and Punishment: How does it work?***

11. Article 3 ECHR reads “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Not all types of harsh treatment will fall within the scope of torture or inhuman and degrading treatment and punishment as protected by Article 3, ECHR. To be breached the conduct must attain a “minimum level of severity”.<sup>200</sup>
12. It can be broken down into five constituent elements. These are the definition of:
  - Torture;
  - Inhuman treatment;
  - Inhuman punishment;
  - Degrading treatment;
  - Degrading punishment.
13. The key issue is therefore whether conduct amounts to treatment or punishment.
14. Most behaviour in violation of the provisions of Article 3, ECHR will be classified as treatment, however, it may also be that it is a form of punishment that is inhuman or degrading.
15. Even though it can be argued that punishment *per se* has an inherent element which includes humiliation, this should not amount to degrading treatment. There is a distinction between punishment in general and punishment that is designed to be inhuman and degrading. Corporal punishment, for example, can amount to degrading punishment (see discussion below which notes that corporal punishment is considered unlawful under international law).<sup>201</sup>

***Factors which may be relevant to identifying whether treatment violates protection from torture, inhuman and degrading treatment and punishment***

16. Whether the threshold of either torture or inhuman or degrading treatment or punishment has been reached will depend on all the circumstances of the case.

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<sup>200</sup> *Ireland v UK*

<sup>201</sup> *Costello Roberts v UK*

In reality to draw a distinction between torture and inhuman and degrading treatment and punishment is to make a distinction without a difference, and from the perspective of international human rights law, all are strictly forbidden, although it is worth noting, as discussed below, that recent cases from the European Court, such as *Gafgen v Germany*, appear to distinguish between the seriousness of torture as opposed to inhuman and degrading treatment and punishment. There remains, however, a special and particular stigma attached to torture.

17. Relevant factors will include the duration of the treatment, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.
18. For example, conditions of detention in a police station amounted to inhuman and degrading treatment for one detainee, who was confined to a wheelchair and also suffered from recurrent kidney problems. While there was not evidence of any positive intention to humiliate or debase the detainee, the same conditions for an able-bodied person would not have raised the same issues in relation to inhuman and degrading treatment.<sup>202</sup> Similarly, where the State fails to take into consideration a detainee's invalidity when arranging for detention and transfer, Article 3 may be violated.<sup>203</sup>
19. In another example, in the case of *Vinter and Others v UK*, the applicants complained that their whole life orders (ie life imprisonment meant life) violated Article 3. However, a majority (4:3) of the European Court of Human Rights found no violation of Article 3. There was detailed discussion in both the majority and dissenting opinions of the Court's general approach to the issue of assessing whether treatment passed the Article 3 threshold.

### **Definition of torture**

20. Article 1 of the UN Convention Against Torture provides a widely-accepted definition of torture.
21. For the purposes of CAT, the term "torture" means:
  - Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:
    - Obtaining from him or a third person information or a confession,
    - Punishing him for an act he or a third person has committed or is suspected of having committed, or
    - Intimidating or coercing him or a third person, or for any reason based on discrimination of any kind;

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<sup>202</sup> *Price v UK*. More recently see e.g. *Arutyunyan v Russia* finding inhuman treatment in violation of Article 3.

<sup>203</sup> *Huqseyin Yildirim v Turkey*

- When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
22. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>204</sup>
23. Because of the stigma attached to torture, international human rights cases have confirmed that the threshold of severity for torture is extremely high.
24. The lead case on this issue comes from the European Court of Human Rights and concerned interrogation techniques in counter-terrorism operations in Northern Ireland. The case was brought by Ireland against the United Kingdom.<sup>205</sup> The complaint concerned the so-called five techniques practised by UK security forces in interrogating suspected IRA terrorists. These techniques included:
- Wall-standing;
  - Hooding;
  - Subjection to noise;
  - Deprivation of sleep; and
  - Deprivation of food and drink.
25. The European Court of Human Rights, by a majority, classified the treatment as inhuman treatment rather than torture. Torture, that Court considered, has a particular stigma attached to it.
26. However, the UK Joint Committee on Human Rights has noted, for example, that “both the ECtHR and the House of Lords have since suggested that given the increasingly high standard being required in the area of the protection of human rights, conduct which was previously found to amount only to inhuman and degrading treatment, such as that at issue in *Ireland v UK*, might now be considered to be torture”.<sup>206</sup> In making this statement the Joint Committee placed particular reliance on *Selmouni v France*, discussed below, and *A v Secretary of State for the Home Department*.
27. In later cases the European Court has held that, as the Convention is a living instrument, treatment that may once have been considered to be inhuman or

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<sup>204</sup> However see the more recent Rome Statute of the International Criminal Court (1998). Its definition is less circumscribed, Torture is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

<sup>205</sup> *Ireland v UK*

<sup>206</sup> Joint Committee on Human Rights, The UN Convention Against Torture (UNCAT), Nineteenth Report of Session 2005–06, Volume I at para. 17.

degrading, may now amount to torture.<sup>207</sup> In *Selmouni v France*, cited above, a Dutch and Moroccan national detained in France for drug trafficking was found to have been tortured. He was subjected to a large number of intense blows all over his body, he was dragged along by his hair, forced to run along a corridor with police officers tripping him up. He was also urinated over and was threatened with a blow lamp and then a syringe. Key to this finding of torture was the treatments’:

- Duration;
- Severity; and
- Intentionality

28. It thus fell squarely within the definition of torture within the UN CAT and the ECHR was interpreted accordingly.

29. On this basis, other treatment that the European Court has found to amount to torture includes stripping someone naked and tying their arms behind their back, and then suspending them by their arms,<sup>208</sup> rape of a detainee by an official of the State,<sup>209</sup> subjection to electric shocks, hot and cold water treatment, blows to the head and threats concerning the ill-treatment of the applicant’s children.<sup>210</sup>

30. More recently regarding the distinction between torture and other inhuman or degrading treatment, the Court has reiterated that “it appears that it was the intention that the Convention should...attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering” and that “[i]n addition to the severity of the treatment, there is a purposive element to torture, as recognised in the [UNCAT] which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating”.<sup>211</sup>

31. Similarly, intimidation and threats fall within the definition of torture.<sup>212</sup> The UN Special Rapporteur on Torture has pointed out that threats and intimidation are often a crucial element in assessing whether a person is at risk of physical torture and other forms of ill-treatment.

32. In a recent Grand Chamber judgment in *Gafgen v Germany*, the European Court of Human Rights reiterated that “a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision” and thus “to threaten an individual with torture may constitute at least inhuman

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<sup>207</sup> *Selmouni v France*

<sup>208</sup> *Aksoy v Turkey*

<sup>209</sup> *Aydin v Turkey*. More recently see e.g. *Zontul v Greece* finding treatment amounting to an act of torture in a case including rape with an object; and finding a violation of Article 3 on account of the acts committed and of the failure to allow the applicant to be involved in the proceedings as a civil party.

<sup>210</sup> *Akkoc v Turkey*

<sup>211</sup> See e.g. reiteration of relevant principles by the Grand Chamber in *Gafgen v Germany*.

<sup>212</sup> Resolution 2001/62, Commission on Human Rights.

treatment". On the facts of that case, the Court was satisfied that "the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3".

33. The Court reiterated that "a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering" and that "the fear of physical torture may itself constitute mental torture", though "the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused". In the case at hand, the Court found a violation of Article 3 on the basis that "the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture".
34. The Court in *Gafgen* also re-emphasised the absolute nature of Article 3 and that the "nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3". For example, although the Court "accept[ed] the motivation for the police officers' conduct and that they acted in an attempt to save a child's life", it underlined that "the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities" and stated that "[t]orture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk" and that "[n]o derogation is allowed even in the event of a public emergency threatening the life of the nation". Article 3, the Court stated, "does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue".

### **Definition of inhuman**

35. If treatment or punishment causes intense physical or mental suffering but is not severe enough to amount to torture, it will be inhuman treatment. The European Court of Human Rights has, for example, "considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering".<sup>213</sup> Physical assaults can amount to inhuman treatment if sufficiently serious.
36. Where an individual is in custody the threshold for inhuman treatment is lowered. For example, the European Court has held that an applicant's injuries, although relatively slight, nevertheless constituted outward signs of the use of physical force on an individual deprived of his liberty and therefore in a state of inferiority. As such, the treatment had been both inhuman and degrading.<sup>214</sup>

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<sup>213</sup> See e.g. reiteration of relevant principles by the Grand Chamber in *Gafgen v Germany*.

<sup>214</sup> *Tomasi v France*

37. Deliberately cruel acts may also amount to inhuman treatment. Therefore, according to the European Court in one case, it was inhuman of the security forces to destroy the applicants' homes.<sup>215</sup> This constituted an act of violence and deliberate destruction in disregard for the safety and welfare of the applicants, who were left without shelter and in circumstances which caused anguish and suffering. Similarly, the moral suffering endured by members of a family as a result of the dismemberment and decapitation of their abducted relatives' bodies, preventing proper burial, amounted to a violation of Article 3.<sup>216</sup>

### ***Definition of degrading***

38. Degrading treatment includes treatment designed to break the physical or moral resistance of the victim. Regard should be had as to whether its object is to humiliate and debase the person concerned, although it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others. The European Court of Human Rights has, for example, held treatment to be "degrading" when "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, or when it was such as to drive the victim to act against his will or conscience".<sup>217</sup>

39. Other issues raising degrading treatment can include handcuffing of prisoners with terminal illnesses to a hospital bed,<sup>218</sup> Although handcuffing in general probably does not reach the minimum level of severity necessary to amount to degrading treatment.<sup>219</sup> The handcuffing of a conscientious objector in public, although accepted as not being necessary, had no long-term psychological consequences and therefore did not cross the threshold of degrading treatment.

### ***Specific Issues Relevant to Protection from Torture and Inhuman and Degrading Treatment and Punishment***

#### **Conditions of detention**

40. Although also directly relevant to the right to liberty, detention conditions can amount to inhuman and degrading treatment and punishment, and even torture, where their effect is to degrade the prisoner.<sup>220</sup>

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<sup>215</sup> *Asker, Selcuk, Dulas & Bilgin v Turkey*

<sup>216</sup> *Khadzhaliyev and Others v Russia*

<sup>217</sup> See e.g. reiteration of relevant principles by the Grand Chamber in *Gafgen v Germany*.

<sup>218</sup> *Henaf v France*

<sup>219</sup> *Raninen v Finland*

<sup>220</sup> *Peers v Greece; Kalashnikov v Russia*. See also e.g. the Grand Chamber judgment in *M.S.S. v Belgium and Greece* finding, among other things, a violation of Article 3 ECHR in a case concerning detention conditions and living conditions of an asylum seeker transferred to Greece by the Belgian authorities under the Dublin regime.

41. Very severe prison conditions can cause pain or suffering which may cross the threshold between cruel, inhuman or degrading treatment and torture. They have sometimes been described as falling into a “grey area” between torture and other forms of cruel, inhuman and degrading treatment or punishment owing to lack of evidence of the intentional or purposive element required by the term “torture”.<sup>221</sup>

42. In assessing the severity of prison conditions the following factors are relevant:

- The space at the disposal of detainees;
- The supply of water and other articles needed for personal hygiene;
- The provision of adequate clothing and bedding;
- The quantity and quality of food and drinking water; recreational facilities (including outdoor exercise);
- Admission of visitors;
- Provision of medical assistance;
- Sanitation, heating, lighting and ventilation;
- The disciplinary regime;
- The complaints system; and
- The behaviour of prison personnel.

43. Strip searches may raise issues in relation to degrading treatment and they must be conducted in an appropriate manner.<sup>222</sup>

44. The requisite conditions necessary to comply with Article 3 will vary depending on the particular characteristics of the detainee, e.g. a prisoner with serious invalidity<sup>223</sup>, or due to the applicant’s youth.<sup>224</sup>

## Length of detention

45. In *Kafkaris v Cyprus* the European Court held that an irreducible life sentence imposed for a criminal offence could engage Article 3. However, on the facts of the case, the sentence was not irreducible as the applicant could be released prior to death under the President’s constitutional powers. The Court also indicated that while a life sentence with no minimum term necessarily entailed anxiety and uncertainty related to prison life, that was inherent in the nature of the sentence imposed, and where there was some prospect of release, even where this was only through executive pardon, Article 3 would not be violated.<sup>225</sup> The case makes clear that only where there is *no* prospect of release will Article 3 be violated.

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<sup>221</sup> UN Torture Factsheet

<sup>222</sup> *Valasinas v Lithuania*. More recently, see e.g. *Hellig v Germany* involving placement in a security cell without clothing.

<sup>223</sup> *Huqseyin Yildirim v Turkey*; *Flamînzeanu v Romania*

<sup>224</sup> *Guveç v Turkey*

<sup>225</sup> See also *Iorgov v. Bulgaria (no. 2)* on this point

## Solitary Confinement

46. Solitary confinement can cross the threshold of inhuman and degrading treatment and punishment. However, where there is no total sensory deprivation and if the State has a compelling reason to detain somebody under these circumstances, for example they have been convicted of offences of terrorism and they are considered to be dangerously charismatic, solitary confinement, for even up to eight years, will not violate the absolute prohibition.<sup>226</sup> However in a case involving detention in solitary confinement for a non-terrorist, the Court held that the conditions the applicant had to endure in prison amounted to inhuman treatment and that he was kept in solitary confinement for an excessive and unnecessarily protracted period.<sup>227</sup>
47. In a recent case, *Csüllög v. Hungary*, the European Court of Human Rights reiterated that the “prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment”. However, as stated by the CPT, “all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities”. The Court stated that it “has established the circumstances in which the solitary confinement of even a dangerous prisoner will constitute inhuman or degrading treatment” and that it “has thus observed that complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason”. In *Csüllög* itself, the Court found a violation of Article 3 in view of the “cumulative effects of the stringent custodial regime to which the applicant was subjected for an extended period of time and the material conditions in which he was detained”.<sup>228</sup>
48. Whilst solitary confinement need not necessarily fall below the standards required for the protection from torture and other ill treatment, solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely.
49. Furthermore, it is essential that the prisoner should be able to have an independent judicial authority review the merits of, and reasons for, a prolonged measure of solitary confinement.
50. A rigorous examination is called for to determine whether prolonged detention in solitary confinement is justified, including:
- Whether the measures taken were necessary and proportionate compared to the available alternatives;

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<sup>226</sup> *Ramirez Sanchez (or Carlos the Jackal) v. France; Ocalan v Turkey*.

<sup>227</sup> *Matthews v Netherlands*, concerning prison conditions in Aruba

<sup>228</sup> Regarding solitary confinement, see also e.g. *Ivanțoc and Others v Moldova and Russia*

- What safeguards were afforded to the applicant; and
- What measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his continued solitary confinement.

51. Measures such as solitary confinement should be resorted to only exceptionally and after every precaution has been taken. In order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended.

52. Those reasons should establish that the authorities have carried out a reassessment that takes into account any changes in the prisoner's circumstances, situation or behaviour. The statement of reasons will need to be increasingly detailed and compelling the more time goes by.

53. Alternative solutions to solitary confinement for persons considered dangerous, and for whom detention in an ordinary prison under the ordinary regime is considered inappropriate, should be sought.

### **Secret or Incommunicado detention**

54. Solitary confinement and incommunicado or secret detention have been found to violate the prohibition on torture. Torture is most frequently practised when a person is held without access to a lawyer, and/or his or her family and relatives or groups from civil society (incommunicado detention). There is a direct link between secret or incommunicado detention and enforced disappearances.

55. Prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.<sup>229</sup> Furthermore, even in cases where no independent risk of torture exists for a person held in incommunicado detention, where such detention is prolonged, that in itself may amount to inhuman and degrading treatment. If prolonged incommunicado detention takes place in a secret or unknown place, this may amount to torture.

56. As part of its review of Spain's compliance with CAT, the Committee Against Torture has pointed out that it, "continues to be deeply concerned by the fact that incommunicado detention up to a maximum of five days has been maintained for specific categories of particularly serious offences. During this period, the detainee has no access to a lawyer or to a doctor of his choice nor is he able to notify his family. Although the State party explains that incommunicado detention does not involve the complete isolation of the detainee, who has access to an officially appointed lawyer and a forensic physician, the Committee considers that

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<sup>229</sup> Resolution 1999/32 (para 5)

the incommunicado regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment.”<sup>230</sup>

57. With incommunicado detention the risks of sexual abuse and harassment, virginity testing, forced abortion and forced miscarriage are increased.<sup>231</sup>

58. In *A and Others v UK*, the applicants, foreign nationals, complained, *inter alia*, about the high security conditions and indeterminate nature of their detention. The European Court stressed that it is “acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence”, however, it noted that, “Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) notwithstanding the existence of a public emergency threatening the life of the nation” and “[e]ven in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment”.

59. In *A and Others*, the Court noted that “[d]uring a large part of that detention, the applicants could not have foreseen when, if ever, they would be released”. It considered that “the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position” and that it was “probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants”. However, it could not be said that “the applicants were without any prospect or hope of release”. In particular, “they were able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and were successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004”. In addition, “each applicant was able to bring an individual challenge to the decision to certify him and SIAC was required by statute to review the continuing case for detention every six months”. Therefore, the Court did not consider that “the applicants’ situation was comparable to an irreducible life sentence, of the type designated in the *Kafkaris* judgment as capable of giving rise to an issue under Article 3”.

60. Overall, the Court did not find the detention to reach “the high threshold of inhuman and degrading treatment”.

## Interrogation

61. As has already been identified, interrogation techniques can also violate the prohibition on torture and inhuman and degrading treatment. Therefore the legal system needs to provide fundamental safeguards against ill treatment. Judges and prosecutors play a key role in safeguarding against such ill treatment. Essential safeguards include:

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<sup>230</sup> Concluding observations of the Committee against Torture: Spain (CAT/C/CR/29/3), at para. 10.

<sup>231</sup> UN Torture Factsheet

- The right of detainees to have the fact of their detention notified to a third party of their choice (family, friend or consulate);
- The right of prompt access to a lawyer;
- The right to challenge the legality of the detention (habeas corpus);
- The right to a medical examination by a doctor of his or her choice.

Proper custody records must also be taken.

62. The UN Special Rapporteur on Torture has also challenged the use of ‘stress and duress’ techniques during interrogation and in particular subjecting detainees to prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, sleep deprivation and 24-hour lighting, and also the keeping of detainees in painful or awkward positions.<sup>232</sup> The Special Rapporteur is also concerned that detention conditions generally can amount to torture. The recent report of the UK Baha Mousa Inquiry, which investigated the use of prohibited interrogation techniques on Iraqi detainees by British troops, addressed a number of the same issues and concerns.

63. As far as interrogation techniques are concerned, international human rights law has identified the following practices to be in violation of the absolute protection from torture, inhuman degrading treatment and punishment:<sup>233</sup>

- Suspending someone from their arms;
- Rape;
- Deprivation of the natural senses, such as sight or hearing, or of his awareness of place and the passing of time;
- Methods of interrogation which impair his or her decision-making capacity or judgment;
- Mock executions;
- Thumb presses;
- Immersion in blood, urine, vomit and/or excrement;
- Medical experimentation that may be detrimental to his or her health;
- Electric shocks;
- Mock amputations;
- Forced to remain naked;
- Threats to family;
- Deliberate destruction of homes and communities;
- Sleep deprivation;
- Hooding;
- Wall standing;
- Use of noise;

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<sup>232</sup> Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/2004/56/Add.1), at para. 1813.

<sup>233</sup> These are examples only. This is not a finite list.

- Deprivation of food and water;
- Humiliation.

64. As a matter of international human rights law, security service investigators are not lawfully authorised to use “physical means” or a “moderate degree of physical pressure” during interrogation, particularly where such interrogation could involve serious physical injury and the risk of death. Even in the context of counter-terrorism strategies only normal investigative procedures are authorised.<sup>234</sup>

65. The fact of torture cannot be side-stepped by changing the language of torture. Therefore simply changing the language to “physical means” or “pressure”, and not torture cannot cure the violation. Courts are not interested in semantics. Simply because the word torture was avoided, is not the same as avoiding torture. The universal prohibition of torture cannot be overcome by trying to reclassify it in a less threatening way. Similarly attempts to redefine torture so as to include within the prohibition only the most extreme examples of treatment are also not permissible.

### ***Recording of interrogations***

66. Perhaps the best safeguard against abuse during the interrogation itself is to ensure that all interrogations are recorded both in video and audio form on pain of exclusion from evidence. This is certainly the approach favoured by the United Nations and it is one that has had a dramatic effect on the number of allegations of abuse emanating from detention centres in Northern Ireland since the introduction of such measures there.

67. Consistent with this approach in 2001 the UN Special Rapporteur on Torture stated that “All interrogation sessions should be recorded and preferably video recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings.”

### **Reliance on Evidence Obtained Through Torture**

68. Evidence obtained through torture, inhuman or degrading treatment will be inadmissible and cannot be adduced at a trial or relied upon in any way to form the case for the prosecution (the “exclusionary rule”) (Article 15 CAT), although this statement of principle must arguably now be read in light of *Gafgen v Germany* (see below). Under no circumstances can it ever be justifiable to violate the protection against torture in order to obtain evidence. Evidence obtained in breach of Article 3, ECHR and Article 7, ICCPR, it should also be remembered is notoriously unreliable.

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<sup>234</sup> *Public Committee Against Torture v State of Israel*, Supreme Court of Israel, 6 September 1999

69. The Council of Europe Commissioner for Human Rights succinctly explained the absolute prohibition on the reliance of evidence obtained through torture. He has pointed out that, "Torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter."<sup>235</sup> This principle has been upheld by the UK's highest court in a case involving the admissibility of evidence, the provenance of which is uncertain. That court categorically held that evidence that could have been obtained through torture must be excluded.<sup>236</sup>
70. The prohibition on the use of evidence obtained through torture is clear-cut. By contrast, recent case law suggests that the use of evidence obtained in a manner amounting to inhuman and degrading treatment may be a more complex issue. The European Court has previously made clear that such evidence should not have been admissible, and to do so was a violation of the right to a fair trial.<sup>237</sup>
71. In the same case, the Court made the following general observations in relation to torture, inhuman and degrading treatment and punishment and the right to a fair trial:
- Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment that can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value.
  - Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did meet the minimum level of severity covered by the ambit of the Article 3 prohibition.
  - The use of such evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings.
  - The general question of whether the use of evidence obtained by an act amounting to inhuman and degrading treatment automatically renders a trial unfair is left open.
  - But, it cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

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<sup>235</sup> UK Report by Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, 4 – 12 November 2004, (CommDH(2005)6)

<sup>236</sup> *A v Home Secretary*

<sup>237</sup> *Jalloh v Germany*

72. The judgment is surprising in that it leaves open the possibility that evidence that has been obtained through inhuman and degrading treatment could be admissible without violating the right to a fair trial. However, although the theoretical possibility might exist, the reality is that in circumstances where evidence obtained in a way that is inhuman or degrading could be adduced, are highly unlikely to occur, and will be extremely rare.<sup>238</sup> In *Jalloh* itself, the Court held that “the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed” and that the “evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention”. Importantly, the Court also found that “the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair” and that “this finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6”.
73. In *Gafgen v Germany*, cited above, the European Court of Human Rights examined the complaints under Article 6 in great detail. In *Gafgen*, the Court noted that “at the trial the Regional Court did not admit any of the confessions the applicant had made in the investigation proceedings under threat or as a result of the continuous effects of the threat” but that the Regional Court “refused to bar the admission of items of evidence which the investigation authorities had secured as a result of his statements made under the continuous effect of his treatment in breach of Article 3”. The European Court of Human Rights considered that “the impugned real evidence was secured as a direct result of his interrogation by the police that breached Article 3”. The Court noted that:

“The Court is therefore called upon to examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture. As shown above...in its case-law to date, it has not yet settled the question whether the use of such evidence will always render a trial unfair, that is, irrespective of other circumstances of the case. It has, however, found that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and the use of real evidence obtained as a direct result of acts of torture made the proceedings as a whole automatically unfair, in breach of Article 6”.

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<sup>238</sup> For example in *Gocmen v Turkey*, the applicant was found guilty of terrorist offences and of being a member of a proscribed organization. It was subsequently established that he had been ill-treated and that evidence obtained during this ill treatment had formed part of the case against him. As such, the European Court held that he did not have a fair trial.

Ultimately, a majority of the Grand Chamber found no violation of Article 6(1) or 6(3), concluding that “in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair”.

74. *Gafgen* has so far proved to be a controversial and much criticised case. The nature of the dissenting opinion in the case itself indicates the approach of much of this criticism.

75. In *Othman (Abu Qatada) v the United Kingdom*, the European Court of Human Rights found that if the applicant were deported to Jordan there would be a violation of Article 6 ECHR given the real risk of the admission of evidence obtained by torture of third persons at the applicant's retrial. The Court also held that there would be no violation of Article 3 as assurances obtained by the UK Government from the Jordanian Government were found to be sufficient to remove any real risk of ill-treatment (see further discussion below of the Court's findings regarding Article 3).

76. As regards Article 6 (on which, see more below in the section on fair trial rights), the Court considered that “the use at trial of evidence obtained by torture would amount to a flagrant denial of justice”. For example, it stated:

“More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself”.

77. The Court also stated that:

“For the foregoing reasons, the Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial. The Court does not exclude that similar considerations may apply in respect of evidence obtained by other forms of ill-treatment which fall short of torture. However, on the facts of the present case...it is not necessary to decide this question”.

78. Similar issues have been considered by the Supreme Court of the USA. In the case of *Rochin v People of California*, the Supreme Court held that evidence obtained by police officers who had forcibly opened the suspect's mouth and extracted the contents of his stomach was inadmissible notwithstanding its reliable nature.
79. The Supreme Court pointed out that "This is conduct that shocks the conscience...They are methods too close to the rack and the screw...Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalise the temper of a society."
80. The Court therefore was affirming the need for courts to protect their own integrity and avoid providing a "cloak" for the brutality represented by physical ill-treatment.

### **Methods of restraint**

81. Under international law, the use of methods of restraint is primarily governed by the Standard Minimum Rules for the Treatment of Prisoners. Rule 33 states that instruments of restraint such as handcuffs, chains, irons and straitjackets should never be applied as a punishment and that chains or irons should not be used as restraints.<sup>239</sup>
82. Instruments of restraint should be used only to prevent escape during a transfer, on medical grounds or as a last resort to prevent prisoners from injuring themselves or others or from damaging property. Rule 34 states that instruments of restraint must not be applied for any longer time than is strictly necessary.
83. In *Kashavelov v Bulgaria*, for example, the European Court of Human Rights noted that the "use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3...where the measure has been imposed in connection with a lawful detention and does not entail the use of force or public exposure exceeding what is reasonably considered necessary". It is important to consider, for example, "the danger of the person's absconding or causing injury or damage" and the Court "must always have regard to the specific facts of the case". In the case at hand, the Court noted that in "view of the gravity of the applicant's sentence, his criminal record and his violent antecedents", the use of handcuffs could be "warranted on specific occasions, such as transfers

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<sup>239</sup> See also e.g. *Ashot Harutyunyan v Armenia* finding a violation of Article 3 on account of the applicant's placement in a metal cage during the appeal proceedings.

outside the prison". However, it held that "the systematic handcuffing of the applicant when taken out of his cell was a measure which lacked sufficient justification and can thus be regarded as degrading treatment" in violation of Article 3.<sup>240</sup> The forced wearing of handcuffs at public hearings may also violate Article 3.<sup>241</sup>

### **Corporal punishment**

84. Corporal punishment is considered to be unlawful under international law and is not a "lawful sanction" falling outside the definition of torture, cruel, inhuman or degrading punishment. Lawful sanctions refer only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards.

### **Other physical punishment**

85. In certain circumstances other forms of physical punishment will violate Article 3, even where physical harm is not directly inflicted on the applicant. In *Chember v Russia* the imposition of an excessive level of physical exercise imposed as punishment on a conscript known to be suffering from health problems amounted to a violation.

### **Physical integrity**

86. In relation to an individual's physical and moral integrity there is a continuum between the right to respect for private life and protection against inhuman and degrading treatment. Therefore, in certain circumstances where there is a failure to treat an individual with appropriate healthcare, inhuman and degrading treatment may be engaged. Similarly force-feeding an individual may amount to inhuman or degrading treatment.<sup>242</sup> If that treatment does not amount to a violation of inhuman and degrading treatment, it will have to be considered from the perspective of private life and physical integrity. This right does permit lawful interference, as discussed below.

### **Access to a doctor**

87. In addition to access to a lawyer, a detainee's access to a doctor is also a crucial safeguard against abuse and the UN Special Rapporteur on Torture has recommended that "At the time of arrest a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention."

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<sup>240</sup> See also e.g. *Filiz Uyan v Turkey*

<sup>241</sup> *Gorodnichev v Russia*

<sup>242</sup> *X v Germany*

88. To have any utility medical examinations must take place in private – in particular in the absence of security personnel – and must be detailed. If they do not afford a detainee a proper opportunity to explain any concerns or complaints he or she may have they will be of greatly reduced evidential value and may, on the contrary, facilitate ill-treatment by providing a superficial cover for it. Medical reports should detail fully the date, location and duration of any medical examination, the questions asked and answers provided and the nature of any physical examination conducted.
89. The CPT has also stated that the best guarantor of effectiveness in this regard is for detainees to be given the opportunity to undergo a medical examination before a doctor of their choice in addition to any examination by a State appointed official.
90. Prosecutors and Judges should also be astute to the fact that certain methods of torture may be particularly sophisticated and may not leave visible marks capable of being detected on examination. These may include particular forms of beating, spraying with freezing water, stripping and electric shocks, as well as non-physical methods of torture.

### **Denial of medical treatment**

91. The intentional withholding of medical treatment from persons in places of detention or from persons injured by an act attributable to public officials will engage the protection from torture, inhuman and degrading treatment.
92. The Standard Minimum Rules for the Treatment of Prisoners set out the following principles:
- Detainees should have access to at least one qualified medical officer with some knowledge of psychiatry and to a qualified dental officer;
  - Sick prisoners who require specialist treatment should be transferred to specialised institutions or civil hospitals;
  - Medical officers should daily see all sick prisoners, and any prisoner to whom their attention is specially directed, and should report to the director of the institution whenever they consider that a prisoner's physical or mental health has been or will be harmed by continued imprisonment or by any condition of imprisonment.
93. Appropriately qualified medical officers should regularly inspect and advise the director on the quantity and quality of food, the hygiene and cleanliness of the institution and the prisoners, and observance of the rules concerning physical education.
94. Protection from torture and inhuman and degrading treatment will also be relevant to enforced treatment in psychiatric hospitals and also experimental

treatments. Failure to treat adequately a heroine addict for her addiction in prison who subsequently died amounted to a violation of Article 3.<sup>243</sup> Similarly, failure to treat a prisoner with a history of mental illness who subsequently committed suicide also amounted to an Article 3.<sup>244</sup>

95. An issue may also arise as to the advisability of maintaining a detention measure in view of the state of health of an applicant.<sup>245</sup>

### **Inadequate medical treatment**

96. Inadequate medical treatment may violate Article 3.

97. Where a detainee is placed in isolation, afforded inadequate medical care and under-nourished, Article 3 may be violated.<sup>246</sup> Similarly, in *Paladi v Moldova*, the failure of the authorities to ensure timely and appropriate medical care, including access to a neurological specialist, for a remand prisoner, amounted to a violation of Article 3.

98. A wholesale omission may amount to a violation of Article 3, even where the failure to act relates to a matter which is not within the authorities' knowledge. In *Dobri v Romania*, the Court held that there had been a violation by the failure to provide an initial tuberculosis screen of the applicant on his arrival to prison. This violation was founded both on the duties owed to the applicant and to other prisoners to prevent the spread of contagious diseases.

### **Hunger Strikes and Forced Feeding**

99. The World Medical Association considers that force-feeding of an individual will amount to inhuman or degrading treatment. In their view doctors should never be used to break hunger strikes through acts such as force-feeding.<sup>247</sup> The European Court has also made a similar finding.<sup>248</sup>

100. As part of his report on the situation of detainees in Guantanamo Bay, the UN Special Rapporteur on the right to health made the following observation: "From the perspective of the right to health, informed consent to medical treatment is essential, as is its "logical corollary" the right to refuse treatment. A competent detainee, no less than any other individual, has the right to refuse treatment. In summary, treating a competent detainee without his or her consent

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<sup>243</sup> *McGlinchey v UK*

<sup>244</sup> *Keenan v UK*. For a more recent case regarding the adequacy of medical assistance in detention see e.g., the 2012 case of *Vladimir Vasilyev v Russia*. See also e.g. *Slyusarev v Russia*, where having regard to the degree of suffering involved and its duration, the Court concluded that a failure to provide glasses amounted to degrading treatment in violation of Article 3.

<sup>245</sup> See e.g. *Slawomir Musiał v Poland*

<sup>246</sup> *Gorodnichev v Russia*

<sup>247</sup> <http://www.wma.net/e/policy/h31.htm>

<sup>248</sup> *X v Germany*

- including force-feeding - is a violation of the right to health, as well as international ethics for health professionals.”<sup>249</sup>

101. By contrast, in the recent decision of *Schucter v Italy*, the European Court has held that:

“As regards the applicant’s fears about the possibility of force-feeding, the Court reiterated that a therapeutic measure regarded as necessary according to recognised medical principles could not, in principle, be analysed as inhuman or degrading treatment. That was the case, in particular, of force-feeding for the purpose of saving the life of a prisoner who refused to eat. In the Court’s opinion, there was no evidence to suggest that, if it proved necessary to feed the applicant against her will in order to save her life, the US authorities would act in a manner that was contrary to the principles established in its case-law regarding the existence of a medical necessity, the procedural guarantees accompanying such a decision and the conditions of implementation, which could not exceed the threshold of seriousness beyond which a course of treatment entailed a violation of Article 3 of the Convention. It was thus not possible to find it foreseeable that the applicant would be subjected to treatment contrary to Article 3. That finding also held true for the applicant’s apparent fear of violence in US prisons.”

### **Forced medical treatment**

102. The European Court has found that it was a breach of Article 3 to administer an emetic to obtain the regurgitation of a small quantity of swallowed drugs.<sup>250</sup> Furthermore, the Court found a breach of the right to a fair trial in that the subsequent conviction of the applicant was based on material obtained in breach of the Convention.

103. The Court reiterated that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, it was stressed that any interference with a person’s physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. In this case, the Court was not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the applicant’s system naturally, that being the method used by many other member States of the Council of Europe to investigate drugs offences.

104. The Court found that the authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but in order to retrieve

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<sup>249</sup> E/CN.4/2006/120, 27 February 2006

<sup>250</sup> *Jalloh v Germany*

evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3.<sup>251</sup>

105. Similar issues were considered in *Bogumil v Portugal*, where a drug trafficker was subjected to surgery to remove a bag of cocaine that he claimed to have ingested in order to prevent death. The Court held that there had been no violation as it had not been clearly established that the applicant did not consent and the reason for the surgery was medical rather than aimed at securing evidence (other bags of cocaine had already been found in his shoes). The Court also took into account that the medical procedure was a straightforward one and that the applicant had been provided with constant supervision.

106. The Court has also made clear that whether it can be shown that the applicant provided *informed* consent will be relevant to a consideration under this limb of Article 3.<sup>252</sup>

## **Discrimination**

107. The significance of protecting against discrimination in international human rights law cannot be overemphasised. As has been stressed, a difference of treatment which cannot be justified is likely to amount to unlawful discrimination. It is also worth noting that severe forms of institutionalised racism can amount to inhuman and degrading treatment.<sup>253</sup>

## **Positive obligations**

108. States are required to put in place mechanisms to prevent torture, inhuman and degrading treatment and punishment. As part of this positive obligation, treatment amounting to torture or inhuman and degrading treatment must be prohibited by the criminal law, and such criminal laws must be implemented in such a way so as to ensure that the prohibition is effective.

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<sup>251</sup> See also e.g. *Milanović v Serbia* finding a violation of Article 3 in a case involving attacks by private individuals on a Hare Krishna member. Compare e.g. *P. F. and E. F. v UK*, concerning community violence in Northern Ireland, which the Court found inadmissible. See also e.g. *Al-Saadoon and Mufdhi v UK*, discussed below.

<sup>252</sup> *VC v Slovakia*

<sup>253</sup> *East African Asians case*

109. For example there have also been a number of cases against the UK concerning failure to protect children at risk of abuse.<sup>254</sup> Also, the failure of the law to adequately protect victims of rape will violate Article 3.<sup>255</sup> In a detention context, in *Premininy v Russia*, the Court has found that failure to “detect, prevent or monitor, and respond promptly, diligently and effectively to the systematic inhuman and degrading treatment to which [the applicant detainee] had been subjected by his cellmates” was in violation of Article 3.

110. States are also under a duty to take all reasonable steps to safeguard persons under a real and immediate risk of conduct amounting to a violation of Article 3 where this risk is or should be known to the authorities.<sup>256</sup> This aspect of the positive obligation derives from the *Osman* line of case law discussed under the right to life above, and mirrors the principles of those cases.

### ***Investigation of claims of ill-treatment***

#### **Procedural safeguards and an obligation to respond to allegations of ill-treatment**

111. Investigations required to satisfy the obligations in relation to protection from torture are the same as those required for right to life purposes. As such:

- It must be carried out by an independent body in public;
- It must be thorough and rigorous;
- It must be capable of imputing responsibility;
- It must enable effective involvement of the victim and their next-of-kin;
- There needs to be proper and effective procedural safeguards;
- The investigation should be capable of leading to the identification and punishment of those responsible.<sup>257</sup>

112. The right to protection from torture, inhuman and degrading treatment will be violated where there has been inadequate forensic medical examination by appropriately qualified medical professionals, brief or incomplete medical reports, and failure to take photographs or make analyses of marks on the body.

113. Failure to investigate allegations of torture or inhuman and degrading treatment suggests official tolerance and therefore this may show systemic failure in protecting against torture.

114. The right to lodge complaints against maltreatment prohibited by Article 3 must be recognised in domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The

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<sup>254</sup> *Z v UK*. More recently see e.g. *M and C v Romania*.

<sup>255</sup> *MC v Bulgaria*

<sup>256</sup> *Opuz v Turkey; ES and Others v Slovakia*

<sup>257</sup> For a recent discussion of the duty to investigate in a case involving allegations of ill-treatment in police custody see, e.g., *Taraburca v Moldova*

Istanbul Protocol also spells out what type of independent inquiry is required to satisfy international human rights law standards.<sup>258</sup>

115. The Istanbul Protocol describes in detail the steps to be taken by States, investigators and medical experts to ensure the prompt and impartial investigation and documentation of complaints and reports of torture.

116. Such investigation requires:

- The investigation should be carried out by competent and impartial experts, who are independent of the suspected perpetrators and the agency they serve;
- They should have access to all necessary information, budgetary resources and technical facilities;
- They should have the authority to issue summonses to alleged perpetrators and witnesses, and to demand the production of evidence;
- The findings of the investigation should be made public;
- The alleged victims and their legal representatives should have access to any hearing and to all information relevant to the investigation;
- Alleged victims of torture, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation;
- Those potentially implicated in torture shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

117. In addition, following a finding of a violation of Article 3 in domestic law, a State's legal framework must provide adequate and effective compensation for violations of Article 3 which do not fall considerably short of the amount that would be awarded by the European Court.<sup>259</sup>

#### *Failure to Actively Investigate Allegations of Torture and Ill Treatment*

118. In a number of cases the European Court has held that there has been a failure at prosecutorial and judicial level to actively investigate allegations of torture and ill treatment when they were first made. This breaches the procedural element of the protection providing the absolute prohibition.<sup>260</sup> For example, the Court has emphasised that authorities must act of their own motion once the matter has come to their attention; they cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures.<sup>261</sup>

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<sup>258</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999)

<sup>259</sup> *Ciorap v Moldova (no. 2)*

<sup>260</sup> *Elci v Turkey*

<sup>261</sup> See e.g. *Khashiyev and Akayeva v Russia (re: Article 2)*.

119. The UN Guidelines on the Role of Prosecutors has put the position clearly. They state the following:

*“When prosecutors come into possession of evidence obtained against suspects they know or believe on reasonable grounds was obtained through recourse to unlawful methods constituting a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice”.*

120. Further, the inability of of victims of an alleged criminal offence to challenge in court a prosecutor's decision not to institute proceedings can violate Article 3.<sup>262</sup>

### ***Retaliation against victims, witnesses and any other person acting on behalf of torture victims***

121. Protection against torture extends to those who act on behalf of torture victims. As such, the Special Rapporteur on Torture will intervene when measures of retaliation are taken or threatened against victims of torture, their relatives, members of civil society, lawyers working on torture complaints and medical or other experts acting on behalf of torture victims.

122. Article 13, CAT states: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

### ***Expulsion, Deportation, Rendering and Extradition***

123. It is a guiding principle of human rights law that a State is not absolved of its human rights responsibilities where it returns an individual to another State where that individual is then exposed to a real risk of a violation of his or her core human rights by that receiving State or a third State.<sup>263</sup>

124. The absolute nature of protection from torture or inhuman or degrading treatment means that it would violate the right to protection from torture, inhuman and degrading treatment to deport (*refoulement*), render or extradite an individual

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<sup>262</sup> *Macovei and Others v Romania*

<sup>263</sup> This obligation extends to circumstances where the individual is at risk from non-State actors and the receiving State is either unwilling or unable to protect the individual from these non-State agents.

in the knowledge that they will be tortured or subject to inhuman or degrading treatment. The principle of *non-refoulement* prohibits the expulsion of persons to States where there are substantial grounds for believing they would be at risk of torture or other serious human rights violations.<sup>264</sup>

125. Whether the State is regarded as being aware of the risk of ill-treatment if the applicant is removed includes not only actual knowledge, but also constructive knowledge, i.e. situations in which the State must have known of the risk.<sup>265</sup>

### **Standard of Proof Required**

126. The risk of such treatment has to be “personal and present”. A mere suspicion of torture is insufficient to engage this protection, but the test need not meet the standard of being highly probable.<sup>266</sup>

127. To rely upon the protection from torture provisions, applicants must show that their expulsion would have the foreseeable consequence of exposing them to a “real and personal” risk of being tortured. As protection from torture is absolute, considerations of a procedural nature or the nature of the activities in which the person engaged are not a relevant consideration. The protection exists “irrespective of whether the individual concerned has committed crimes and the seriousness of those crimes”.<sup>267</sup>

128. In weighing up the evidential merits, the authorities and a court have to be satisfied that the applicant has produced a sufficient body of evidence to substantiate his claim that, if expelled, he will be exposed to a real risk of torture, inhuman or degrading treatment or punishment. As such it is incumbent on persons who allege that their expulsion would amount to a breach of the protection against torture to adduce, to the greatest extent practically possible, material and information allowing the authorities and a court, to assess the risk that a removal may entail. Such information can include Country Reports and publications compiled primarily by Governments and international NGOs, as well as supplementary (and complementary) witness statements.<sup>268</sup>

129. Failure on the part of the authorities to adequately investigate allegations and to scrutinise the merits of a claim may in and of itself amount to a violation of the obligation to protect against torture.

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<sup>264</sup> See e.g. *N v Sweden*, a case involving a deportation order to Afghanistan of a woman separated from her husband, where the court found a violation of Article 3. See also e.g. *Auad v Bulgaria*, where the Court emphasised the “lack of a legal framework providing adequate safeguards” in the respondent State and stressed the need for “rigorous scrutiny”. See also e.g. *Iskandarov v Russia*.

<sup>265</sup> *Garabayev v Russia*

<sup>266</sup> CAT General Comment 1.

<sup>267</sup> UN Torture Factsheet.

<sup>268</sup> *Saidi v Netherlands*

## Diplomatic Assurances

130. Where there is a risk of torture, if the deporting country receives assurances that the individual will not be tortured on return, these have to be proven to be cast iron. The difficulty with such assurances is that almost by definition they are likely to be worthless without concrete evidence of protection for the individual concerned, which includes effective monitoring mechanisms and arrangements. Torture, as has been established, is a grave violation of international law. No State is therefore likely to accept that it happens within its borders, let alone its institutions.
131. Diplomatic assurances concerning human rights can be effective under certain circumstances. For example, it is possible for receiving States to give an assurance that an individual will not face the death penalty if returned. However, that penalty is still recognised as one that can be lawful under circumscribed circumstances in international law, although the European Court's position on the issue is less flexible, as discussed above. Therefore, it is a matter of international relations and negotiation that a particular punishment that the deporting State finds particularly repugnant will not be applied.
132. For example, in *Harkins and Edwards v UK* the European Court of Human Rights rejected as inadmissible complaints regarding the alleged risk of the death penalty being imposed; assurances provided in the cases were regarded by the Court as sufficient to remove any such risk. In addition, regarding the applicants' complaints relating to life imprisonment without parole, the Court did not find that the applicants had demonstrated a real risk of treatment reaching the Article 3 threshold as a result of their sentences if they were extradited to the USA and so found that there would be no violation of Article 3. On a similar issue, see the case of *Vinter*, cited above.<sup>269</sup>
133. In addition, see for example, *Al-Saadoon and Mufdhi v UK*, a case involving the detention of two Iraqi nationals by British forces in Basra and their transfer to the custody of the Iraqi authorities. The European Court of Human Rights found that while "the applicants remain at real risk of execution...it cannot at the present time be predicted whether or not they will be retried on charges carrying the death penalty, convicted, sentenced to death and executed". However, "[w]hatever the eventual result...it is the case that through the actions and inaction of the United Kingdom authorities the applicants have been subjected, since at least May 2006, to the fear of execution by the Iraqi authorities...causing the applicants psychological suffering of this nature and degree constituted inhuman treatment". Accordingly the Court found a violation of Article 3.

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<sup>269</sup> See also e.g. *Babar Ahmad and Others v UK*, where the Court found admissible complaints concerning possible post-trial detention in USA prison with the highest possible of security levels (a "supermax" prison); and complaints concerning the length of their possible sentences in the USA.

134. With a torture assurance, first the State of destination will have to concede that it occurs, in violation of its international human rights obligations, and then it will have to provide concrete assurances that it will not be inflicted upon a particular individual and be able to prove that protection of that individual can be provided. This will also require objective confirmation.
135. The issue of the validity of diplomatic assurances in the context of torture and *refoulement* is therefore a controversial one. It is currently the subject of extensive debate.
136. On numerous occasions, the Human Rights Committee has emphasised its position in relation to *refoulement*. For example, the Committee has stressed that it was, “concerned about the formulation of the draft law on the legal status of foreigners, which...may allow for the removal of foreigners who are regarded as a threat to State security, despite the fact that they may be exposed to a violation of their rights under [ICCPR] Article 7 in the country of return.”<sup>270</sup>
137. The Committee has also emphasised that Security Council Resolution 1373<sup>271</sup> does not give permission to violate human rights. They have pointed out that, “the State Party is requested to ensure that counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant. In particular, it should ensure absolute protection for all individuals, without exception, against *refoulement* to countries where they risk violation of their rights under article 7.”<sup>272</sup>
138. Significantly, the HRC has criticised States parties for not ensuring that those who are returned are protected from torture, inhuman and degrading treatment. For example, the Committee has noted that, “...nationals suspected or convicted of terrorism abroad and [returned] have not benefited in detention from the safeguards required to ensure that they are not ill-treated, having notably been held incommunicado for periods of over one month (Articles 7 and 9 of the Covenant).”<sup>273</sup>
139. Like the HRC, the Special Rapporteur on torture has stressed the binding nature of the obligation to protect against torture in the context of deportation. Governments therefore have been urged to:

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<sup>270</sup> Concluding observations of the Human Rights Committee: Lithuania (CCPR/CO/80/LTU).

<sup>271</sup> The key Resolution at the UN imposing obligations on States to counter terrorism

<sup>272</sup> Concluding observations of the Human Rights Committee: Lithuania (CCPR/CO/80/LTU). See also Concluding observations of the Human Rights Committee: Yemen (CCPR/CO/75/YEM); Concluding observations of the Committee against Torture: Yemen (CAT/C/CR/31/4). For a recent opinion of the United Nations Human Rights Committee on violations of ICCPR art. 13, in connection with terrorism and expulsion proceedings, see HRC Communication No. 1051/2002, *Ahani v. Canada*.

<sup>273</sup> Concluding observations of the Human Rights Committee: Egypt (CCPR/CO/76/EGY).

- Refrain from deporting persons to a country where they would be at risk of torture (or to a transit country where they would be at serious risk of further deportation to such a country); unless
- It obtains unequivocal guarantees that the persons concerned will not be subjected to ill-treatment; and
- Establishes a system to monitor their treatment after their return.

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

141. In *Othman (Abu Qatada) v UK*, discussed above, the European Court of Human Rights held, among other things, that there would be no violation of Article 3 as assurances obtained by the UK Government from the Jordanian Government were found to be sufficient to remove any real risk of ill-treatment. This is a significant decision in this area.

142. In its assessment of Article 3, the Court acknowledged the “widespread concern within the international community as to the practice of seeking assurances” however, it noted that “its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment”. It noted that any assurances will “constitute a further relevant factor which the Court will consider” but “are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment”. The weight to be accorded to the assurances will depend “in each case, on the circumstances prevailing at the material time”. Usually, the court will assess “first, the quality of assurances” and “second, whether, in light of the receiving State’s practices they can be relied upon”.<sup>274</sup>

143. As a result of their controversial nature in context of the protection from torture and other ill-treatment, in relation to diplomatic assurances, a number of considerations need to be taken into account, as discussed above. Traditionally, it was clear from the Court’s case law that such assurances would be unacceptable in circumstances:

- Where there is substantial and credible evidence that torture and prohibited ill-treatment in the country of return are systematic, widespread, endemic, or a recalcitrant or persistent problem;
- Where government authorities do not have effective control over the forces in their country that perpetrate acts of torture and ill-treatment; or
- Where the government consistently targets members of a particular racial, ethnic, political or other identifiable group for torture or ill-treatment and the person subject to return is associated with that group.

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<sup>274</sup> See also e.g. *Klein v Russia*, finding extradition would violate Article 3.

Further consideration now needs to be given to this issue in light of recent case law on the subject, particularly *Othman (Abu Qatada) v UK*.

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

## Rendition

145. The UN High Commissioner for Human Rights and the Council of Europe have also expressed significant concerns about the use of unlawful rendition or the transfer of non-national suspected terrorists who are considered to pose a security risk to their countries of origin or third countries.
146. Transfer, in this context, is defined as the involuntary relocation of non-citizens across borders from the custody of one government to another, regardless of the procedure used and its basis in law, or lack thereof. Often, these transfers are carried out on the basis of assurances from receiving States that persons will not be tortured or ill-treated.
147. The High Commissioner for Human Rights has pointed out that cases have come to light that demonstrate that some of these transfers are taking place outside the law, in the absence of procedural safeguards such as due process protection and judicial oversight. Persons subject to such transfers often have no ability to challenge the legality of their transfer or the reliability of the assurances given by the receiving State that they will be protected from torture and other ill treatment.<sup>275</sup>
148. Extraordinary renditions under these circumstances will constitute grave violations of international human rights law, including but not limited to the absolute prohibition on torture and other ill-treatment (of which the absolute principle of *non-refoulement* is an integral part), the rights to liberty and security of the person, and the absolute prohibition on enforced disappearances where the detention is unacknowledged or the whereabouts of the person are not disclosed. As such it is incumbent upon States to have in place procedures to ensure accountability for extraordinary rendition and any complicity a State may have in the process, whether by the activities of their own agents, the presence of foreign agents or the use of their airspace. A victim of an 'extraordinary rendition' must be afforded an effective remedy and full and adequate reparation by each responsible entity.<sup>276</sup>

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<sup>275</sup> Report of the High Commissioner for Human Rights, E/CN.4/2006/94, 16 February 2006.

<sup>276</sup> See the UN Convention on the Protection of All Persons from Enforced Disappearances (2006)

149. The General Secretary of the Council of Europe has made the following recommendations on how best to contain the practice of extraordinary rendition.<sup>277</sup> These are:

- All forms of deprivation of liberty outside the regular legal framework need to be defined as criminal offences in all States and be effectively enforced. Offences should include aiding and assisting in such illegal acts, as well as acts or omission (being aware but not reporting), and strong criminal sanctions should be provided for intelligence staff or other public officials involved in such cases;
- The rules governing activities of secret services appear inadequate in many States and better controls are necessary, in particular as regards activities of foreign secret services on their territory;
- The current international regulations for air traffic do not give adequate safeguards against abuse. There is a need for States to be given the possibility to check whether transiting aircraft are being used for illegal purposes. Within the current legal framework, States should equip themselves with stronger control tools;
- International rules on State immunity often prevent States from effectively prosecuting foreign officials who commit crimes on their territory. Immunity must not lead to impunity where serious human rights violations are at stake. Work should start at European and international levels to establish clear human rights exceptions to traditional rules on immunity;
- Mere assurances by foreign States that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

150. In January 2012, jurisdiction was relinquished in favour of the Grand Chamber of the European Court of Human Rights in *El Masri v The Former Yugoslav Republic of Macedonia* (Application No. 39630/09), a case involving, among other things, allegations of “extraordinary rendition” to a State not Party to the ECHR.

### **The Developing Case Law before the European Court of Human Rights**

151. The European Court of Human Rights has, for decades, incorporated the principles discussed above into its case law. The non-expulsion to countries where the individual would be subjected to torture, inhuman and degrading treatment and punishment was first established in *Soering v UK*. In that case, the

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<sup>277</sup> Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006) 5, 28 February 2006. See also, Secretary General’s supplementary report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006) 13, 14 June 2006

Court held that to extradite the applicant to the USA to face a charge of murder would amount to inhuman and degrading treatment because the applicant would be exposed to the death row phenomenon. Post-*Soering* it is therefore necessary to receive an assurance that the death penalty will not be applied. On the basis of *Soering*, it appeared possible to argue that to return someone in the knowledge that they will not get a fair trial, will also violate the Convention, and this argument has found favour in *Othman (Abu Qatada) v UK*.

152. In *Chahal v UK*, the Strasbourg Court held that Article 3 would be violated if the applicant, a Sikh terrorist, was deported to India in the knowledge that on his arrival he would be likely to be tortured. The fact that his presence in the UK was not in the public interest was not sufficient to justify exposing him to torture. This landmark decision establishes therefore that national security and counter-terrorism strategies cannot take precedence over the absolute obligation to protect people from torture.

153. The blanket nature of this protection is emphasised by *D v UK*. In that case the applicant was a convicted drug-trafficker who had been diagnosed with Aids whilst in prison in the UK. He could not be deported to his country of origin, St Kitts, because he had no family there, no home and there was no treatment whatsoever for HIV/Aids. To deport someone under such circumstances would amount to inhuman and degrading treatment.

### ***State Obligations to Prevent Torture: a summary of the duties of States***

- Implement procedural safeguards regarding arrest and detention;
- Investigate complaints and have in place a domestic legal framework for the prosecution of those violating Article 3;
- Ensure evidence obtained through torture cannot be relied upon in a trial (except as evidence that acts of torture have occurred);
- Implement procedures for ongoing review of criminal justice arrangements and practices;
- Carry out anti-torture training programmes for all relevant agencies on an ongoing basis;
- Monitor the use of law enforcement and restraint equipment;
- Do not return an individual to their country of origin, or a third country, where they risk exposure to torture.

### 3. Detention Conditions, the Right to Liberty and Access to a Lawyer

1. Human rights relating to detention are inextricably linked with freedom from torture, prisoners' rights and the right to a fair trial.
2. International human rights law recognises that all persons should be protected from interference with the right to liberty except under defined and limited circumstances. At the same time, international human rights law also recognises that those in detention require special protection due to their vulnerable position (vulnerable because they are entirely in the power of the state and, due to their imprisonment, face a higher risk of abuse). The right to liberty is therefore a test of the legality of detention and a procedural guarantee. The key protections in this context are three-fold:
  - The prohibition on arbitrary detention. Detention can only be justified on an exhaustive list of specified grounds;
  - The right of all persons deprived of their liberty to challenge the lawfulness of their detention before a court (through the legal procedure known as *habeus corpus*)<sup>278</sup> and to have the detention reviewed on a regular basis. Of particular concern here is where a detainee is unable to communicate with the outside world, such as family, friends and legal representatives (commonly referred to as 'incommunicado detention'); and
  - The rights of prisoners whilst in detention, including the physical conditions, disciplinary systems, use of solitary confinement and the conditions under which contact with the outside world is facilitated (including family, lawyers, social and medical services and non-governmental organisations).
3. International human rights law has laid down detailed criteria about when it is lawful to detain people and how such people should be treated in detention. In international human rights law, the liberty and security of the person is protected by Article 5 ECHR<sup>279</sup> and Article 9 ICCPR. Article 5 ECHR is more precisely worded than Article 9 ICCPR.

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<sup>278</sup> Including those in social care institutions - *Stanev v Bulgaria*

<sup>279</sup> Article 5, ECHR:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following circumstances and in accordance with the 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

## Treatment of Detainees

4. Article 10 ICCPR builds upon Article 9 by dealing with the treatment of prisoners whilst in detention:
  - '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' (Article 10(1));
  - provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones and that juvenile persons shall be separated from adults (Article 10(2)); and
  - states that the 'essential aim' of imprisonment should be 'the reform and social re-adaptation of prisoners' (Article 10(3)).
5. Article 10, ICCPR has a clear relationship with the protection from torture, inhuman and degrading treatment and punishment. Article 10 imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.
6. The obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, not dependent on the material resources available to the state party.<sup>280</sup>

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- 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, or persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f) The lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants;
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.
  3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to a 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

<sup>280</sup> General Comment 21.

## **The Standard Minimum Rules for Treatment of Prisoners 1957 and the UN Body of Principles 1988**

7. The Standard Minimum Rules and the UN Body of Principles have already been examined in the context of protection against torture, inhuman degrading treatment and punishment. They are also directly relevant to deprivation of liberty. They build on the ICCPR provisions by setting out in much greater detail the content of the protection which should be afforded to detainees. In summary, the Standard Minimum Rules ('SMR') and Body of Principles ('BP') cover such areas as:
- The maintenance of a register of prisoners (SMR 7);
  - Separation of categories of prisoner (SMR 8);
  - The right of access to legal advice (BP 17 and 18) and medical services (SMR 22-25);
  - The right of detainees to visits by family members and an adequate opportunity to communicate with the outside world (SMR 37-39, BP 19);
  - Provision of a complaint mechanism for detainees and/or detainee's family, legal representative in relation the detainee's treatment (SMR 35 -36; BP 33 - 34).

### ***European Prison Rules***<sup>281</sup>

8. These UN standards are reflected, and somewhat updated, in the more comprehensive European Prison Rules.

### ***Understanding the Right to Liberty***

9. Article 5, ECHR is concerned with the deprivation of liberty. It is not engaged by mere restrictions on liberty.<sup>282</sup> In determining whether the level of restraint involved amounts to a detention, regard should be had to a whole range of criteria, including the type of detention, its duration, its effects and the manner of implementation.<sup>283</sup>
10. The right to liberty can be summarised as follows:
- Governs all elements of loss of liberty – for whatever reason – from initial detention to release
  - Protects against arbitrary detention – without liberty it is difficult to enjoy other human rights
  - Any limits or restrictions to the right to liberty must be interpreted narrowly

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<sup>281</sup> Committee of Ministers Recommendation Rec (2006)2

<sup>282</sup> *Engels v Netherlands*

<sup>283</sup> *Guzzardi v Italy*

- The right to liberty is given a purposive interpretation and an autonomous meaning
- The right to liberty applies to an arrest or detention by agents of any contracting party to the ECHR, even if it is affected outside the territory of that Member State but is within its jurisdiction<sup>284</sup>
- Any deprivation of liberty should be:
  - exceptional
  - objectively justified
  - of no longer duration than absolutely necessary
- The justification for loss of liberty must be closely scrutinised

### **The right to liberty poses two questions:**

- What is meant by the right to liberty and security?
- What is a procedure prescribed by law?

### **Loss of liberty**

11. Firstly, the right to security does not mean protection from attack by others. The right to liberty is only concerned with physical liberty.

12. The right is engaged when there is any loss of liberty. This will occur even when a law enforcement officer obliges a person to stay somewhere or to go elsewhere. Compulsion is required even if surrender is voluntary. A curfew, for example, might amount to a deprivation of liberty.<sup>285</sup> Mere restrictions on liberty will not engage the right. What is required is that there is a loss of liberty. For example a condition that an individual resides in a particular building (house arrest) may be a deprivation of liberty, depending on the facts. A requirement for an individual to reside somewhere for 20 hours of the day is likely to be a deprivation of liberty, whereas an obligation to remain somewhere for 6 hours may just be a constraint on liberty.

13. Two issues arise in relation to loss of liberty:

- The nature of the confinement: Whether someone has had lost their liberty rather than just having had their liberty restricted is a question of degree and intensity.<sup>286</sup> An individual who was detained in a mental hospital even though he could freely walk around the building was detained.<sup>287</sup> Similarly, a requirement to live on part of an island amounted to a loss of liberty.<sup>288</sup>

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<sup>284</sup> *Al Jedda v UK* *Ocalan v Turkey*

<sup>285</sup> But see *Cyprus v Turkey* where it was held not to

<sup>286</sup> *Guzzardi v Italy*

<sup>287</sup> *Ashingdane v UK*

<sup>288</sup> *Guzzardi v Italy*

- The status of the person affected will also be relevant. For example, members of the armed forces can be treated differently from civilians.<sup>289</sup>

### **Access to a Lawyer**

14. Nowhere in the right to liberty is there an express mention of the need to have access to a lawyer on being detained. However, without immediate access to a lawyer, the right can be rendered meaningless. Therefore under the doctrine that human rights must be “practical and effective”, this right of access to a lawyer as soon as is practicable (ie possible) has been read into the right to liberty as well as the right to a fair trial.<sup>290</sup> Failure to grant access to a lawyer can also raise issues of the absolute prohibition on torture and other ill treatment.
15. The centrality of the legal profession to the rule of law and the protection of human rights is precisely why access to them represents such a crucial safeguard for detainees. As to what this means, the HRC and the European Court have repeatedly made it clear that this access must be immediate and must be effective. The European Court has specified that access to a lawyer is a “basic safeguard against abuse”,<sup>291</sup> and in a case concerned with the hanging of a Palestinian detainee, which occurred during lengthy incommunicado detention, the Court observed that the absence of such access to a lawyer left a detainee “completely at the mercy of those detaining him”.<sup>292</sup>
16. The right of access to a lawyer under Article 5 ECHR includes the right to confidential lawyer-client communication.<sup>293</sup>

### **Prescribed by Law and Accordance with Law**

17. Any deprivation of liberty must be prescribed by law. This requires compliance with both national law and human rights law. National law must be precise, accessible and foreseeable. There must also be a continued legal basis for the detention. For example where national law only permits detention under a particular circumstance for 12 hours and an individual is detained for 12 hours and 40 minutes the detention for 40 minutes will be unlawful.<sup>294</sup> There must also be a clear legal basis for the detention and legal certainty. Therefore procedures which have evolved over time may not be sufficient to guarantee legal certainty.<sup>295</sup>
18. An arrest warrant will indicate that the arrest is lawful and detention starts for the purposes of Article 5 following a lawful apprehension of the individual.

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<sup>289</sup> *Engel v Netherlands*

<sup>290</sup> *John Murray v UK*

<sup>291</sup> *Brannigan & McBride v UK*

<sup>292</sup> *Aksoy v Turkey*

<sup>293</sup> *Modarca v Moldova*

<sup>294</sup> *K-F v Germany*

<sup>295</sup> *Jecius v Lithuania*

## When Detention is Lawful

19. To be lawful for the purposes of international human rights law, detention must be justifiable for one of the six reasons identified in Article 5(1)(a) – (f) ECHR. These can be summarised as:

- a. Detention following conviction
- a. Detention to enforce court orders or to fulfil an obligation prescribed by law
- b. Detention following arrest to bring the individual before the competent legal authorities
- c. Detention of children for educational supervision or to bring them before the competent legal authorities
- d. Detention of alcoholics, drug addicts, vagrants and persons of unsound mind
- e. Detention pending deportation or extradition

If detention cannot be justified under one of these heads, then it is unlawful. Where detention is not for one of the purposes listed in Article 5(1) and the State, while not the detaining body, is acquiescent in a person's detention at the hands of a private individual, there will be a violation of Article 5.<sup>296</sup>

### *Article (5)(1)(a): Detention post-conviction by a competent court:*

20. This is the most straightforward form of detention and regulates and authorises the detention of convicted offenders. The court of conviction must satisfy the requirements of independence and impartiality and have jurisdiction to try the case.

21. The fact that a conviction is subsequently overturned on appeal does not necessarily affect the lawfulness of detention pending appeal. What is required is lawful detention, not necessarily a just conviction.<sup>297</sup> Although there will be a breach where the conviction had no basis in domestic law.<sup>298</sup> A conviction, however, must be the cause of the detention.<sup>299</sup>

22. Recourse to detention should be a proportionate response to the commission of an offence. In *Gatt v Malta* for example, detention for 5 years 6 months for the failure to pay a fine for breaching bail conditions was deemed so disproportionate as to be unlawful.<sup>300</sup>

### *Article 5(1)(b): Detention to enforce a court order*

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<sup>296</sup> *Rantsev v Cyprus & Russia*

<sup>297</sup> *Douiyeb v Netherlands*

<sup>298</sup> *Tsirlis and Kouloumpas v Greece*

<sup>299</sup> *Weeks v UK*

<sup>300</sup> *Gatt v Malta*

23. In relation to detention following the lawful order of a court, detention is only permitted for as long as is necessary to carry out the court's order. For example, the court may order the detention of an individual for the purpose of taking a blood test. Once that blood has been taken, the individual must be released.
24. Detention to secure the fulfilment of any obligation prescribed by law requires specificity.
25. In *Ciulla v Italy* the Italian authorities could not rely on Article 5(1)(b) to justify the detention of a suspected *mafioso* who had failed to change his behaviour. This failure was not considered to be a specific and concrete obligation.
26. Therefore, Article 5(1)(b) cannot be used to justify preventative detention. As such, when considering when it is lawful to detain under Article 5(1)(b) this provision must be interpreted narrowly and it cannot be used to justify detention which would otherwise not comply with the other justifications for detention under Article 5(1). Therefore to stress, the detention will only be justified if there are specific and concrete reasons for it.

*Article 5(1)(c): Detention on reasonable suspicion of having committed an offence:*

27. This governs the circumstances where it is permissible to detain someone who is suspected of having committed an offence or where someone is considered likely to commit an offence. For the detention to be lawful under 5(1)(c) the following three-stage test must be met:
- The offence must exist in national law. In *Lukanov v Bulgaria* the detention of the former prime minister violated the right to liberty because the activity that he was accused of carrying out was not unlawful;
  - The objective must be to bring the individual before the competent legal authority;
  - There must be reasonable suspicion to arrest someone. The fact that an individual has past convictions is not enough. Reasonable suspicion requires objective justification, but can be based on anonymous informants.<sup>301</sup> In a case involving counter terrorism, it was not necessary for there to be sufficient evidence to charge someone in order to be able to establish reasonable suspicion, if detention is justified to further investigations.<sup>302</sup> Honesty and good faith is required on the part of the law enforcement officers.
28. Blanket arrests are unlikely to be proportionate. Article 5(1)(c) cannot be used to authorise a general policy of preventative detention on the basis of a propensity to commit offences.<sup>303</sup> For Article 5(1)(c) to be relied upon the offence in issue

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<sup>301</sup> *Doorson v Netherlands*

<sup>302</sup> *Brogan v UK*

<sup>303</sup> *A and others v UK*

needs to be a specific one. Detention under Article 5(1)(c) also guarantees further protection under Article 5(3).

29. Article 5 cannot be used to justify indefinite detention on the grounds of suspicion of involvement in terrorism.<sup>304</sup>

#### *Article 5(1)(d): Detention of Children*

30. For the purposes of detaining children for educational supervision or to bring them before the competent legal authorities,<sup>305</sup> a minor is someone who is under the age of 18.

#### *Article 5(1)(e): Detention of alcoholics, drug addicts, vagrants and persons of unsound mind*

31. In *De Wilde*, the court accepted the Belgian penal code definition of a vagrant as someone of no fixed abode, with no trade or profession and no means of subsistence.<sup>306</sup>

32. In *Guzzardi v Italy* the Italian government sought to rely on Article 5(1)(e) to detain suspected *mafiosi*, however, the Strasbourg court rejected Italy's suggestion that the Mafia fell within the definition of 'vagrant'.

33. In *Litwa v Poland* it was held that it would be lawful to detain a drunk person only if there was a further reason to detain other than simply that the individual was drunk. In *Kharin v Russia* it was held that it was lawful to detain a drunk person overnight in a sobering-up centre after he had been behaving aggressively in public.<sup>307</sup>

#### *Detention on the grounds of mental health*

34. In *Winterwerp v Netherlands* the five-stage test for detaining persons of unsound mind was established:

- a. The mental disorder must be established by objective medical expertise
- b. The nature and degree of the disorder must be sufficiently extreme to justify the detention
- c. Detention should only last as long as the medical disorder and its required severity persists
- d. In cases where detention is potentially indefinite, periodical reviews must take place by a tribunal which has powers to discharge

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<sup>304</sup> *A and Others v UK*

<sup>305</sup> Article 5(1)(d), ECHR

<sup>306</sup> *De Wilde, Ooms and Versyp v Belgium*

<sup>307</sup> *Kharin v Russia*

- e. Detention must take place in a hospital, clinic or other appropriate institution authorised to detain such persons
35. There is no right to treatment, but failure to treat may amount to a breach of the right to physical integrity (Article 8) or be inhuman treatment (Article 3).
36. Where a person was detained for 14 days in a psychiatric institution solely for the purpose of conducting psychiatric tests, the European Court of Human Rights found a violation of Article 5(1)(e). Unless the need for detention is exceptionally urgent, the question of whether a person is of unsound mind should be established *before* his detention can be justified under Article 5(1)(e).<sup>308</sup>

*Article 5(1)(f): Detention for the purposes of deportation and extradition:*

37. This Article permits the detention of individuals pending extradition or deportation. Attempts to deport or extradite must be genuine and be in process. If deportation or extradition is impossible, Article 5(1)(f) cannot justify detention.<sup>309</sup> Therefore if it is impossible to deport someone because to do so would expose them to torture, Article 5(1)(f) cannot be relied upon to detain them. Procedural safeguards must exist and the procedure for challenging detention must be precise, foreseeable and accessible.<sup>310</sup> The European Court of Human Rights has held that the detention of a person for three years pending extradition could not be justified under Article 5(1)(f) ECHR because he had no way of having his detention reviewed.<sup>311</sup>

***Preventative and/or Administrative Detention***

38. As has already been mentioned, human rights standards are autonomous concepts; it is therefore open to courts to go behind the definition given by the State authorities. If the courts consider the detention to be of a criminal character, they may treat it as such and provide the appropriate guarantees.
39. Under the circumstances of preventative or administrative detention, if the detention cannot be justified by reference to the right to liberty, it will be unlawful. The State party will then have to consider whether it can justify derogating from its obligations under human rights law. Even if the detention is lawfully permitted, by way of derogation, that deprivation of liberty should still remain subject to judicial scrutiny, which requires an independent and impartial tribunal.

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<sup>308</sup> *C.B. v Romania*

<sup>309</sup> *Ali v Switzerland*

<sup>310</sup> *Soldatenko v Ukraine*

<sup>311</sup> *Nasrulloev v Russia*

40. States parties should seriously consider alternatives to preventative detention.<sup>312</sup>
41. Preventative detention has been used by States in the context of protest; the European Court has consistently held that detaining a person to restrict their right to peaceful assembly, in the absence of a reasonable suspicion that the person will commit a specified offence, will violate Article 5 ECHR.<sup>313</sup> The European Court of Human Rights has held that the detention of a human rights activist for 45 minutes with a view to preventing him committing unspecified offences was unlawful.<sup>314</sup>
42. The main area where preventative and/or administrative detention is relied upon is in the context of migration. Where such detention occurs the following rights will be engaged:
- The right to liberty;
  - The right to fair trial;
  - Protection from torture and inhuman and degrading treatment;
  - The right to a private and family life; and
  - The right not to be discriminated against.
43. The Special Rapporteur on the human rights of migrants has addressed the relationship between counter-terrorism measures and migration. She has pointed out that: "[T]he strengthening of security policies and the tendency to consider migration as a matter falling under State security plans pose a threat to the human rights of migrants."
44. Drawing particular attention to the issue of administrative detention of migrants, she has stated:
- "There is in fact a tendency to criminalise infringements of immigration regulations and to punish them severely, while a great number of countries resort to administrative detention of irregular migrants pending deportation. The Special Rapporteur regrets that deprivation of liberty is resorted to without due regard for the individual history of the persons in question.... This situation is often encouraged by the absence of automatic mechanisms for judicial or administrative review.... [The Special Rapporteur] recommends that procedural safeguards and guarantees established by international human rights law and national law in criminal proceedings be applied to any form of detention.
45. The Working Group on arbitrary detention has expressed "its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It notes a further expansion of States' recourse to

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<sup>312</sup> *Lelievre v Belgium*

<sup>313</sup> *Schwabe and M.B. v Germany*

<sup>314</sup> *Shimovolos v Russia*

emergency legislation diluting the right of habeas corpus or amparo and limiting the fundamental rights of persons detained in the fight against terrorism. In this respect, several States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention."

### ***Procedural safeguards - Reasons for Detention***<sup>315</sup>

46. Reasons for detention must be *prima facie* well founded and must be given promptly.<sup>316</sup> This safeguard applies to all people detained for whatever reason. The promptness of reasons depends upon the circumstances of the case. Prompt does not necessarily mean immediate and a few hours might suffice. In one case, the European Court of Human Rights did not object to a delay of 19 hours where national security was concerned.<sup>317</sup> Although without a reason for detention, it is very difficult to challenge the legality of detention. Nineteen hours should therefore be considered the exception and not the rule.<sup>318</sup> A ten-day delay<sup>319</sup> in a mental health case was held to violate this obligation, as was a 76-hour delay in an asylum case.<sup>320</sup>
47. Reasons need not be writing, although it will be insufficient just to refer to a formal statutory provision and it must be more than informing someone that they have been detained under emergency legislation. To comply with this obligation, reasons must also be given in a language that the detainee understands.
48. The age and mental state of the detained person is also relevant. It may be that a responsible third person must be informed promptly of the reasons for the detention.

### ***Procedural safeguards – Judicial Supervision***<sup>321</sup>

49. Justifications for delay in bringing suspects detained on suspicion of having committed an offence under Article 5(1)(c) before a court have been very heavily scrutinised by the European Court of Human Rights.
50. The presumption is that once someone who has been detained on suspicion of having committed an offence, and their identity has been established, as soon as their procedural rights have been guaranteed, for example notifying them of

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<sup>315</sup> Article 5(2), ECHR

<sup>316</sup> *Stepuleac v Moldova*

<sup>317</sup> *Dikme v Turkey*

<sup>318</sup> *Murray v UK*

<sup>319</sup> *Van der Leer v Netherlands*

<sup>320</sup> *Saadi v UK*

<sup>321</sup> Article 5(3) ECHR

the reason for their detention and granting them access to a lawyer, she or he should be brought before a court. That court must have the power to order release. A power to recommend release is insufficient.<sup>322</sup>

51. It must be emphasised that in *Brogan v UK* it was held that to detain somebody for four days and six hours before bringing them before the competent legal authority was too long, even where national security and suspected terrorist activity were involved. Delays of 14 days were unlawful even in an accepted emergency that threatens the life of the nation.<sup>323</sup> While a degree of flexibility will be attached to the notion of “promptness” in bringing a person before a judge, according to the special features of each case, the European Court of Human Rights has held that such flexibility must not be taken so far as to negate the State’s obligation under Article 5(3) altogether.<sup>324</sup>
52. Detention under Article 5(3) must be authorised by a court or ‘an officer authorised by law.’ To satisfy this test, the officer must be independent of the Executive and be impartial. That person must also be able to authorise release. In *Brincat v Italy*, detention was confirmed by a public prosecutor who subsequently concluded that he did not have territorial jurisdiction of the case. The case was then handed over to another prosecutor in the appropriate district. In finding the detention unlawful, the Strasbourg Court held that doubts as to the impartiality of the officer were raised immediately the detention was confirmed. It was immaterial that he later lacked jurisdiction.

### ***A Trial within a Reasonable Time and the Right to Bail***<sup>325</sup>

53. Any period of pre-trial detention, no matter how short, will always have to be justified. What is ‘a trial within a reasonable time’ depends on the circumstances of a case – for example, a complex fraud trial which took four years to come to trial, and which involved many witnesses and much documentation, was not held to violate Article 5(3);<sup>326</sup> yet in a less complex case delays of over three years did violate Article 5(3).<sup>327</sup>
54. Length of time runs from arrest to release or to conviction. The suspect is not under any obligation to assist the authorities in their prosecution. However, failure to do so may affect the slowness of the process.
55. There is a presumption in favour of bail.<sup>328</sup> Prior to conviction the presumption of innocence applies.<sup>329</sup> As such the court must consider bail at the earliest

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<sup>322</sup> *Ireland v UK*

<sup>323</sup> *Askoy v Turkey*

<sup>324</sup> *Medvedyev & Others v France*

<sup>325</sup> Article 5(3), ECHR

<sup>326</sup> *W v Switzerland*

<sup>327</sup> *Clooth v Belgium and Muller v France*

<sup>328</sup> *Tomasi v France*

opportunity. Grounds for refusing bail cannot be relied upon *in abstracto*, but grounds can include:

- Fear of absconding
- Interference with the course of justice
- Prevention of further offences
- Preservation of public order
- Protection of the defendant

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

57. In relation to bail conditions, the right to liberty requires only what is necessary to ensure presence. That right was violated when bail was calculated on the basis of the loss imputed to the alleged victim.<sup>330</sup> Conditions might include reporting to a local police station and/or the surrender of a passport.

### ***Procedural safeguards: The Right to Challenge the Legality of Detention – Habeas Corpus***<sup>331</sup>

58. As has already been established, *habeas corpus* is now considered to be an absolute, and non-derogable, right. It provides essential protection for detainees. The following explains how it works:

- Fixed-term sentences incorporate *habeas corpus* protection
- Indeterminate sentences require *habeas corpus* proceedings to determine release
- The degree of scrutiny required varies with the context but must be able to review the lawfulness of detention
- The adjudicating authority must be independent and impartial and able to take binding decisions, but not necessarily in public
- Principles of equality of arms apply, which implies adversarial proceedings
- The burden is on the detaining authority to prove legality
- It may be necessary to provide legal assistance/legal aid

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<sup>329</sup> In *McKay v UK*, the applicant complained that the court to which he was brought could not grant him bail. This was because the offence he was alleged to have committed (burglary) was scheduled as being included as a terrorist offence. On the facts of the case, it was not in dispute that the applicant had not been involved in terrorist activity. Only a higher court was empowered to grant bail. In this case this meant that the applicant was dealt with some 24 hours later by the High Court, which ordered his release. The European Court found no element of possible abuse or arbitrariness arose from the fact that his release was ordered by another tribunal or judge or from the fact that the examination was dependent on his application to the High Court. The applicant's lawyer had lodged such an application without any hindrance or difficulty.

<sup>330</sup> *Neumeister v Austria*

<sup>331</sup> Article 5(4), ECHR

59. The notion of “speedily” in this context is not the same as the promptness requirement found elsewhere in the right to liberty. In relation to ongoing detention it should be possible to challenge the detention at reasonable intervals.

60. The right to challenge the legality of detention can be summarised as follows:

- First, the right to challenge detention applies to all persons deprived of their liberty and not just those suspected of committing a criminal offence;
- Second, the authority before which the challenge is to be made must be a formally constituted court or tribunal with the power to order the release of the detainee. The HRC has held that review of a petitioner’s claim before a superior military officer lacked the “judicial character” of a court hearing;<sup>332</sup>
- Third, the authority ruling on the application must be both subjectively and structurally impartial and independent from the body making the decision to detain;
- Fourth, the authority must make its decision without delay. The longer detention lasts the greater burden the State bears in justifying it;
- Finally, the right to *habeas corpus* may never be suspended. This is because of its critical role in safeguarding other absolute rights such as the right to life and the right to be free from torture. *Habeas corpus* performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing disappearances or the keeping of a detainee’s whereabouts secret and protecting that person against torture or other cruel, inhumane or degrading punishment or treatment.

### ***Compensation for unlawful detention***

61. Article 5(5) ECHR guarantees that everyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation. This does not require that the detainee establishes bad faith on the part of the authorities, however an error within jurisdiction does not necessarily give rise to a claim. In a claim for compensation, there is no need to establish that the detainee has suffered non-pecuniary damage as a result of the unlawful detention.<sup>333</sup>

### ***Safeguards for Special Categories of Detainees***

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<sup>332</sup> *Vuolanne v Finland (HRC)*

<sup>333</sup> *Danev v Bulgaria*

62. All detained people have the right to equal treatment but particular allowances will also have to be made for certain special categories including women, juveniles, the elderly, foreigners, ethnic minorities, those with different sexual orientation, those who are ill and those with mental health disabilities. Some groups may need particular protection from abuse from other detainees as well as from those detaining them.

### *Women in detention*

63. Detention of women in detention centres run exclusively by male officers can give rise to particular problems and, in some cases, very serious abuse. For example a 17-year-old female detainee was found to have been tortured having been detained by gendarmerie in an unofficial and unacknowledged detention centre, isolated from her father and sister-in-law (both detained with her), blindfolded, stripped, sprayed with cold water, raped and beaten.<sup>334</sup> It is difficult to see how any of that could have occurred had proper safeguards including the ability to have immediate access to counsel and effective judicial scrutiny been in place.
64. In another case involving allegations of threats of rape<sup>335</sup> the European Court was particularly concerned to ensure proper hygiene facilities and privacy for female detainees arrested and held at the same location with male detainees.
65. The UN's Standard Minimum Rules for the Treatment of Prisoners also set out basic ground rules for the detention of women. These are:
- Women in custody should be supervised by female members of staff;
  - They should also be held in separate institutions or segregated within an institution under the authority of female staff;
  - No male staff should enter the part of the institution set apart for women unaccompanied by a female member of staff;
  - In institutions where women are held in custody, facilities for pre-natal and post-natal care and treatment must be provided;
  - Wherever possible, arrangements should be made for children to be born in hospitals outside the institution.

### *Juvenile detention*

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

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<sup>334</sup> *Aydin v Turkey*

<sup>335</sup> *Elci v Turkey*

67. Article 37 of the Convention emphasises that detention of children should be a measure of last resort and used for the shortest possible period of time. It requires due account to be taken of their needs and states that they should be kept separate from adults unless, as in the case of detention of their carer or parents, it is considered in their best interests to be kept together.
68. The CPT has also laid down some specific safeguards for protecting children against ill-treatment in detention. It has endorsed the approach taken in certain jurisdictions that recognise that the inherent vulnerability of juveniles requires that additional precautions be taken.
69. These include placing police or other detaining officers under a formal obligation to ensure that an appropriate adult person is notified of the detention of the juvenile and a prohibition on interviewing a juvenile unless an appropriate adult or lawyer is present.
70. Juveniles should not be detained in adult detention facilities.<sup>336</sup> Violations of Article 5 ECHR have been found in a number of cases where juveniles have been detained in adult institutions pre-trial.<sup>337</sup>

#### *People with mental health problems*

71. The UN's Standard Minimum Rules also provide guidance for people with mental health problems. They state that people with mental health problems shall not be detained in prisons and shall be observed and treated in specialised institutions under medical management.
72. Similarly the CPT has set out a number of principles:
- First, a mentally ill prisoner should be kept and cared for in a hospital facility, which is adequately equipped and possesses appropriately trained staff.
  - Second, this facility should be a civil mental hospital or specially equipped psychiatric facility within the prison system.
  - Third, a mentally ill violent prisoner should be treated through close supervision and nursing support. While sedatives may be used, if considered appropriate, instruments of physical restraint should only be used rarely and must either expressly be authorised by a medical doctor or be immediately brought to the attention of a doctor. These should be removed at the earliest opportunity and should never be used as a means of punishment.

#### ***Deprivation of Liberty: the tests required***

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<sup>336</sup> *Nart v Turkey*

<sup>337</sup> For example, *Güveç v Turkey*

- Is the right to liberty engaged (i.e. has the individual in question been detained)?
- If so, what is the legal authority for his or her detention and have the procedural requirements of domestic law been complied with?
- If so, is the detention permitted under Article 5(1)(a) to 5(1)(f)?
- If so, were reasons given to the individual for his or her detention?
- If so, is there a procedure whereby the individual can test the legality of his or her detention before a court in accordance with *habeas corpus*?
- In the criminal context, have the pre-trial rights been complied with (bearing in mind that bail and trial within a reasonable period are not alternatives)?
- In all cases, is there an enforceable right to compensation for anyone detained in breach of his or her right to liberty?

## 4. The Right to a Fair Trial

1. Article 6, ECHR<sup>338</sup> and Article 14, ICCPR, which set out specific guarantees in relation to both criminal and civil proceedings, protect the right to a fair trial.

### *The importance of the right to a fair trial*

2. The closely related principles of “due process” and “the rule of law” are fundamental to the protection of human rights. Such rights can only be protected and enforced if an individual has recourse to courts and tribunals, independent of the State, which can resolve disputes in accordance with fair procedures. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for “substantive protection” against State power. The protection of human rights therefore begins but does not end with fair trial rights.<sup>339</sup>
3. Fair trial rights are not only a fundamental safeguard to ensure that individuals are not unjustly punished under the criminal law, but they are also indispensable for the protection of other human rights, including the right to freedom from torture and the right to life, and, especially in political cases, the right to freedom of expression and freedom of association.

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<sup>338</sup> Article 6, ECHR states:

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of 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.

<sup>339</sup> Clayton, R. and Tomlinson H. *Fair Trial Rights* (2001)

4. The implementation of the right to a fair trial therefore plays a crucial role in the maintenance of order, the rule of law and confidence in the State authorities. If there is a system of fair trial in place, before independent and impartial judges, there is an assurance, in principle:
  - That convictions are well-founded;
  - That the executive arm of government can, if necessary, be held to account; and
  - There is an effective dispute resolution system between private parties.
5. As such, as well as being the corner stone of a democratic society, the right to a fair trial is also one of the main bulwarks against chaos and anarchy.
6. Fair trial rights therefore are also relevant to administrative and civil proceedings. While nations have developed different systems of administrative, civil and criminal procedures, international human rights law has been able to establish a number of fair trial principles that straddle and apply broadly to all legal systems.

### ***The Right to a Fair Trial and the Right to an Effective Remedy***

7. A key feature of the right to a fair trial is that, ultimately, it is through the medium of fair trial that the right to an effective remedy is guaranteed. This is a further reason why the right to a fair trial is so vital to the whole scheme of human rights. The relationship between the right to a fair trial and the right to an effective remedy is a symbiotic one. Whether rights are being enforced through the normal trial processes, or by way of judicial review of administrative acts, the requirement for fairness remains the same.<sup>340</sup>

### ***The Right to a Fair Trial and How it Works***

8. As a general principle, whether dealing with criminal or civil law, the right to a fair trial is considered to be fundamental to the whole scheme of human rights. It needs therefore to be given a wide and broad interpretation. To give it a restrictive interpretation would not correspond to the object and purpose of the ECHR.<sup>341</sup>
9. The crucial aspect of the right to a fair trial is that it is not simply a matter for the State to respect the right to a fair trial. Governments must also put into place a legal and institutional framework to protect it. As such the right to a fair trial requires the State to provide, amongst other things:
  - Availability of legal assistance, including legal aid;
  - A prosecution service; and

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<sup>340</sup> Council of Europe Recommendation Rec(2004) 20, of the Committee of Ministers to member states on judicial review of administrative acts, 15 December 2006

<sup>341</sup> *Delcourt v Belgium*

- A trained and independent judiciary.

### **Is the right to a fair trial absolute?**

10. The right to a fair hearing lies at the heart of the concept of a fair trial and encompasses all the procedural and other guarantees laid down in international standards. These include the right to cross-examine witnesses, the right to be defended by a lawyer of choice, as well as the right to be presumed innocent and the right to be tried without undue delay.
11. The right to a fair trial, as a procedural right, is different to other guarantees of substantive human rights protection, such as the right not to be tortured or freedom of expression, and are subject to their own rules of interpretation. Therefore fair trial rights do not fit neatly into the categorisation of rights as either absolute, or rights that permit limits.
12. However, what is clear is that taken as a whole, with the benefit of a review of the entire process, the right to a fair trial is an absolute right. In this respect, the right to a fair trial cannot be limited in, for example, the public interest. That said, under certain limited circumstances, it is possible to derogate from aspects of the right to a fair trial as long as that derogation does not undermine the whole notion of due process and the rule of law.

### **When is it permissible to limit fair trial guarantees?**

13. Constituent fair trial rights (but not a fair trial as a whole) are sometimes subject to interpretation in the public interest. This does not mean that they are qualified rights.
14. It is essential that any attempt to limit the constituent elements of the right to a fair trial is seen as a different exercise to the approach taken to qualify rights such as freedom of expression and privacy. Those rights are intended to be balanced between the right on the one hand, and the community's interest on the other, or in relation to competing rights.
15. Whether there may be a need to limit certain elements of Article 6, the motivation for doing so, and the process in carrying out this exercise, is different. The aim is to ensure the fairness of the trial, whilst at the same time acknowledging that to ensure fairness to all involved, including the public interest, it may be necessary to adopt different procedures. Sexual abuse cases may be the most straightforward example. It may be necessary to ensure that alleged victims are not required to be directly confronted by the defendant. Therefore the methods and content of cross-examination can be limited to guarantee victim's rights. If this happens, this must be balanced out to ensure that the defence is still provided a fair trial. For example, the tribunal which decides the guilt or

innocence of the defendant must take this into account and attach appropriate weight to the evidence.

16. It is less clear cut that it is appropriate to limit fair trial rights in cases involving national security, and counter-terrorism in particular. A State, for example, may have good reasons for not wishing to disclose all its evidence to the defence, however to fail to do so may significantly prejudice the defendant who is therefore not in a position to rebut these allegations, and thus potentially prove his or her innocence.
17. It is in these contexts that the right to a fair trial is most stretched. It then becomes incumbent upon the State to propose mechanisms that guarantee the fairness of a trial, whilst also preserving the State's interest in protecting national security. It is then up to the court to decide whether such procedures are fair and to either accept, reject or modify them. For example, the European Court appears to have approved of a system in national security cases where a special counsel is appointed to act in the interests of a fair trial. This counsel sees all the evidence, but the defence does not. That special counsel can therefore, without disclosing that evidence, take instructions from the defence and make representations to the court.<sup>342</sup>

### **Derogating from the right to a fair trial**

18. As has already been discussed above, like the right to liberty, it can be lawful under limited circumstances to derogate from the right to a fair trial if there is a national emergency. However, any such derogation cannot undermine the principles of independence and the impartiality of a court or tribunal.
19. The HRC has stressed that certain elements of the right to a fair trial must be respected, even under states of emergency.<sup>343</sup> The HRC has pointed out that, "The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (Article 14 of the Covenant)".<sup>344</sup>

### ***The Right to a Fair Trial in Civil Proceedings***

20. If it is established that civil rights and obligations are being determined, then there is an obligation on the part of the State to ensure a fair trial in their determination, regardless of who the parties are.

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<sup>342</sup> *Chahal v UK*

<sup>343</sup> Human Rights Committee, General Comment No. 29.

<sup>344</sup> Concluding observations of the Committee Against Torture: Yemen (CAT/C/CR/31/4). See also Concluding observations of the Committee against Torture: Egypt (CAT/C/CR/29/4). See also *Nallaratnam v Sri Lanka* (HRC).

21. In essence civil rights and obligations are determined in any proceedings “the result of which is decisive for private rights and obligations”. Article 6(1) therefore applies irrespective of the status of the parties or of the nature of the legislation/law that governs the manner in which the dispute is to be determined.
22. For Article 6(1) to apply it is enough that the outcome of the proceedings will be decisive for private rights.<sup>345</sup>

### **What is a “determination”?**

23. Proceedings that only have a tenuous connection with civil rights and obligations are outside the scope and protection of Article 6(1). For example, in *Balmer-Schafroth v Switzerland*, the applicants could not establish a direct link between the operating condition of the power station that they were contesting and their right to protection of their physical integrity.
24. *Ex-gratia* or discretionary payments of benefits are unlikely to engage Article 6(1) as there is no right to them. Therefore, if the government sets up a fund in response to an emergency where people can make an application for financial assistance the discretionary nature of this fund will almost certainly take it outside the scope of Article 6(1).
25. In *Fayed v UK* the applicant sought to argue that he had been denied the right to a fair trial in relation to an official inquiry into his activities. The Strasbourg Court held, however, that in relation to that inquiry there was no disposition of legal rights and duties and therefore Article 6(1) was not engaged in the first instance.
26. In *Micallef v Malta* the European Court made clear that interim proceedings may engage Article 6(1). The nature of the interim measure, its object and purpose, and its effect on the right should be assessed. The Court did, however, accept that in exceptional circumstances the legitimate objectives of the interim measure would be defeated by the application of Article 6(1), and if that was shown, the right to a fair trial would not be breached to the extent that it was not possible to ensure certain safeguards.
27. Procedural determinations have not traditionally been held to determine a civil right, but more recently the European Court, has, for example, proceeded on the basis that Article 6(1) applies to decisions on permission to appeal.<sup>346</sup>

### **What are civil rights and obligations?**

28. What is a civil right is an autonomous concept dependent on the substantive character of the right, rather than its characterisation in domestic law. It is the impact of the proceedings on the parties rather than their classification in

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<sup>345</sup> *Ringeisen v Austria* 1 EHRR 513

<sup>346</sup> *Mendel v Sweden*

domestic law that is crucial<sup>347</sup>, and States cannot simply remove from the jurisdiction of the courts a range of civil claims without supervision by the European Court.<sup>348</sup>

29. When civil rights are being determined this will include all types of private litigation between individuals up to and including the assessment of damages and enforcement of judgements.<sup>349</sup> Article 6 is not, however, confined strictly to private law rights and it will also include some, but not all, decisions of a public law character.
30. For Article 6(1) to apply the right must exist in domestic law. It does not require a State to provide legal remedies where none already exist, and it cannot create rights that are not at least arguably already recognised in domestic law. Therefore, it does not in itself guarantee any particular content for civil rights and obligations in substantive law.<sup>350</sup>
31. As such, a restriction, immunity or privilege may apply which extinguishes a right in domestic law and under such circumstances, Article 6(1) will have no application.<sup>351</sup> But where a right is limited, but not extinguished in domestic law Article 6(1) will apply.<sup>352</sup> This is explained in detail below.
32. One way of determining whether a right is a civil right, is to ask whether it is of a predominantly personal, private or economic nature<sup>353</sup>, as opposed to rights which are predominantly public or political in character.<sup>354</sup> Where both features are present, the European Court will balance which features are predominant.<sup>355</sup>

### ***Disputes held to be civil rights***

33. Examples of disputes held to be civil rights are:

- Rights of private individuals, e.g. contract or tort disputes, which may include the private rights of a third party affected by a decision of a public authority;
- Right to enjoy a good reputation, subject to relevant immunities, e.g. parliamentary;
- Property rights;
- Family rights, provided the family relationship in question is sufficiently close;
- Right to engage in commercial activities and carry out business;
- Right to enter and practise a profession;

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<sup>347</sup> *Konig v Germany*

<sup>348</sup> *Fayed v UK*

<sup>349</sup> *Hornsby v Greece*

<sup>350</sup> *H v Belgium*

<sup>351</sup> *Powell & Rayner v UK*

<sup>352</sup> *Osman v UK*

<sup>353</sup> *Editions Periscope v France*

<sup>354</sup> For example, *Yazar v Turkey*

<sup>355</sup> *Feldbrugge v The Netherlands*

- Rights to compensation;
- Welfare benefits, although there will not normally be a civil right to a wholly discretionary benefit.

34. The unlawful acts of public authorities which give rise to compensation in domestic law will constitute civil rights.<sup>356</sup>

35. Disciplinary proceedings do not normally determine civil rights and obligations unless those proceedings affect the right of an individual to pursue his or her professional activities. When this happens Article 6(1) guarantees must be applied:

- *H v Belgium* – lawyers;
- *Stefan v UK* – doctors;
- *Guchez v Belgium* – architects.

36. A key factor to be taken into account is the severity of any penalty or sanction to be imposed. Proceedings that could lead to a warning or reprimand need not necessarily engage Article 6(1) standards or rights.<sup>357</sup>

37. Licensing decisions, where they affect a profession or the right to engage in commercial activity, will attract Article 6(1) rights.<sup>358</sup>

### ***Disputes held not to engage civil rights***

38. Examples of disputes held not to be civil rights are:

- Tax obligations;
- Education rights;
- Immigration rights;
- Right to stand for public office;
- Right of political parties to continue their activities;
- Refusal to issue a passport;
- Right of access to information, unless such information must be disclosed pursuant to Article 8<sup>359</sup>, or where such information may assist in establishing a claim for damages<sup>360</sup>;
- Imposition of reporting restrictions on the press preventing reporting of a public trial;
- Obligations to perform military or civic service.

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<sup>356</sup> See, for example, *Kaukonen v Finland*

<sup>357</sup> *Le Compte, Van Leuven & De Meyere v Belgium*

<sup>358</sup> *Konig v Germany*

<sup>359</sup> *Gaskin v UK*

<sup>360</sup> *McGinley & Egan v UK*

39. If the dispute is essentially of a public law character, Article 6(1) will not apply. So for example, there is not a private law right to education or immigration status. These areas are governed by principles of public law and as such there is no right to them that could be resolved as if between two private parties. The existence of a discretion by an administrative authority in the area in question will be relevant, although not decisive.<sup>361</sup>
40. This does not mean that any dispute involving a public authority or regulated by the State is outside the scope of Article 6(1). For example, most property disputes between a private party and a public authority will determine civil rights, and therefore Article 6(1) will apply.
41. In relation to employment disputes for those who are essential to the administration of the State, such as civil servants, police officers and members of the armed forces, the European Court has recognised the State's interest in controlling access to a court for certain categories of staff but has stated that the current position of the law<sup>362</sup> is that:
- If the State excludes certain disputes from the courts, the European Court would itself verify whether this could be justified;
  - In order to exclude the matter, the State must first expressly exclude access to a court in domestic law;
  - Second, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the sector or category of persons participates in the exercise of public power is not in itself decisive;
  - Therefore, there can in principle be no justification for excluding ordinary labour disputes from Article 6(1) simply because of the special relationship between the civil servant in question and the State;
  - A presumption exists that Article 6(1) applies.

***When a civil right is being determined, the right to a fair trial requires:***

### **Independent and impartial tribunal**

42. Article 6(1) tribunals must be independent from the executive and the parties and be above influence. Such tribunals must also be established by law. The mere fact that a professional disciplinary body includes members of the profession does not of itself offend the requirement for independence,<sup>363</sup> although the manner of appointment may be relevant. For more detail, see below in relation to a criminal trial.

### **Trial within a reasonable time**

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<sup>361</sup> *Jacobsson v Sweden; Masson v Van Zon v The Netherlands*

<sup>362</sup> *Eskilinen v Finland*. This decision alters the Court's original approach on *Pellegrin v France*

<sup>363</sup> *Stefan v UK*, 9 December 1997

43. In relation to delay relevant factors will be: a) the complexity of the case; b) what is at stake for the applicant; c) the conduct of the relevant authorities, including the courts; and d) the conduct of the applicant. Certain types of cases call for particular diligence. These include childcare cases, serious personal injury, cases involving the elderly or infirm, and employment disputes. In relation to a civil trial, time runs from the initiation of proceedings and ends with the enforcement of judgement.

### Access to court

44. As with criminal trials, the right of access to court has been read into the notion of a fair trial. Access to court is not an absolute right; restrictions are permitted but only in so far as they pursue a legitimate aim and are proportionate. Reasonable limitation periods and time limits can be lawful,<sup>364</sup> as can reasonable qualification periods required before bringing proceedings,<sup>365</sup> as well as restrictions on vexatious litigants. Security for costs can operate as a restriction on access to court and therefore must be treated with caution. It may be appropriate to make such an order on appeal, but it is less likely to be appropriate at first instance.<sup>366</sup> In relation to costs generally, although there is no right to costs in Article 6(1), reasonable costs for the successful party is considered to be part of the determination of civil rights and obligations. Court fees may, subject to the facts of the case and the ability of the individual to pay them, deny access to a court.<sup>367</sup>

45. Individuals are free to waive their rights of access to court by agreeing to arbitration. However, such agreements must be genuinely voluntary and must be subjected to careful review to ensure the applicant was not subject to constraint.<sup>368</sup>

46. Without access to court the essential protection guaranteed by Article 6(1) would be pointless. The indispensable nature of the need for access to court was emphasised succinctly by the Strasbourg Court in *Golder v UK*, pointing out that:

*“The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.”*

47. In the absence of such a right it would be open to a State to deprive an individual of their Article 6 rights by creating insurmountable hurdles that prevent them from getting legal proceedings off the ground, or appealing against decisions at first instance.<sup>369</sup> Reading into Article 6(1) an inherent right of access to a court in the

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<sup>364</sup> *Stubbings v UK*

<sup>365</sup> *Stedman v UK*

<sup>366</sup> *Tolstoy Miloslavsky v UK*

<sup>367</sup> *Krausz v Poland*

<sup>368</sup> *Deweert v Belgium*

<sup>369</sup> *Somerfeld v Germany; Mendel v Sweden*

determination of civil rights and obligations has led to a rich vein of case law that deals with the right to institute civil proceedings. Article 6(1) therefore is not just concerned with the conduct of an action already initiated before a court. It is also as concerned with ensuring access to court in the first instance.

48. In *Golder v UK* the Court held that “by its very nature [access to court] calls for regulation by the State, which may vary in time and place according to the needs and resources of the community and of individuals”. As already noted, any limits on the right of access to court must be strictly necessary and proportionate to a legitimate aim, the obvious examples being restrictions on access to court for psychiatric patients, vexatious litigants and bankrupts, as well as limitation periods.

### *Legislative Intervention*

49. The Strasbourg Court has on a number of occasions been required to deal with circumstances where the legislature intervenes during the course of civil proceedings, which has the effect of determining their outcome. This can violate the right of access to court.

50. The approach of the Court has been that where the intervention by the legislature with the administration of justice is designed to influence the judicial determination of the dispute, this is an interference with the right to a fair trial protected by Article 6.<sup>370</sup> This is particularly the case where the State, or an emanation of it, is party to the proceedings.

51. There have been a number of cases concerning Croatia where the Court has found a violation of Article 6 when cases have been stayed, by amendment to an Act of Parliament, pending the adoption of new legislation to deal with the matter in issue. These have been cases emanating from the conflict during the 1990s.<sup>371</sup> The Court has stressed, “the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable.”

52. However, the Court has drawn a distinction whereby if legislation, which will have retrospective effect that will affect the outcome of a case, is introduced, this will not violate Article 6 if it is designed to close a loophole in legislation and the primary intention of which is not to defeat the outstanding claims.<sup>372</sup> Therefore, in *National and Provincial Building Society and Others v UK* there was no violation of Article 6 where the UK Parliament passed retrospective legislation following a decision of the UK’s highest court which had imposed an obligation on the Inland Revenue to repay interest on overpayments of tax.

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<sup>370</sup> *Stran Greek Refineries and Stratis Andreadis v Greece*

<sup>371</sup> See for example, *Kastelic v Croatia*

<sup>372</sup> See, for example, *Acimovic v Croatia*

53. The consequence of that legislation was to defeat outstanding claims to restitution brought by the applicant building societies. In that case the Court emphasised that any reasons adduced to justify such measures must be treated with the greatest possible degree of circumspection.
54. This approach was followed in *OGIS-Institut Stanislas and Others v France*. The Court again considered that the legislature had intervened to correct a technical flaw in the law with the purpose of filling a legal vacuum and re-establishing parity. Therefore the retroactive reduction of the amount of reimbursement of contributions paid by bodies administering private schools had not violated Article 6.
55. The applicants had sought to obtain a windfall by taking advantage of a loophole in the regulations, were aware, or ought to have been, that the State would seek to remedy the legal shortcomings. In the Court's view the legislature's intervention had been entirely foreseeable and had been clearly and compellingly justified in the general interest.
56. In another recent case against Spain, concerning a local community's attempt to prevent the building of a dam and the flooding of their village, this principle was re-affirmed. As a consequence of a new law, construction of the dam continued despite the fact that earlier it had been halted. The Court found no violation of Article 6(1) and pointed out that the law was of general application and had not been passed for the purpose of circumventing the principle of the rule of law and in particular had not been intended to remove the courts' power to rule on the lawfulness of the proposed dam.<sup>373</sup>
57. In such cases, the fact that the State is not a party to the proceedings in question will be a relevant factor.<sup>374</sup>

#### *Procedural and Substantive Restrictions on Access to Court*

58. Where there is a substantive limit on access to court, whether as a result of a defence privilege or immunity, and there is no right of access to court under domestic law, Article 6 will then be inapplicable. For example, in *Powell and Rayner v UK* it was held that the applicants had no right of access to court as no such substantive right existed under domestic law.<sup>375</sup> Therefore, the applicants could not rely upon Article 6(1). The case concerned aircraft noise nuisance and the applicants' attempt to challenge flights coming in and out of Heathrow.
59. The matter is less clear-cut in cases which seek to draw distinctions between procedural and substantive limitations of a given entitlement under domestic law.

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<sup>373</sup> *Gorraiz, Lizarraga and Others v Spain*

<sup>374</sup> *Gabor v Serbia*

<sup>375</sup> 12 EHRR 355.

In *Osman v UK* the Court rejected the argument that a particular exclusionary rule, in that case the inability to sue the Police in relation to operational matters in negligence, in effect gave no access to court under Article 6(1) because as a consequence there was no substantive right.<sup>376</sup> Instead, they held that the exclusionary rule was a restriction on access to court that required justification according to the principles of necessity and proportionality, and that under the circumstances, those tests had not been made out.

60. *Osman* was then followed by *Z v UK* where the Strasbourg Court sought to clarify its understanding of the English law of negligence. In effect, the Court partly overturned their decision in *Osman*.<sup>377</sup> In *Z*, the Court accepted that the public policy that established no duty of care was owed to the applicants amounted to a substantive bar that meant no cause of action existed, thereby making Article 6(1) inapplicable on the same basis as *Powell and Rayner* (see above). As such the question as to whether it was a necessary and proportionate interference with the right of access to court did not apply.
61. *Z* also concerned the immunity from suit in negligence actions of certain key workers, in that case social workers. In *Z*, the Court accepted that there was no substantive right of action in domestic law and that Article 6(1) had been satisfied by the strike out proceedings. These had resulted in the dismissal of the case on the basis that a cause of action could not be brought against the defendants.
62. The Court then went on to hold that, on the facts of the case, there had been a violation of Article 3 of the ECHR (which protects against torture, inhuman and degrading treatment and punishment) and importantly the applicants' had not been guaranteed an effective remedy, as guaranteed by Article 13, in relation to that finding of a violation.
63. *Z* reaffirms that Article 6 does not itself guarantee any particular content for civil rights in substantive law. However, even under such circumstances, where the bar on access to court is substantive and not procedural, the Court may still find that the substantive bar is wholly disproportionate and one that cannot be justified. It is still open to the Court to challenge a substantive bar where that bar would amount to an arbitrary denial of access to court. Therefore, in *Z v UK* the Court considered there to be sufficient public policy reasons for it.

## Immunities

64. In cases involving immunities and privileges, where there is an arguable claim in domestic law, the Court will look very closely at defences or immunities which operate to defeat such a claim or prevent it from being determined on its merits. Such procedural bars must be justified on the basis of the test of necessity and proportionality. For example, State immunity is considered to be proportionate to

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<sup>376</sup> 29 EHRR 245

<sup>377</sup> 34 EHRR 3

the legitimate aim of complying with international law to promote comity and good relations between States, even where this amounts to a denial of access to court.<sup>378</sup> Similarly, the immunity from suit of the European Space Agency is a justified and proportionate restriction on access to court.<sup>379</sup>

65. The principle, however, of restricting limits on access to court was elaborated in *Fayed v UK* where the court held:

*"Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined in national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6(1) may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the state concerned. However, it would not be consistent with the rule in a democratic society or with the basic principle underlying Article 6(1) – namely that the civil claims must be capable of being submitted to a judge for adjudication – if, for example, a state could, without restraint or control, by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons."*<sup>380</sup>

### *Parliamentary Immunity*

66. Cases against Italy have confirmed that Parliamentary immunity, whilst pursuing a legitimate aim, cannot be relied upon in relation to statements made by a Member of Parliament outside the exercise of his (or her) functions. Under those circumstances such an immunity is a disproportionate impediment on access to court.<sup>381</sup> These Italian cases should be contrasted with *A v UK* which, amongst other things, held that Parliamentary immunity is lawful in that the immunity attached only to statements made in the course of Parliamentary debates.

### **Equality of arms**

67. Equality of arms is essentially the mechanism developed by the Court, whereby a trial is ensured to be fair. As well as requiring that a fair balance be struck between the parties in order that each party has a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent, equality of arms essentially requires that all judicial proceedings should be adversarial.

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<sup>378</sup> *Fogarty v UK* and *Al-Adsani v UK*,

<sup>379</sup> *Beer and Regan v Germany*

<sup>380</sup> 18 EHRR 393.

<sup>381</sup> *De Jorio v Italy*

68. The most effective way of ensuring that adversarial quality to the determination of civil rights is to import within the notion of equality of arms the procedural guarantees spelt out as basic minimum guarantees for a criminal trial in Article 6(3). These are explained in detail below. In particular these include, the right to understand the nature of the action, adequate time and facilities to prepare a case, where appropriate to be given legal assistance to ensure that legal proceedings are effective, and to be able to examine or have examined witnesses and to be able to rely on witnesses. If necessary an interpreter should be provided.
69. A number of Strasbourg cases have alluded to the principle that the guarantees of Article 6(3) should be read into Article 6(1), even in relation to civil matters.<sup>382</sup> The Court has stressed that the right to an adversarial procedure means ‘in practice an opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed’.<sup>383</sup>
70. Although as a general principle the Court does accept that it is for the domestic courts to assess the necessity of hearing a particular witness, in exceptional circumstances, if a court refuses to hear a witness, this may constitute a violation. In *Tamminen v Finland*, the Court held that there was a violation of Article 6(1) on account of the refusal to hear a witness in civil proceedings.

### Access to legal assistance

71. Article 6 does not require legal aid to be made available for civil proceedings, however, under certain circumstances lack of State provision of legal assistance can interfere with the right of access to court depending upon what is at stake in the proceedings, the nature and complexity of the case, and the capacity of the individual to represent him or herself.<sup>384</sup>
72. Article 6, like all Convention rights, is to be “practical and effective”, not “theoretical and illusory.” Therefore, under the doctrine of positive obligations, the State may be required to ensure that, even in some civil matters, a potential litigant is properly represented in court proceedings. Since *Airey v Ireland* it has been an established principle of Article 6(1) that under certain circumstances legal aid is required to ensure that a litigant has an effective determination of his or her civil rights and obligations. This principle was brought up to date in *Steel and Morris v UK*, commonly known as the ‘McLibel’ case, where the Court, applying the *Airey* principles, held that the applicants ought, to ensure that they had a fair trial, to have been legally aided.
73. In ‘McLibel,’ the applicants, two campaigners, were sued by the McDonalds in libel. The applicants were unable to pay for lawyers and legal aid was

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<sup>382</sup> *Albert and Le Comte v Belgium and X v Austria*

<sup>383</sup> *JJ v Netherlands*

<sup>384</sup> *Airey v Ireland; Handölsdalen Sami Village v Sweden*

unavailable. The case was particularly complex. The trial was the longest trial in English legal history and lasted over 300 days. The applicants defended themselves and McDonalds had a team of lawyers, including a senior lawyer.

74. This case should be contrasted with *McVicar v UK* where no violation of Article 6(1) was found in relation to the absence of legal aid for the defendant in defamation proceedings. Essentially, 'McLibel' can be distinguished from *McVicar* in that the latter case was not considered to be sufficiently complex to require a person in the applicant's position to have legal assistance. Also in *McVicar*, the litigation was not considered to be of the same character as that in *Airey*. The emotional consequences of it were limited.

75. Mandatory representation requirements may raise issues under Article 6(1) where legal aid is denied. The lead case in relation to this is *Aerts v Belgium* where the Court held that the absence of legal aid for an appeal to the Court of Cassation, where legal representation was compulsory, impaired the very essence of the applicant's right of access to court.

### **Right to an adversarial hearing**

76. As an accepted principle of Article 6(1) case law, proceedings which determine civil rights should be adversarial. At the same time, fairness requires that the parties are present.

### **Disclosure of evidence**

77. In relation to the right to disclosure of evidence and the right to equality of arms generally, Article 6(1) has been read in a manner consistent with Article 6(3)(d) in the criminal context, and the parties must be given a proper opportunity to present their case, including their evidence, and they must be able to cross examine their witnesses.

### **Right to a public hearing**

78. Parties can waive their right to a public hearing, but otherwise hearings as required by Article 6(1), subject to the identifiable limitations, should be held in public.

### **Reasons for decisions**

79. Reasons must be given for judgements, but this does not require a detailed answer to every argument.

### **Enforcement of court judgments**

80. The guarantees of Article 6 include the implementation of court decisions, otherwise the right of access to court would be rendered illusory.<sup>385</sup>

### **Decision Making and Independence from the Executive**

81. It is a recognised principle of Strasbourg case law that “respect must be accorded to decisions taken by administrative authorities on grounds of expediency.”<sup>386</sup> In relation to administrative decision making, which determines civil rights, such as the system of planning control whereby a Government minister makes the final decision on a planning application, subject only to judicial review, significant issues are raised as to the independence of the decision-maker. This issue has been addressed in *Holding and Barnes v UK*.

82. The principle to be derived from *Holding and Barnes* is where the application of policy is concerned, and thus the exercise of discretion conferred by Parliament, judicial review is sufficient even where the decision maker is a branch of the State.

83. Judicial review would therefore appear to be sufficient in all administrative law cases to satisfy Article 6(1).

84. In *Bryan v UK*, the Court accepted that judicial review could be sufficient for Article 6(1) purposes to remedy any defect in the administrative decision making process, i.e. lack of independence. *Bryan*, like *Holding and Barnes* also concerned planning policy. In that case the lack of independence of the planning inspector was being challenged. The applicant, in that case failed in establishing a violation of Article 6(1) for a number of reasons. These included:

- the specialised subject matter of the decision appealed against;
- the quasi-judicial character of the proceedings before the inspector;
- the duty of the inspector to act independently and not be subject to extraneous influence;
- the duty of the inspectorate to act impartially.

85. Of crucial importance was the quasi-judicial character of the fact finding process, which to all intents and purposes complied with the fairness standards of Article 6(1), except for its lack of independence. The domestic courts could also intervene on traditional judicial review grounds, even if they could not substitute their decision for that of the decision-maker.

86. The current position of the law is that if the administrative decision in question is subject to subsequent control by a judicial body that has full jurisdiction, can quash the decision in question, and overall the process complies with Article

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<sup>385</sup> *Hornsby v Greece*

<sup>386</sup> *Zumtobel v Austria*, 17 EHRR 116

6(1), then Article 6 will be satisfied.<sup>387</sup> A complete rehearing or appeal before an independent and impartial tribunal will satisfy Article 6, but depending on the circumstances, a rehearing may not be necessary, and a higher court's ability to address errors of law will be sufficient.<sup>388</sup> What is required will depend on the subject-matter of the decision, the procedure for reaching the decision, the nature of the dispute.<sup>389</sup> To take one example, where the issue arising from the decision is a simple question of fact, conventional judicial review may be inadequate.<sup>390</sup>

## Separation of Powers

87. In *Kleyn and Others v The Netherlands*,<sup>391</sup> the Grand Chamber was faced with a situation in which the Netherlands Raad van State had played a role in the legislative process and subsequently acted in a judicial capacity. The issues were thus similar to those examined in *Procola v Luxembourg*,<sup>392</sup> in which the Court had found a violation of Article 6. However, the Court considered that the two cases could be distinguished, since in *Kleyn* the Raad van State had not been called on to interpret and apply the law on which it had previously given an opinion.

## EU Charter of Fundamental Rights

88. The potential impact of the right to a fair trial guaranteed by the EU Charter of Fundamental Rights should not be overlooked. The right to a fair trial is found in Article 47, which asserts:

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

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

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

89. Article 47 draws no distinction between civil and criminal matters. All that is required to engage the Article is the violation of the rights and freedoms guaranteed by EU law. The Charter itself contains a comprehensive catalogue of

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<sup>387</sup> *Albert and Le Compte v Belgium; Crompton v UK; Kingsley v UK*

<sup>388</sup> *Bryan v UK*

<sup>389</sup> See, for example, *Crompton v UK*

<sup>390</sup> *Tsfayo v UK*

<sup>391</sup> Judgment of 6 May 2003

<sup>392</sup> 22 EHRR 193

rights protected by the EU. These include both civil and political and economic and social rights. The Charter's Explanations prepared by the Praesidium clarify the meaning of Article 47 as follows:

*"The first paragraph is based on Article 13 of the ECHR ...(the right to an effective remedy)"*

*"However, in Community law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined the principle in its judgment of 15 May 1986 (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313. According to the Court, this principle also applies to the Member States when they are implementing Community law. The inclusion of this precedent in the Charter is not intended to change the appeal system laid down by the Treaties, and particularly the rules relating to admissibility. This principle is therefore to be implemented according to the procedures laid down in the Treaties. It applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law."*

*"The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows ...*

*"In Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Community is a community based on the rule of law as stated by the Court in Case 294/83, "Les Verts" v. European Parliament (judgment of 23 April 1986, [1988] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.*

*"With regard to the third paragraph, it should be noted that in accordance with the case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR Judgment of 9.10.1979, Airey, Series A, Volume 32, 11). There is also a system of legal assistance for cases before the Court of Justice of the European Communities."*

90. The potential effect of Article 47 is self-evident. In theory it simplifies the approach to Article 6. It could also be far-reaching. Does it mean that asylum claims based upon EU directives, that in the absence of the Charter would have been classified as non-civil rights, are now entitled to fair trial guarantees as provided for by Article 6(1)?

## ***The Right to a Fair Trial in Criminal Proceedings***

91. The starting point in relation to the right to a fair trial in criminal proceedings is as follows:

- The right to a fair trial requires the right to equal treatment by the courts;
- This means that the defence and the prosecution are to be treated in a manner that ensures that both parties have an equal opportunity to present their cases during the course of the proceedings; and
- That every accused person is entitled to be treated equally with other similarly placed accused people, without discrimination.

92. One implication is that a person charged with a criminal offence such as destruction of property should be afforded the same guarantees whether or not the offence occurred in a “political” or “ordinary criminal” context.

93. Where the determination of a criminal charge is involved, the right to a fair trial falls into four broad sections. These are:

- Access to a lawyer;
- The requirement to guarantee a fair trial in both civil and criminal matters which identifies certain key elements, as well as limits, for the trial process such as when a trial can be in private;
- The presumption of innocence in criminal cases;
- Further specific procedural protections in criminal cases.

### ***Access to a Lawyer***

94. Access to a lawyer is as important under the right to fair trial as it is to the right to liberty. Prompt access to lawyers is central to the administration of justice and the effective prosecution of offenders. As such, it will be a pre-requisite to any compliance with fair trial guarantees. The European Court has held that even a 24-hour delay in access to a lawyer would involve a violation of the right to a fair trial.<sup>393</sup>

95. Effective access to a lawyer means access must be confidential, unless a detainee may feel intimidated from disclosing ill-treatment. This requirement for confidential access has long been emphasised by the HRC and it is reflected in the rules and procedures of the International Criminal Court. The European Court has emphasised,

*“ ...that an accused’s right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a*

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<sup>393</sup> *Averill v. the United Kingdom*

*democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.*<sup>394</sup>

### *Respect for the functions of a lawyer*

96. In a case concerning the detention of 16 lawyers the Court found violations of the prohibition on torture and ill treatment in a series of respects in relation to 9 of the detainees.<sup>395</sup> The applicants represented a large element of the local defence Bar practising in the South East of Turkey at the height of the problems in that region.

97. The European Court made it clear how critical freedom of action on the part of lawyers was to the maintenance of the rule of law and made a very strong statement as to the importance of not associating lawyers with the alleged causes or actions of their clients. The Court said the following:

*“The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers’ offices, will be subject to especially strict scrutiny by the Court.”*

### **The Component Parts of a Fair Trial**

98. The elements identified for a fair trial in a criminal proceedings can be broken down by addressing the following questions.

### **What is a criminal charge?**

99. Fair trial rights apply not only to court proceedings but also to the stages which both precede and follow them. A State cannot escape its obligations under the right to a fair trial and the application of criminal procedural safeguards by seeking to classify criminal matters as non-criminal, yet at the same time retaining criminal sanctions. As such, a criminal charge is an autonomous

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<sup>394</sup> *Ocalan v Turkey*

<sup>395</sup> *Elci v Turkey*

concept, and a charge is “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.<sup>396</sup>

100. However fair trial rights can also be engaged when someone is significantly disadvantaged by an investigation, i.e. before they are charged with a criminal offence<sup>397</sup>, but will not apply to proceedings which are not determinative of a criminal charge, e.g. pre-trial hearings concerning trial arrangements.<sup>398</sup>

101. As an autonomous concept, whether something amounts to a criminal charge depends on:<sup>399</sup>

- Its domestic classification;
- The nature of the offence; and
- The severity of the penalty.

Classification as non-criminal in domestic law is relevant but not definitive<sup>400</sup>, and the European Court will inquire whether a proceeding is by its nature criminal or has exposed a person to a sanction which belongs in the criminal sphere.<sup>401</sup>

102. When assessing the nature of the offence, the following factors indicate that the offence is criminal:

- If the offence can be committed by everyone and not just a restricted group, such as doctors or accountants, and the purpose is to punish and deter<sup>402</sup>;
- Whether the proceedings are instituted by a public body with statutory powers of enforcement<sup>403</sup>;
- Whether the imposition of a penalty is dependent on a finding of culpability.<sup>404</sup>

103. If the penalty is imprisonment, or can include imprisonment, such as imprisonment in default of a fine, this is likely to be a criminal charge. This will include situations where the offence is part of a State’s separate administrative enforcement regime, not the criminal justice system.<sup>405</sup> Financial penalties may also amount to a criminal charge, for example fines, tax penalties, etc. By contrast, regulatory offences which can only result in disqualification are unlikely to be regarded as criminal. The severity of the penalty will be the decisive factor in offences against military and prison discipline.

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<sup>396</sup> *Deweert v Belgium*

<sup>397</sup> *Funke v France*

<sup>398</sup> *Korellis v Cyprus*

<sup>399</sup> *Engel v Netherlands*

<sup>400</sup> For example, *Benham v UK*

<sup>401</sup> *Lutz v Germany*

<sup>402</sup> *Benham v UK*

<sup>403</sup> *Ozturk v Germany*

<sup>404</sup> *Benham v UK*

<sup>405</sup> *Ozturk v Germany*

## What is an independent and impartial tribunal?

104. A fundamental principle and prerequisite of a fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial and free from any interference by the State, the parties and external influences.<sup>406</sup>
105. Like the right to *habeas corpus*, the right to an independent and impartial tribunal is now considered to be an absolute and non-derogable right in international human rights law. The right to trial by an independent and impartial tribunal is so central to the due process of law that it “is an absolute right that may suffer no exception”.<sup>407</sup>
106. International standards relating to the selection of judges and their conditions of employment have been established to safeguard the independence and competence of the judiciary.<sup>408</sup>

### *Independence*

107. An independent and impartial tribunal requires independence from the executive. The composition of its members and how they are appointed, including the length of term of office will also be relevant.<sup>409</sup>
108. In determining whether the requirement of independence has been met, regard must be had to the manner of appointment of a tribunal’s members, their term of office, the existence of guarantees against outside pressures, and the question whether the body presents and appearance of independence.<sup>410</sup> Independence does not however have to be guarded by statute but should be assessed on all the basis of all the facts that are publicly known.
109. Appointment by the executive or legislature is permissible, provided that the appointees are free from influence or pressure when carrying out their adjudicatory role.
110. In order to establish a lack of independence in the manner of appointment, it is necessary to show that the practice of appointment as a whole was unsatisfactory, or alternatively, that the establishment of the particular court, or the appointment of the particular adjudicator gave rise to a risk of undue influence over the outcome of a case.<sup>411</sup>

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<sup>406</sup> *Findlay v UK; Ocalan v Turkey; McGonnell v UK.*

<sup>407</sup> *Gonzalez del Rio v Peru (HRC).*

<sup>408</sup> Basic Principles on the Independence of the Judiciary. See also Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE), on Standards Concerning the Independence of the Judiciary and the Irremovability of judges Recommendation no. r (94) 12

<sup>409</sup> *Le Compte, Van Leuven & De Meyere v Belgium*

<sup>410</sup> See for example, *Langborger v Sweden; Campell and Fell v UK; Findlay v UK; Incal v Turkey.*

<sup>411</sup> *Zand v Austria*

111. A relatively short term of office has been viewed as acceptable for unpaid appointees to administrative or disciplinary tribunals.<sup>412</sup> A renewable four year appointment for a judge who is a member of a national security court was considered “questionable”.<sup>413</sup> Members of a tribunal must at a very minimum be protected against removal during their term of office.<sup>414</sup> How and when judges can be removed forms a key element in securing their independence. In recent cases the European Court has made clear that a tribunal with members having no specified term of office who can be removed at the whim of the executive will not meet the requirements of independence.<sup>415</sup>
112. Independence also requires that each judge and tribunal member be free from outside instructions or pressure, whether from the executive, legislature, parties to the case or other members of the court or tribunal. A court cannot be said to be independent if the executive provides a binding interpretation of the legislation. Also, where a tribunal’s members “include a person who is in a subordinate position in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence”<sup>416</sup>.

### *Impartiality*

113. The requirement for an impartial tribunal embodies the protection against actual and presumed bias. The European Court has adopted a dual test for impartiality.
114. The Court examines the evidence of actual bias, and then makes an objective assessment of the circumstances alleged to give rise to a risk of bias.<sup>417</sup>
115. The onus of establishing actual bias is a heavy one. The test adopted for bias is that members of a tribunal must be “subjectively free of personal prejudice or bias”.<sup>418</sup> There is a presumption that the court has acted impartially which must be displaced by evidence to the contrary.<sup>419</sup> The European Court will inquire whether the tribunal offered guarantees sufficient to exclude such a doubt,<sup>420</sup> or whether there are ascertainable facts that may raise doubts as to a tribunal’s impartiality.<sup>421</sup>

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<sup>412</sup> *Campell and Fell v UK*

<sup>413</sup> *Incal v Turkey*

<sup>414</sup> *Campell and Fell v UK*

<sup>415</sup> *Dauti v Austria; Fruni v Slovakia*

<sup>416</sup> *Sramek v Austria*

<sup>417</sup> *Piersack v Belgium*

<sup>418</sup> *Findlay v UK*

<sup>419</sup> *Hauschildt v Denmark*

<sup>420</sup> *Piersack v Belgium; Incal v Turkey*

<sup>421</sup> *Hauschildt v Denmark*

116. In making an assessment of a tribunal's impartiality, "even appearances may be important."<sup>422</sup> This may arise based on the previous posts held by the judge<sup>423</sup> or because a judge has a personal or financial interest in the outcome.<sup>424</sup> Where there is a legitimate doubt as to a judge's impartiality she or he must withdraw from the case.<sup>425</sup> Any allegations of impartiality must be properly investigated, unless they are manifestly devoid of merit.<sup>426</sup>

117. The principle of impartiality demands that:

- Both judges and juries be unbiased;
- Proceedings are conducted fairly; and
- Decisions made solely on the evidence.<sup>427</sup>

118. The fact that a judge has dealt with the accused on a previous occasion will not necessarily cause the proceedings to be unfair. The key issue will be the nature and character of the previous decision.<sup>428</sup> Where the prior involvement with the individual concerned the same or a related matter, this increases the likelihood that the proceedings will be unfair.<sup>429</sup>

119. Article 6(1) imposes an obligation on every court to check whether, as constituted, it is an impartial tribunal when there is an allegation of bias that does not immediately appear manifestly devoid of merit.<sup>430</sup>

120. There is no requirement that a superior court is bound to send a case back to a differently constituted branch of the authority below.<sup>431</sup>

121. The requirement that a court or tribunal is established by law is because the judicial organisation in a democratic society must not depend upon the discretion of the executive, but that it should be regulated by law emanating from the legislature which establishes at least the framework for the judicial organisation.<sup>432</sup>

122. Similarly, if the identity of judges are concealed, this also undermines their independence.<sup>433</sup>

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<sup>422</sup> *Piersack v Belgium*

<sup>423</sup> *Piersack v Belgium*

<sup>424</sup> *Micallef v Malta*

<sup>425</sup> *Hauschildt v Denmark*

<sup>426</sup> *Remli v France*

<sup>427</sup> See the Human Rights Committee decisions: *Karttunen v Finland (HRC)* and *Collins v Jamaica (HRC)*, and *Fey v. Austria (HRC)*.

<sup>428</sup> *Hauschildt v Denmark*

<sup>429</sup> *Fatullayev v Azerbaijan; Chesne v France*

<sup>430</sup> *Remli v France; Szypusz v UK*

<sup>431</sup> *Dinnet v France*

<sup>432</sup> *Zand v Austria*

<sup>433</sup> *Castillo Petruzzi v Peru* (Inter-American Court)

123. The tribunal for the purposes of the right to a fair trial must also be able to give a binding decision<sup>434</sup>, and if the executive is permitted to prove a binding interpretation of the relevant law, the procedure will not comply with the impartiality requirements of Article 6.<sup>435</sup>

## **Courts Martial, Military Tribunals and the Presence of a Military Judge**

### *Military Judges*

124. The presence of serving military (and for that matter, police) on a tribunal will compromise the independence of that tribunal if those service personnel are appointed by and belong to the military and are subject to military discipline.

125. There are legitimate doubts as to independence because:

- The military is subject to the orders of the executive; and
- Therefore reappointment of the judge is also in the hands of the executive.

126. These concerns cannot be cured by an assurance that no instructions will be given and the members of the tribunal are instructed to act independently from the executive.<sup>436</sup> In *Ocalan*, (a case concerning the trial of the leader of the Kurdish resistance movement in Turkey, the PKK) the last minute replacement of a military judge was insufficient to remedy the lack of independence.

### *Courts Martial*

127. The key to the compatibility of courts martial with fair trial rights is the appointment process. Crucial to this is the involvement of civilians who are unrelated to the military hierarchy.<sup>437</sup>

### *Military Tribunals*

128. As far as military or special tribunals are concerned, the HRC has held that the basic requirements of Article 14 apply equally to them as they do to ordinary tribunals.<sup>438</sup> Of particular importance is that these tribunals satisfy the obligations of independence and impartiality.

129. The HRC, in noting the existence in certain countries of military tribunals that try civilians, has pointed out that “the trying of civilians by such courts should be

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<sup>434</sup> *Findlay v UK; Edwards v UK*

<sup>435</sup> *Beaumont v France*

<sup>436</sup> *Incal v Turkey*

<sup>437</sup> *Cooper v UK; Grieves v UK*

<sup>438</sup> General Comment No.13 (1984)

very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14.”

130. The approach of the European Court is to ask whether the manner in which such tribunals function infringes the applicant’s right to a fair trial. The Strasbourg Court places much emphasis on the confidence that the courts in a democratic society must inspire in the public, as well as for the accused.
131. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important, without being decisive. What is decisive is whether his or her doubts can be held to be objectively justified. Therefore, even in the context of counter-terrorism, the presence of a military judge in a case involving civilians might mean that the judge could be unduly influenced by considerations which have nothing to do with the nature of the case.”<sup>439</sup>
132. Military tribunals responsible for determining the legality of conduct in the context of armed conflict are governed by principles of humanitarian law, or the laws of war, most notably the Geneva Conventions and their Protocols, as well as customary international law.<sup>440</sup> Amongst other things, these provide for battlefield hearings to resolve doubts about the legal status of detainees captured by the military in combat.
133. Under these circumstances the laws governing wars will be the primary basis upon which to proceed. However, that does not mean human rights law plays no role or is silent during the process.
134. Military tribunals, even within the midst of an armed conflict, must still guarantee certain minimum safeguards in relation to a fair trial. These include ensuring:
- The impartiality of the tribunal;
  - The detainee has an opportunity to contest the factual basis for his/her detention;
  - The detainee is given the reasons for his/her detention;
  - The detainee has an opportunity to be heard within a reasonable time; and
  - The detainee has the right of access to a lawyer.

### **What is a trial within a reasonable time?**

135. As a general principle, time begins to run when an individual is charged, although this may stretch back to arrest rather than formal charge.<sup>441</sup> Time ends for the purposes of a fair trial when the proceedings are over, including any appeal.

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<sup>439</sup> *Incal v Turkey*

<sup>440</sup> For example Article 5 of the [Third Geneva Convention](#) regarding the rights of prisoners of war.

<sup>441</sup> *Eckle v Germany*

136. When assessing whether a length of time can be considered reasonable, the Court takes into account the following factors:

- The complexity of the case (complexity issues may concern questions of fact as well as law);
- The conduct of the applicant;
- The conduct of the judicial and administrative authorities of the State; and
- What is at stake for the applicant (i.e. whether they are being detained).

137. Other relevant issues may be the nature of the facts to be established, the number of accused persons and witnesses, international elements and the joinder or relevance of the case to other cases. For example, six years and three months was not considered unreasonable because a case concerned a difficult murder inquiry and the parallel progression of two cases.<sup>442</sup> Although sixteen years was an unreasonable delay, even though the case involved a complex murder and sensitive problems of dealing with juveniles.<sup>443</sup>

138. The applicant is not required to cooperate actively in expediting the proceedings which might lead to his or her own conviction. Delays brought about by a defendant bringing perfectly legitimate points cannot be held against an applicant in an overall delay case. Periods spent at large are discounted.

139. The authorities cannot seek to justify delays because of the workload of the court or shortages of resources. In a straightforward case, a period of inactivity of one year is unduly long.<sup>444</sup>

### **When can a trial be held in private?**

140. There is a presumption that ordinary criminal proceedings should be public, even when they involve dangerous individuals. However, it has been accepted that it would impose a disproportionate burden on the authorities to require prison disciplinary hearings to be held in public.<sup>445</sup> However, where those disciplinary proceedings amount to the determination of a criminal charge convicted prisoners have a right to be legally represented.<sup>446</sup> Private hearings can only be justified on one of the grounds within Article 6 itself, and have been held to be permissible on their specific facts in cases involving, for example, examination of a person's sexual conduct<sup>447</sup>, and national security issues.<sup>448</sup>

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<sup>442</sup> *Boddaert v Belgium*

<sup>443</sup> *Ferantelli & Santangelo v Italy*

<sup>444</sup> *Ledonne No. 2 v Italy*

<sup>445</sup> *Campbell & Fell v UK*

<sup>446</sup> *Ezeh & Connors v UK*

<sup>447</sup> *Porubova v Russia*

<sup>448</sup> *Kennedy v UK*

## When is there a right to appeal?

141. Article 6, ECHR does not guarantee a right to appeal or an obligation to set up an appeal procedure.<sup>449</sup> However, if an appeal exists that appeal process must also be compliant with fair trial rights, as discussed in the rest of this section.<sup>450</sup>

142. Article 14 of the ICCPR provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Human Rights Committee has held that this requires full review of the conviction and sentence.<sup>451</sup> However, there is no right to a hearing *de novo*.

143. Whether an appeal can correct defects at trial is a question of fact in each case.<sup>452</sup>

## What is a fair hearing?

### Access to court

144. Access to court has been dealt with in detail in relation to the determination of civil rights. The right to access to court has been read into the right to a fair hearing.<sup>453</sup> It is acknowledged that the right of access to court could not be absolute, and that by its very nature it calls for regulation. It may be relevant in relation to ancillary aspects of the criminal justice system, such as prison disciplinary proceedings and civil actions against the police. The issue may also arise in relation to time limits on bringing a prosecution.

### Access to Legal Advice and to a Lawyer

145. In the absence of access to a lawyer, the right to fair trial may be meaningless. As will be explained below, there is a guarantee of a lawyer in criminal trials, however this principle can also apply to the need for a lawyer and legal advice in civil and administrative law matters. A consequence of which may be the obligation on the State to pay for the provision of legal aid.<sup>454</sup>

### Equality of arms

146. Access to court has been dealt with in detail in relation to the determination of civil rights. The right to equality of arms is fundamental to the notion of a fair trial. This right, which has been read into fair trial rights, cross relates to the

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<sup>449</sup> A right to appeal in criminal matters is guaranteed under the ECHR in Article 2 of the 7th Protocol.

<sup>450</sup> *Delcourt v Belgium*

<sup>451</sup> *Reid v Jamaica (HRC)*; *Gomez Vazquez v Spain (HRC)*

<sup>452</sup> *Findlay v UK*; *Krestovskiy v Russia*

<sup>453</sup> *Golder v UK*

<sup>454</sup> *Airey v Ireland*; *Steel v UK*

guarantee of adequate time and facilities to prepare a defence, the right to examine witnesses.

147. This guiding principle of the guarantee of a fair trial is likely to raise serious challenges in the context of counter-terrorism prosecutions and what must, or need not, be disclosed to the defence.
148. In essence, equality of arms guarantees that everyone who is party to the proceedings must have a reasonable opportunity of presenting their case to the court under conditions which do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.<sup>455</sup>
149. The principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating him or herself or in obtaining a reduction in sentence, including material which might undermine the credibility of a prosecution witness.<sup>456</sup>
150. This principle has been held to include access to all the materials that the judge sees, including the court's amicus brief.<sup>457</sup>
151. The failure to disclose material sent to the court by the prosecutor but not disclosed to the accused may violate Article 6.<sup>458</sup> Similarly, the destruction of evidence prior to trial on grounds of irrelevance may also breach the right to a fair trial.<sup>459</sup>

### **The right to be present**

152. Where important evidence is adduced in the absence of the defendant this will usually render the trial unfair.<sup>460</sup>
153. Merely by absconding, a defendant does not necessarily waive his rights to a fair trial, permanently. Before an accused can be said to have impliedly, through his conduct, waived an important right under the right to a fair trial, it must be

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<sup>455</sup> In *Rowe & Davis v UK* the applicants were convicted of murder. The prosecution had decided, without notifying the judge, to withhold certain evidence on the grounds of public interest. On appeal the Court of Appeal reviewed the undisclosed evidence in *ex-parte* hearings with submissions from the prosecution, but in the absence of the defence, and decided not to disclose the evidence. The European Court found a violation of Article 6(1) and pointed out that although disclosure of relevant evidence is not an absolute right, non-disclosure under those circumstances can only be permissible where it is strictly necessary. The procedures before the Court of Appeal could not remedy the initial flaw in the trial because they relied upon accounts of the issues given to them by the prosecution alone. But in *Jasper and Fitt v UK*, where the evidence had been submitted to the judge at an *ex parte* hearing, the Strasbourg Court held that there was no violation.

<sup>456</sup> *Jaspers v Belgium*

<sup>457</sup> *Goc v Turkey*

<sup>458</sup> *Hakan Duman v Turkey*

<sup>459</sup> *Natunen v Finland*

<sup>460</sup> *Barbera, Messegue & Jabardo v Spain*

shown that he could reasonably have foreseen what the consequences of his conduct would be. Minimum safeguards must therefore be guaranteed.

154. In the absence of the possibility of a retrial in the presence of the accused, the primary concern for the authorities must be whether the proceedings held in the accused's absence were compatible with human rights standards and the right to a fair trial in particular. This includes whether they guaranteed a fair determination of the merits of the charge, in respect of both law and fact.<sup>1</sup>

155. In criminal trials, it may be allowed in certain exceptional circumstances to proceed with the trial of the accused, or another party, in their absence. This will only be permitted if the authorities have acted diligently but have not been able to notify the relevant person of the hearing.<sup>461</sup> However, as a general rule the defendant has the right to be present at the trial.

156. Defendants can be excluded where they cause disruption to the proceedings, refuse to come to court or make themselves too ill to attend, provided that their interests are protected in that their lawyers are present.<sup>462</sup>

157. The right to a fair trial may not be violated under certain circumstances where a defendant has waived his or her right to be present, either expressly or impliedly, by failing to attend the hearing having been given effective notice of it. That waiver must be clear and unequivocal following diligent attempts by the State to give the accused notice of the hearing, and the absent accused must be afforded adequate legal representation.<sup>463</sup>

158. The Human Rights Committee has held that criminal trials *in absentia* will only be tolerated when the defendant has been given ample notice, and adequate opportunity, to attend the proceedings.<sup>464</sup>

### **An adversarial hearing**

159. The notion of an adversarial hearing requires that all evidence and submissions be made in the presence of the defendant and in circumstances in which she or he has the opportunity to comment upon them.<sup>465</sup> This applies even where submissions are made by an independent party such as an amicus lawyer and where those submissions are wholly objective.

### **Effective participation in the hearing**

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<sup>461</sup> *Goddi v Italy*

<sup>462</sup> *Ensslin v Germany*. In this case the applicants were unable to attend trial because of ill health induced by hunger strike

<sup>463</sup> *Lala v Netherlands; Gusak v Russia*

<sup>464</sup> See for example *Maleki v Italy*

<sup>465</sup> *Ruiz-Mateos v Spain*

160. The right to participate in the hearing requires that the defendant is able to hear and follow the proceedings. In *T & V v UK*, a case involving two 11-year-old boys on trial for the murder of a toddler, it was held that they did not have a fair trial because, due to their age, they were unable to properly participate in and understand the proceedings.

### **Public hearing**

161. The public nature of hearings is an important safeguard for the individual and the interests of society at large. Apart from exceptional circumstances, a hearing must be generally open to the public including the press, and must not be accessible only by certain categories of persons. Moreover, even in cases where the public is excluded, the judgement, with certain strictly defined exceptions, must be made public. The right to a public hearing generally includes the right to an oral hearing.<sup>466</sup>

162. There is a presumption that ordinary criminal proceedings should be public, even when they involve dangerous individuals. It may be that aspects of that hearing are held in private, however, where this does occur the rights of the defence must be safeguarded. These issues are dealt with elsewhere in this manual.

163. It has been accepted that it would impose a disproportionate burden on the authorities to require prison disciplinary hearings to be held in public.<sup>467</sup> However, where those disciplinary proceedings amount to the determination of a criminal charge convicted prisoners have a right to be legally represented.<sup>468</sup>

### **Reasons for decisions**

164. Article 6(1) obliges courts to give reasons for their judgements, although this obligation does not extend to providing a detailed answer to every argument. The courts must indicate with sufficient clarity the grounds on which they base their decisions, because it is these reasons which will be taken into account in making it possible for the accused to appeal.<sup>469</sup>

## ***Specific guarantees in relation to criminal trials***

### **The presumption of innocence**

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<sup>466</sup> *Rodriguez Orejuela v Colombia (HRC)*.

<sup>467</sup> *Campbell & Fell v UK*

<sup>468</sup> *Ezeh & Connors v UK*

<sup>469</sup> *Hadjianastassiou v Greece; Taxquet v Belgium*

165. A fundamental principle of the right to fair trial is the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty in accordance with the law after a fair trial.<sup>470</sup>

166. This right applies from when criminal charges are first laid, right through until a conviction is confirmed following a final appeal. It applies to all public officials, including prosecutors and police.<sup>471</sup> The presumption of innocence can be infringed by, for example, unqualified public statements by the police or prosecution which refer to an individual as the perpetrator of an offence<sup>472</sup>, or by the dismissal of the accused from their post at work while criminal proceedings were ongoing.<sup>473</sup>

167. The presumption of innocence imposes the burden of proof on the prosecution:

- If there is reasonable doubt, the accused must not be found guilty<sup>474</sup>;
- Any doubt should benefit the accused.

168. The prosecution has to adduce sufficient evidence to convict the accused and then inform the accused of the case against him/her in order that they may prepare and present their defence accordingly.<sup>475</sup>

169. Moreover, procedures during the trial must not impinge on the presumption of innocence. For example, holding the accused in a cell within the courtroom or requiring the accused to wear handcuffs, shackles or prison uniform, could impact on the presumption of innocence. Once a person is acquitted, that judgment is binding on all state authorities, and therefore police and prosecutors should refrain from questioning a person's innocence.

170. Acquittal of a criminal offence does not prohibit courts from establishing civil liability based on the same set of facts and using a lower standard of proof. However, it may also be relevant in relation to compensation proceedings, which raise suspicions about an individual's guilt.

171. The presumption of innocence requires that members of the court should not start with the pre-conceived idea that the accused has committed the offence charged.

## Obligations on the media

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<sup>470</sup> Article 11 of the UDHR, Article 14(2) of the ICCPR, Article 6(2) of the ECHR.

<sup>471</sup> HRC General Comment 13, para. 7. The presumption of innocence is *not*, however, considered to be violated if the authorities inform the public about criminal investigations and in doing so name a suspect, or state that a suspect has been arrested or has confessed, provided there is no declaration that the person is guilty: *Krause v. Switzerland* and *Worm v Austria*

<sup>472</sup> *Alenet de Ribemont v France*

<sup>473</sup> *Celik v Turkey*

<sup>474</sup> Article 66(3) of the ICC and HRC General Comment No. 13, para. 7.

<sup>475</sup> *Barbera, Messegue & Jabardo v Spain*

172. The presumption of innocence also applies to the media and the manner in which they report stories. Where news stories state or imply the guilt of an individual before their conviction, this can undermine the presumption of innocence and can amount to a violation of Article 6.<sup>476</sup> Therefore the media need to be aware of their responsibilities in this area.

173. Pre-trial publicity can prejudice a defendant's prospects of a fair trial, therefore it can be possible to limit pre-trial publicity without prejudicing the right to freedom of expression protected by Article 10.<sup>477</sup> However, a proper balance between a fair trial and a free press must be maintained.<sup>478</sup>

174. The presumption of innocence will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. The presumption of innocence may be infringed not only by a judge or court but also by others representing public authorities, such as the police, prosecutors or other government officials. Public officials in their statements must therefore take care with the choice of words before a person has been tried and found guilty of an offence. Whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of the particular circumstances in which the statement is made.<sup>479</sup>

### **Presumptions of fact or law**

175. The presumption of innocence might not be breached by presumptions of fact or law as long as they are within reasonable limits.<sup>480</sup> Therefore an applicant who was found with drugs in his luggage was presumed to have known that they were there.

176. Read into the presumption of innocence have been two specific guarantees of the right to silence and freedom from self-incrimination. The European Court has held that the right to a fair trial includes "the right of anyone charged with a criminal offence ... to remain silent and not to contribute to incriminating himself".<sup>481</sup>

### **The right to silence**

177. The right to silence is not an absolute right. In a case involving a suspected terrorist who was found destroying potential evidence, it was held that it was

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<sup>476</sup> *Kuzmin v Russia*

<sup>477</sup> *Craxi v Italy*

<sup>478</sup> *Worm v Austria*

<sup>479</sup> *Butkevicius v. Lithuania*

<sup>480</sup> *Salabiaku v France*

<sup>481</sup> *Funke v France*

incompatible with the right to a fair trial to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence.

178. However, it was also held that it was equally obvious that where there was clearly a call for the accused to explain the persuasiveness of the evidence produced by the prosecution and that explanation was not forthcoming, it was possible to draw inferences under those limited circumstances.<sup>482</sup>

179. The Court has also held that where inferences may be drawn from a defendant's silence during police interviews, it is essential that the defendant should have access to a lawyer before interview. Where an accused exercises his right to silence based on advice given by his or her lawyer the trial judge must take this into account when drawing inferences from the exercise of the right to silence.<sup>483</sup>

### **Freedom from self-incrimination**

180. The right not to incriminate oneself is an essential guarantee to ensure that the prosecution in a criminal case seeks to prove their case against the defendant without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.<sup>484</sup>

181. Protection from self-incrimination applies to all criminal proceedings and it is not confined to statements of admission of wrong doing nor to remarks that are directly incriminating.<sup>485</sup>

182. In *Saunders v UK* the applicant, who was a successful business man, was compelled to give evidence under an investigation by the UK Department of Trade. That evidence was then used as the basis of a prosecution against him. It was not compulsory questioning as such that infringed the Convention, but it was the use of the answers elicited as a result of compulsion in criminal proceedings that was a violation of the presumption of innocence and the right to a fair trial.

183. The right to protection from self-incrimination is probably not absolute. A presumption that the owner of a car is responsible for speeding and parking offences does not necessarily breach the protection against self-incrimination.<sup>486</sup> However, in certain similar circumstances, where the prosecution had not established a prima facie case, the requirement that the

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<sup>482</sup> *Murray v UK*

<sup>483</sup> *Beckles v UK*

<sup>484</sup> HRC General Comment 13, para 14; *Kelly v Jamaica* (HRC); *Allan v UK*; *Saunders v UK*

<sup>485</sup> *Heaney & McGuinness v Ireland*

<sup>486</sup> *Tora Tolmos v Spain*

individual provide an explanation can amount to a shifting of the burden of proof.<sup>487</sup>

### **Article 6(3) and specific procedural safeguards in relation to criminal trials**

**To be informed promptly in a language which he understand and in detail, of the nature and cause of the accusation against him<sup>488</sup>**

184. This right links directly with the right to liberty.<sup>489</sup> Its purpose is to enable individuals to begin preparing their defence.<sup>490</sup> In most circumstances the information concerning the charge should be detailed.<sup>491</sup> It is perfectly acceptable to amend a charge against a defendant, as long as she or he is informed in a language that is understood and is given adequate time to prepare their defence.

**To have adequate time and facilities for the preparation of his defence<sup>492</sup>**

185. The adequate time requirement depends on the nature and complexity of the case. Where there is a late change of lawyer an adjournment may be necessary.<sup>493</sup> This right is also directly relevant to equality of arms.<sup>494</sup>

**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<sup>495</sup>**

186. It may be that the State is required to provide legal aid at all stages of the proceedings, where it is in the interests of justice to do so. Relevant to the interests of justice test are:

- The complexity of the case;
- The ability of the defendant to understand and present the relevant arguments without assistance;
- Severity of the possible penalty.

187. Where deprivation of liberty is at stake, the interests of justice, in principle, call for free legal assistance.<sup>496</sup>

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<sup>487</sup> *Krumpholz v Austria*

<sup>488</sup> 6(3)(a), ECHR

<sup>489</sup> Article 5(2), ECHR

<sup>490</sup> In *Brozicek v Italy* the applicant was German and therefore he needed the charge properly explained to him in a language which he could understand.

<sup>491</sup> *Pelissier v France*

<sup>492</sup> 6(3)(b), ECHR

<sup>493</sup> *Goddi v Italy*

<sup>494</sup> *Ocalan v Turkey*

<sup>495</sup> 6(3)(c), ECHR

188. Despite the absolute language of Article 6(3)(c), a court is not prevented from requiring that the defendant be represented by a court-imposed lawyer, and in legal aid cases defendants do not have an unqualified right to a lawyer of their choice.<sup>497</sup> Merely allocating a lawyer to the defendant if that lawyer is manifestly unable to provide effective representation does not satisfy the conditions of the right.<sup>498</sup>

189. Article 6(3)(c), read in conjunction with Article 6(1), requires a suspect to have access to a lawyer before he is subject to police questioning unless there are particular and compelling reasons to retract that right.<sup>499</sup>

**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<sup>500</sup>**

190. This goes to the heart of equality of arms between the parties before the court. It requires positive steps to be taken to ensure that the defendant can confront and call witnesses. There are certain circumstances where hearsay evidence is permitted, but these must be kept within strict limits.<sup>501</sup> The question in each case is whether there has been overall fairness. This might include admitting the hearsay evidence of witnesses who are too ill to attend court or who have died.<sup>502</sup>

191. Provided that there are counter-balancing factors to protect the defendant, it is possible to admit hearsay evidence of witnesses who genuinely fear reprisals if they attend court, although it may be unfair to base a conviction on such evidence.<sup>503</sup> In *Al-Khawaja & Tahery v UK* the European Court has stated that convictions based solely or decisively on hearsay evidence that cannot be tested in court do not in principle violate Article 6, although whether there is a violation will be fact-specific given the clear concerns raised by convictions secured in such circumstances. The European Court has indicated that the following factors are relevant:

- The reasons advanced for non-attendance;
- Compensating safeguards;
- The opportunity, if any, which the defence has had to confront the witness at an earlier or late stage in the proceedings;

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<sup>496</sup> *Benham v UK*

<sup>497</sup> *Croissant v Germany*

<sup>498</sup> *Artico v Italy*

<sup>499</sup> *Salduz v Turkey*

<sup>500</sup> 6(3)(d), ECHR

<sup>501</sup> *Van Mechelen v Netherlands*

<sup>502</sup> *Bricmont v Belgium*

<sup>503</sup> *Saidi v France*

- The possibility of introducing the evidence in a manner less intrusive to the rights of the accused;
- Whether the defence requested the attendance of the witness.

192. Similar principles apply in relation to anonymous witnesses, as long as there are effective counter-balancing factors to protect the defendant.<sup>504</sup> Anonymous evidence from law enforcement officers will have to be very strictly justified.<sup>505</sup>

193. Reliance on the evidence of informers and undercover officers is not prohibited but safeguards are necessary to protect the rights of the defence.<sup>506</sup>

**To have the free assistance of an interpreter if he cannot understand or speak the language used in court<sup>507</sup>**

194. The court has an obligation to ensure the quality of interpretation and the right extends to all documentary material disclosed, but this does not necessarily mean that all translations must be in written form. In limited circumstances some oral translation is acceptable.<sup>508</sup> The right is not subject to qualification, even if the accused is subsequently convicted, she or he cannot be ordered to pay the costs of an interpreter.<sup>509</sup> However this right does not provide a right to conduct proceedings in the language of the defendant's choice.

***Issues arising out of the right to a fair criminal trial***

**Entrapment**

195. It is unfair under the right to a fair trial to prosecute an individual for a criminal offence, incited by undercover agents, which, but for the incitement, would probably not have been committed. Even the public interest in the detection of serious crime cannot justify the instigation of criminal offences by undercover agents.<sup>510</sup>

196. The law governing the use of undercover agents must be clear and precise. It must also provide safeguards against abuse. So long as informers and/or undercover officers keep within the reasonable limits of passive surveillance no issues arise under the right to a fair trial, neither does any privacy issue arise under the right to respect for private life.<sup>511</sup> The defence must, however, have the opportunity of challenging the evidence.

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<sup>504</sup> *Doorson v Netherlands*

<sup>505</sup> *Van Mechelen v Netherlands*

<sup>506</sup> *Ludi v Switzerland*

<sup>507</sup> 6(3)(e), ECHR

<sup>508</sup> *Kaminski v Austria*

<sup>509</sup> *Ozturk v Germany*

<sup>510</sup> *Teixera da Castro v Portugal*

<sup>511</sup> *Ludi v Switzerland*

## Unlawfully obtained evidence

197. It has traditionally been clear that evidence obtained in breach of absolute rights, such as protection from inhuman and degrading treatment, or torture, must always be excluded from trial.<sup>512</sup> The UN Torture Convention specifically requires this, as does previous case law of the courts and tribunals responsible for the guarantee of human rights.

198. To take an example, in a case concerning the forcible use of an emetic to ensure the regurgitation of a small quantity of drugs, the European Court noted that, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence was nevertheless obtained by a measure which breached the prohibition on inhuman and degrading treatment. As such the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant had rendered his trial as a whole unfair. The Court found that the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity. Further, and more controversially, the Court held that they would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics had infringed his right not to incriminate himself which also rendered his trial as a whole unfair.<sup>513</sup>

199. However, recent case law complicates the issue, and the current state of the law is that:

- Evidence obtained as a result of ill-treatment with the aim of extracting a confession will inevitably violate Article 6 where the admission of that evidence will have a bearing on the outcome<sup>514</sup>;
- Evidence obtained by ill-treatment, but not torture, which is not the primary evidence used to secure conviction will give rise to a strong presumption of unfairness, but not an inevitable finding of unfairness<sup>515</sup>;
- The admission of evidence obtained from torture, as opposed to ill-treatment, still leads to an inevitable violation of Article 6.

### *Fair trial in breach of the right to respect for privacy*

200. The mere fact that evidence has been obtained in breach of other human rights, notably the right to respect for private life, does not automatically lead to its

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<sup>512</sup> *Austria v Italy*

<sup>513</sup> *Jalloh v Germany*

<sup>514</sup> *Lopata v Russia; Brusco v France; Lazarenko v Ukraine*

<sup>515</sup> *Gafgen v Germany*

exclusion.<sup>516</sup> The question which must be answered is whether the proceedings as a whole, including the way in which evidence was obtained, were fair.<sup>517</sup>

201. In determining whether a trial has been fair where unlawfully obtained evidence in breach of privacy rights has been relied on, the following factors will be relevant:

- Whether there was a breach of domestic law as well as the Convention;
- Whether the breach of Convention rights was in good faith or not;
- Whether there was any element of entrapment or inducement;
- Whether the unlawfully obtained evidence is the only evidence against the defendant will also be relevant but not determinative.

### **Deportation to face an unfair trial**

202. In *Othman (Abu Qatada) v UK* the European Court for the first time held that an expulsion would be in violation of Article 6 where the suspect would face the real risk of the admission of evidence obtained by torture at his retrial, reflecting the international consensus that the use of evidence obtained through torture makes a fair trial impossible.

### **Victim's rights**

203. Under international human rights law, there is a general duty to protect human rights. This may mean putting into place adequate laws to ensure that there is a proper legal framework for criminalising certain activity which violates Convention rights.<sup>518</sup> Therefore this duty provides protection for victims of crime. In *M.C. v Bulgaria* the criminal law and practice providing protection against rape was found to be inadequate and therefore in violation of the right to physical integrity as guaranteed by the prohibition on torture and inhuman and degrading treatment and the right to respect for private life.

204. There is also a positive obligation on the State to protect identifiable victims who are at a real and immediate risk of serious crime, such as a risk to life that the law enforcement agencies know about or ought to have known about.<sup>519</sup> In *Airey v Ireland* it was also established that victims of domestic violence need to have effective access to the courts. The right to an effective remedy for violation of human rights is also a key protection for victims of human rights violations. It requires that a range of remedies are available to victims of serious crime,

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<sup>516</sup> *Khan v UK* and *Schenk v Switzerland*

<sup>517</sup> see *Allan v UK* where the eliciting of a confession through placing a police informant in the defendant's cell in violation of privacy rights violated the right to a fair trial.

<sup>518</sup> *X & Y v Netherlands*

<sup>519</sup> *Osman v UK*

which includes an effective investigation and prosecution of alleged offenders.<sup>520</sup>

205. Although the right to a fair trial is principally concerned with defendants' it also acknowledges that the rights of witnesses must be respected. For example, if necessary, screens and other equipment can be used in court to protect vulnerable witnesses.<sup>521</sup> However, if a less restrictive measure can suffice, then that measure should be applied.<sup>522</sup> Victims' rights to privacy should also be respected, especially where this relates to medical confidentiality.<sup>523</sup>

206. The rights of victims of terrorism are being increasingly recognised and these are being framed as a human rights issue. For example, the Council of Europe Guidelines acknowledge that, "When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned."<sup>524</sup>

## Sentencing

207. The fair trial requirements still apply at the sentencing stage, although different considerations are engaged. For example, the presumption of innocence ceases to apply,<sup>525</sup> and evidence that would have been inadmissible at the trial can be relied upon. Previous convictions may also be taken into consideration.

208. International human rights law protects against retrospective criminal penalties.<sup>526</sup> This is an absolute right. It protects individuals from being convicted of criminal offences which did not exist at the time the act was committed, and prohibits the imposition of a more severe penalty for an offence than that which applied at the time the offence was committed.<sup>527</sup> As an absolute right, it may not be derogated from even in time of national emergency or war.

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<sup>520</sup> *Aydin v Turkey*

<sup>521</sup> *X v UK*

<sup>522</sup> *Van Mechelen v Netherlands*

<sup>523</sup> *Z v Finland*

<sup>524</sup> Guideline XVII

<sup>525</sup> *Engel v Netherlands*

<sup>526</sup> See Article 7, ECHR which corresponds with Article 15, ICCPR. Article 15, ICCPR states:

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.

<sup>527</sup> *Welch v UK*

209. Where an individual is sentenced for conduct protected as a qualified right under human rights standards, such as freedom of expression, any punishment must be proportionate. Custodial sentences for offences relating to free speech that fall short of incitement to violence, can rarely, if ever be justified (see below for details).
210. Preventative sentencing is permissible so long as it is lawful and that *habeas corpus* safeguards are built into the process, which means that the lawfulness of the detention can be challenged periodically before a competent court and release be ordered.
211. The sentencing of juveniles needs to reflect their youth and potential to mature and therefore change.
212. Protection from inhuman and degrading treatment will also be relevant in the sentencing process. This will include the nature of the punishment. For example, corporal punishment is unacceptable and the conditions of the punishment regime.<sup>528</sup>
213. Discriminatory treatment and family life should also be taken into account in relation to sentencing. The dispersal of prisoners may raise these issues. Prisoners need also to be permitted to manifest their religion effectively.

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<sup>528</sup> *Tyrer v UK*

## 5. Evidence collection, surveillance, investigation techniques and the right to respect for private life

1. The right to respect for private life is guaranteed by Article 8, ECHR<sup>529</sup> and the similarly worded Article 17, ICCPR.

### *The concept of private life*

2. Privacy has been defined as, 'the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others and free from state intervention and free from excessive unsolicited intervention by other uninvited individuals'.<sup>530</sup> The concept of private life therefore incorporates the classic notion of civil liberties, in that the State should not be permitted to intrude into the private sphere in the absence of strict justification. The essence of the right to privacy is the 'right to be let alone'.<sup>531</sup>
3. This broad definition of private life is reflected in human rights case law. Respect for private life encompasses more broadly the right:
  - To be oneself
  - To live as oneself
  - To keep to oneself
4. A key feature of private life is that it protects personal identity; this includes the closely allied wider notion of self-determination.<sup>532</sup> This notion of a right to self-determination includes the right to live a particular lifestyle.<sup>533</sup>
5. The concept of privacy rights cannot be narrowly construed and, because privacy rights tend to restrict the activity of the State, privacy rights are politically

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<sup>529</sup> Article 8, ECHR states:

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.

<sup>530</sup> Pannick & Lester, 2<sup>nd</sup> edition, para. 4.82

<sup>531</sup> The origins of this right can be found in T. Cooley *A Treatise on the Law of Torts* (2<sup>nd</sup> edition, Chicago: Callaghan & Co. 1888, p. 29). The principle was then developed, expanded and consolidated in the seminal work of S. D. Warren and L. D. Brandeis in 'The Right to Privacy' (4 *Harv. L.R.* 193-220, 1890).

<sup>532</sup> *Pretty v UK*

<sup>533</sup> in *Cyprus v Turkey*, Article 8 was violated by the Turkish Republic of Northern Cyprus where the hostile environment created, meant that community and social life for Greek residents was impossible.

controversial.<sup>534</sup> Privacy rights may therefore constrain people's conception of the legitimate sphere of the State in social life.

6. Privacy is also essential to maintaining a functioning community. For example, families need privacy to function, as do friends, workplaces, and even political parties. Privacy allows groups to form and function without undue interference. The public and private spheres necessarily interact and they are not mutually exclusive. Almost everyone must carry on their life partly in public.
7. What is clear is that, as a matter of human rights law, the concept of private life is made up of concentric rings. The inner core of privacy rights is that notion of privacy which is essential and elemental for the individual to exist as who they are. However, the notion of privacy then broadens to include, amongst other things, personal and social relationships.
8. Included, therefore, within the idea of private life are personal freedoms, personal autonomy, personal integrity and personal relations. These ideas form part of a broader notion of the State's limited role within the private sphere where individual development is concerned. That wider notion of privacy includes more straightforward ideas such as State control of individuals within society, regulation of private conduct and surveillance.

### ***Developing Privacy Rights before International Courts and Tribunals***

9. Private life rights are engaged by the following examples. It must be remembered that as a classic qualified right, under certain circumstances there may be a lawful interference with privacy rights, thus establishing no violation of the right to respect for privacy.

### **Physical and moral integrity**

10. Laws that fail to properly ensure the physical integrity of individuals against interference by other private parties will violate private life rights.<sup>535</sup> Similarly unwanted and forced medical examinations may violate the right.<sup>536</sup> The preservation and protection of a person's mental health is also an aspect of the right to a private life.<sup>537</sup> Private life rights are relevant to reproductive choices.<sup>538</sup>

### **Personal identity**

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<sup>534</sup> Feldman D., *Civil Liberties and Human Rights* (2<sup>nd</sup> edition)

<sup>535</sup> *X & Y v Netherlands* and *MC v Bulgaria*

<sup>536</sup> *Y F v Turkey*

<sup>537</sup> *Bensaid v UK*

<sup>538</sup> *A, B, C, v Ireland; Tysiac v Poland*

11. This includes the right to: a name and the right to change names,<sup>539</sup> to gender reassignment and the right to an identity for transsexuals.<sup>540</sup> The right to a personal identity also includes the right to such an identity as a member of a minority group. Therefore, gypsies and indigenous people of northern Finland have found protection within the right to respect private life.<sup>541</sup>
12. Through this principle, group rights can be categorised as individual rights. Therefore attempts to restrict, or control the rights of a minority group or community may be unlawful under the right to respect for private life, even if the justification for that interference is national security or the prevention of disorder or crime. For example, if an established community is required to move from, or return, to their property, this must be justified under privacy rights principles, including satisfying the tests of necessity, proportionality and non-discrimination.

### **Sexual orientation, identity and relations**

13. Private life guarantees the right to a sexual identity including the right to a lesbian and gay sexual identity.<sup>542</sup> This means that the criminal law cannot be used to regulate consensual same sex sexual conduct between adults.<sup>543</sup> In conjunction with the right not to be discriminated against, Article 8 ECHR prohibits discrimination on the grounds of sexual orientation in the development of a family life in certain circumstances, such as adoption.<sup>544</sup>

### **Personal or private space**

14. Private space is necessary in order to be able to form relations with others.<sup>545</sup> This notion of private space is broader than the idea of one's home. It encompasses the notion of a personal realm where one ought to be allowed to go about one's business, even in public, without unjustified interference. The right to private life includes specifically the notion of one's home. This includes business premises as well as private homes.

### **Privacy and intrusive publications**

15. Famous people, royalty and celebrities have sought to rely on private life rights to protect their private life from media intrusion.<sup>546</sup> It is also relevant in relation to media intrusion into the lives of ordinary people, for example where a publication implies that someone is guilty of a crime when they are not,<sup>547</sup> or identifies a

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<sup>539</sup> *Guillot v France; Coeriel and Aurik v the Netherlands HRC*

<sup>540</sup> *B v France; Goodwin v UK*

<sup>541</sup> *G and E v Norway; Buckley v UK*

<sup>542</sup> *Norris v Ireland; Toonen v Australia (HRC)*

<sup>543</sup> *Dudgeon v UK, Modinos v Cyprus*

<sup>544</sup> *E.B. v France*

<sup>545</sup> *Niemitz v Germany*. Also see *Roemen and Schmit v Luxembourg* and *Elci v Turkey*

<sup>546</sup> *Spencer v UK; Princess Caroline of Monaco v Germany; Petrina v Romania*

<sup>547</sup> *A v Norway*

person as suffering from an illness which may result in them being stigmatised socially and professionally.<sup>548</sup> These claims illustrate the fact that the right to respect for private life not only encompasses the notion that the State ought not interfere with one's private life (without good justification), but also that the State may have an obligation to ensure that third parties do not unjustifiably interfere with someone else's privacy.

## Personal data

16. This includes census and ID schemes. It is unlikely that a census or ID scheme per se, though an interference with the right to respect for private life, would be a violation of that right.

## Home and environment

17. The destruction of the applicant's home by the security forces violated their right to home life.<sup>549</sup>

18. Private life rights can have direct relevance to planning laws and protection from severe environmental nuisance affecting a person's wellbeing.<sup>550</sup> Duties to provide information and safeguards may arise where environmental hazards exist. For example, where an industrial plant caused extensive and dangerous water pollution, the European Court held that the State was under an obligation to provide information to the locals about the risks to their health and welfare, and to adopt adequate measures to protect their right to the enjoyment of a healthy and safe environment.<sup>551</sup> The Court has also found violations of Article 8 in relation to offensive smells from waste,<sup>552</sup> excessive traffic noise,<sup>553</sup> the failure to remove rubbish<sup>554</sup> and dangerous stray dogs.<sup>555</sup>

19. In *Guerra v. Italy*, the Court held that its obligation was to ascertain whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8. In this case, the applicants had had to wait from the date the factory was opened until the date it stopped producing fertilisers for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in their town, which was particularly exposed to danger in the event of an accident at the factory. The Court therefore held that the respondent State had not fulfilled its positive obligation to secure the

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<sup>548</sup> *C.C. v Spain*

<sup>549</sup> *Bilgin v Turkey*

<sup>550</sup> See *Guerra v Italy*; *Lopez-Ostra v Spain*; *Hatton v UK*; *Mileva and Others v Bulgaria*

<sup>551</sup> *Tatar v Romania*

<sup>552</sup> *Brânduse v Romania*

<sup>553</sup> *Deés v Hungary*

<sup>554</sup> *Di Sarno and others v Italy*

<sup>555</sup> *Georgel and Georgeta Stoicescu v Romania*

applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

20. In *Fadeyeva v. Russia*, the applicant complained that the State failed to protect her private life and home from severe environmental nuisance arising from the industrial activities of a nearby steel plant. The Court held that the very strong combination of indirect evidence and presumptions made it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions. Moreover, there could be no doubt that it adversely affected her quality of life at home, all of which reached a level sufficient to bring it within the scope of Article 8. The Court found that the refusal to resettle the applicant in order to save the limited resources for the building of new housing for social purposes was a legitimate aim of the government because the resettlement would breach the rights of others. However, despite the wide margin of appreciation left to the respondent State in achieving this aim, it had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life.
21. In *Hatton v. United Kingdom*, the Court accepted that, while there was no explicit right to a clean and quiet environment under the Convention, the noise increase around London's Heathrow Airport was a matter covered by the right to private and family life and the right to respect for one's home. The Court accepted that the implementation of a new scheme of flights was susceptible to adversely affecting the applicants' private life and their right to respect for their homes. However, it concluded that there was no violation of Article 8; as the respondent Government had struck the correct balance between the competing interests.
22. Planning controls which affect gypsies and the Roma community will engage private life rights.<sup>556</sup>
23. In the housing context, the European Court has held that an independent tribunal must undertake an Article 8 ECHR proportionality review of the necessity of evicting a person from her home.<sup>557</sup>

## Correspondence

24. Prisoners have the right to correspond in confidence with their legal advisers and/or the courts.<sup>558</sup> This may mean that the authorities have to positively facilitate legal correspondence, such as by providing stamps.<sup>559</sup> Similarly

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<sup>556</sup> *Buckley v UK*

<sup>557</sup> *McCann v UK; Ćosić v Croatia; Gladysheva v Russia*

<sup>558</sup> This point has been reaffirmed in a number of cases, from *Golder v UK* to *Ocalan v Turkey*. The HRC have also affirmed this in *Pinkney v Canada* See also *Angel Estrella v Uruguay*

<sup>559</sup> *Gagiu v Romania*

prisoners have a right to correspond in confidence with medical professionals.<sup>560</sup> The systematic monitoring of the entirety of a prisoner's correspondence is a disproportionate interference with his or her Article 8 ECHR rights.<sup>561</sup>

25. Prisoners also have the right to meaningful correspondence with their relatives in certain circumstances, for example, if a family member is dying a prisoner should be allowed to bid farewell to him or her and attend the funeral.<sup>562</sup>
26. Unduly restrictive limits on a prisoners' right to have family visits or correspond with his or her family may also violate Article 8.<sup>563</sup>

## Medical care

27. The failure to treat, and the treatment of people without their consent, will engage Article 8. Disclosure of medical confidentiality is tightly controlled under the ECHR.<sup>564</sup> Where children are concerned, consent to medical treatment must be obtained from their parents or guardians.<sup>565</sup>
28. In *Glass v. United Kingdom* the Court ruled that the UK had breached the Article 8 rights of a severely disabled child and his mother by administering diamorphine to him (in an emergency for pain relief) against his mother's wishes. Having pointed out that the hospital was aware of the mother's resistance to the use of diamorphine in advance, the Court ruled that the hospital could have sought judicial guidance prior to the event and, in any event, during the crisis, choosing instead to: "... use the limited time available to them in order to try to impose their views on the second applicant. It observes in this connection that the [hospital] was able to secure the presence of a police officer to oversee the negotiations with the second applicant but, surprisingly, did not give consideration to making a High Court application even though 'the best interests procedure can be involved at short notice' .... The Court considers that, having regard to the circumstances of the case, the decision of the authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8 of the Convention."
29. The removal of a person's legal capacity will also engage Article 8 ECHR and the European Court has closely scrutinised the legitimacy and proportionality of such measures in the mental health context.<sup>566</sup>
30. Private life was also violated in *Shtukaturov v. Russia*. This case concerned a schizophrenic adult had been declared as lacking legal capacity in a decision

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<sup>560</sup> *Szuluk v UK*

<sup>561</sup> *Petrov v Bulgaria*

<sup>562</sup> *Lind v Russia; Giszczak v Poland*

<sup>563</sup> *Moiseyev v Russia; Mehmet Nuri Özen and Others v Turkey*

<sup>564</sup> *Z v Finland ; Juhnke v Turkey ; I v Finland*

<sup>565</sup> *M.A.C. and R.K. v UK*

<sup>566</sup> *X v Croatia*

made without his knowledge at the request of his mother, who had become his guardian. He had not been able to challenge the decision in court and had subsequently been confined to a psychiatric hospital. The Court found that the interference with the applicant's private life had been considerable. It had made him totally dependent on his guardian for most aspects of his life and for an indefinite duration. Moreover, that interference could only be disputed through the intermediary of his guardian, who had opposed any attempt to lift the measure. In addition, the proceedings in which the applicant had been deprived of his legal capacity had been vitiated because he had been unable to participate in them. Lastly, the reasoning of the decision had been insufficient because it was based solely on a medical report which had not analysed in sufficient depth the applicant's degree of incapacity. The report had not considered the consequences of the applicant's illness on his social life, health and financial interests, or analysed in exactly what way he was unable to understand or control his actions. The Court found that the existence of a mental disorder, even a serious one, could not be the sole reason to justify full incapacitation, and held that there had been a violation of private life rights guaranteed by Article 8.

### **Access to health information**

31. Where individuals are exposed to a specific health risk, the duty to give appropriate health advice and information can arise.<sup>567</sup>

32. Individuals must be given proper access to their own medical records.<sup>568</sup>

### **Extradition, immigration and deportation**

33. The decision to extradite, remove or exclude a person from a country where he or she has close relatives or has established a private life through work or study, may constitute an interference with their private and family life.<sup>569</sup>

### **Victims' rights**

34. The State has an obligation to protect victims of crime, even though private individuals carry out those crimes.<sup>570</sup> This obligation on the State will involve putting in place a legal framework to prosecute crimes that is effectively enforced and results in the proper protection of victims.<sup>571</sup> The obligation to prosecute crimes may arise even where the victim does not want to pursue a prosecution, particularly in the context of domestic violence.<sup>572</sup>

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<sup>567</sup> *LCB v UK*

<sup>568</sup> *K.H. and others v Slovakia*

<sup>569</sup> *Mehemi v France; Bouchelkia v France; S and S v UK*

<sup>570</sup> *X & Y v Netherlands; M.A.C. and R.K. v UK*, in the context of children

<sup>571</sup> *A v Croatia*

<sup>572</sup> *Opuz v Turkey; Hajduová v Slovakia*

35. There is also a duty to protect the privacy rights of victims in the courtroom.

### **Privacy, Policing and Surveillance**

36. The reality is that interferences with privacy rights are at the heart of any effective policing strategy. As such how to lawfully interfere with privacy and data protection, has to be understood. The general principles to be observed are as follows:

- The expression “private life” must not be interpreted restrictively: it includes the right to establish and develop relationships with other human beings and also activities of a professional or business nature.<sup>573</sup>
- The existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. The legislation at issue must be accessible and foreseeable as to its effects.<sup>574</sup>
- The law must indicate the degree of the discretion conferred on the competent authorities and the manner of its exercise with adequate precision.<sup>575</sup>
- “[...] the Contracting States [do not] enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.”<sup>576</sup>
- Safeguards should be established by the law concerning the supervision of the relevant services’ activities.<sup>577</sup> Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular

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<sup>573</sup> *Amann v Switzerland; Rotaru v Romania*

<sup>574</sup> *Rotaru v Romania*. See also *Silver and Others v UK; Sunday Times v UK*; and *Malone v UK*, reiterated in *Amann v Switzerland*

<sup>575</sup> *Rotaru v Romania*

<sup>576</sup> *Klass v Germany; Leander v. Sweden; Malone v UK; Chahal v UK*; and *Tinnelly & Son Ltd and McElduff v UK*

<sup>577</sup> *Bykov v Russia*

the rule of law, which is expressly referred to in the ECHR Preamble. The judiciary is in the best place to effectively check the interferences to the right to private life.<sup>578</sup>

## Special Investigative Techniques, Surveillance and Policing

37. “Stop and search” procedures engage the right to respect for private life. The European Court has held that it is not permissible to search a person unless there is a reasonable suspicion of their involvement in wrongdoing.<sup>579</sup>
38. Once an individual is being formally investigated by a law enforcement agency on suspicion of having committed a crime, respect for their private life is almost certainly engaged. Private life will be a relevant factor to be taken into account once information about an individual is stored and processed. Sharing of information on individuals is also an interference with privacy rights, which if it is to be lawful, must be justified.
39. Investigatory and surveillance systems are increasingly sophisticated, which has correspondingly made the need to protect private life even more important. The European Court of Human Rights in particular places a premium on privacy and the need to protect it from unwarranted state interference. Therefore principles of necessity, proportionality and non-discrimination must be met. Racial and religious profiling must be treated as raising serious issues in relation privacy and protection from discrimination.
40. The Council of Europe have produced recommendations which seek to codify the principles established by the case law of the European Court of Human Rights as they relate to surveillance and investigative policing operations (SIT Recommendation).<sup>580</sup> This Recommendation should be considered as the benchmark in relation to interferences with privacy rights as far as intelligence led policing is concerned.<sup>581</sup>
41. The SIT Recommendation, and how to develop effective counter terrorism strategies that recognise the importance of privacy rights will be explained in full

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<sup>578</sup> *Klass v Germany*

<sup>579</sup> *Gillan and Quinton v UK*

<sup>580</sup> Recommendation REC (2005)10 of the Committee of Ministers to Member States on “Special Investigation Techniques” in Relation to Serious Crimes Including Acts of Terrorism, (*Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies*)

<sup>581</sup> Several other instruments of the Council of Europe already deal with the question of special investigative techniques such as, for instance, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Article 4 - ETS No 141), the Criminal Law Convention on Corruption (Article 23 - ETS No. 173), the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Articles 17 to 20 – ETS No 182), or the Committee of Ministers’ Recommendation Rec(2001)21 on the fight against organised crime. However, these instruments address issues connected with the use of SIT only in so far as these are being used in relation to their respective scope whilst the SIT Recommendation offers a comprehensive approach to the use of SIT in connection with all forms of serious crimes, including acts of terrorism.

below. Before someone is put under a special investigative technique (SIT), there need to be “sufficient reasons to believe” that the individual is involved in the commission or likely commission of serious criminal activity. The difficulty in determining what is meant by “sufficient reasons” should not be underestimated.

42. The essentially factual nature of the concept makes a legal definition of it almost impossible. As a source of inspiration to help clarify the concept, the right to liberty can be of some assistance. As has been shown, that right includes the concept of “reasonable suspicion”. This test could be used to justify placing someone under surveillance. The European Court of Human Rights has found that “having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as ‘reasonable’ will depend upon all the circumstances.”<sup>582</sup>

43. All forms of covert policing and surveillance will engage the right to respect for private life, which to be lawful, must be justified.<sup>583</sup> These include:

- Collection of private information by State security services which is systematically collated and retained;<sup>584</sup>
- CCTV schemes where any images are recorded, processed and stored;<sup>585</sup>
- Surveillance operations, which require independent, preferably judicial supervision;<sup>586</sup>
- Collecting samples such as fingerprints and DNA;<sup>587</sup>
- Retention of personal data is different from collection, and must be separately justified;<sup>588</sup>
- Policing methods, such as entrapment.<sup>589</sup>

44. Interception of communications must meet the minimum requirements of:

- Confidentiality;
- Integrity; and
- Availability.

45. These requirements mean that the information should be accessible only to certain authorised persons (confidentiality), that the information should be authentic and complete, thus granting a minimum standard of reliability (integrity)

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<sup>582</sup> *Fox, Campbell and Hartley v the United Kingdom*

<sup>583</sup> *Malone v UK; Halford v UK*

<sup>584</sup> *Rotaru v Romania*. This is particularly so in respect of information concerning an individual's distant past

<sup>585</sup> *Peck v UK*

<sup>586</sup> HRC General Comment 16

<sup>587</sup> *Murray v UK; Friedl v Austria; S and Marper v UK*

<sup>588</sup> *X v Germany*

<sup>589</sup> *Texiera de Castro v Portugal*

and that the technical system in place to intercept telecommunications is accessible whenever necessary (availability).

46. Private life rights apply to telegraphic communications.<sup>590</sup> In *Copland v. the United Kingdom*, the Court held that e-mails sent from the workplace was covered by “private life” and “correspondence”. This included monitoring personal use of the Internet at the place of work. The applicant had a reasonable expectation of privacy that her e-mails and use of the internet would not be monitored.

### **Searches and seizure**

47. Police searches and seizure whether conducted at home, business or other premises will engage privacy rights. For example, in *Niemietz v. Germany*, the applicant lawyer complained that a search conducted by the police of his law office constituted an interference with his right to private life. Contrary to the respondent State’s arguments supporting the police action, the Court held that it would be too restrictive to limit “private life” to an “inner circle” and to exclude from it the outside world not encompassed within that circle. As has been stated above, “private life” should not be taken to exclude activities of a professional or business nature. The Court stated that in the case of a person exercising a liberal profession it is impossible to distinguish between private and professional relationships.

48. In *Roemen and Schmidt v. Luxembourg*, the first applicant was a journalist, and the second applicant was his lawyer. The first applicant published an article in a newspaper, making criminal allegations against a government minister. Searches were carried out at the journalist’s home and workplace, and at the lawyer’s office, during which certain documentation was seized. The first applicant alleged, in particular, that his right as a journalist not to disclose his sources had been violated. The second applicant principally complained of an unjustified interference with her right to respect for her home. The Court accepted that the search and seizure of documents from the lawyer’s office amounted to an interference with her rights under Article 8.

49. In *Peev v. Bulgaria*, the Court re-affirmed the principle that private life exists within the workplace. The applicant was employed at the Prosecutor’s Office. After writing a letter to the media his office was sealed off and searched. In the Court’s view, the applicant could reasonably have expected his workspace to be treated as private property, or at the least, his desk and filing cabinets, in which he kept personal belongings.<sup>591</sup> A search of that space therefore amounted to an “interference” with his private life.

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<sup>590</sup> *Guzzardi v. Italy*

<sup>591</sup> See also *Halford v UK*

50. In *Keegan v. UK*, the applicants' house was forcibly entered and searched, albeit that this turned out to be a mistake and, due to failure of the police, the wrong house was entered. The applicants could not sue the police because it was accepted that the police had not acted with malice. The Court pointed out that the exercise of powers to interfere with home and private life had to be confined within reasonable bounds to minimise its impact on the personal life of the individual. Because in this case basic steps to verify the address were not effectively carried out, the resulting police action, could not be regarded as proportionate. The failure to take reasonable and available precautions led to the finding of a violation of the right to respect for home life, as well as the right to an effective remedy (Article 13). In a similar case, to the extent that the police had failed to verify facts leading to an interference with private life, in *McLeod v UK* (1999), the Court held that entry of the police into the applicants' house in order to prevent a breach of the peace amounted to an interference with her rights under Article 8(1). The Court found that there was little or no risk of disorder or crime.
51. The Court noted in *Imakayeva v. Russia*, that no search warrant was produced to the applicant during the search of her house and that no details were given of what was being sought. Furthermore, it appeared that no such warrant was drawn up at all. Nor was the Government able to give any details about the items seized because they had allegedly been destroyed. The Court highlighted that reference to combating terrorism and the reliance on counter-terrorism legislation could not replace an individual authorisation of a search, delimiting its object and scope, and drawn up in accordance with the relevant legal provisions either beforehand or afterwards.

### **Informers, Undercover Officers and Entrapment**

52. It is unfair under the right to a fair trial to prosecute an individual for a criminal offence incited by undercover agents, which, but for the incitement, would probably not have been committed. Even the public interest in the detection of serious crime cannot justify the instigation of criminal offences by undercover agents.<sup>592</sup>
53. The law governing the use of undercover agents must be clear and precise. It must also provide safeguards against abuse. So long as informers and/or undercover officers keep within the reasonable limits in relation to surveillance no issues arise under the right to a fair trial, neither does any privacy issue arise under the right to respect for private life.<sup>593</sup> The defence must, however, have the opportunity of challenging the evidence.

### **Unlawfully obtained evidence**

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<sup>592</sup> *Teixera da Castro v. Portugal*

<sup>593</sup> *Ludi v. Switzerland*

54. As a general principle, any evidence obtained in breach of private life rights should not form part of a criminal prosecution, because to do so may violate the right to a fair trial.<sup>594</sup> Evidence gained from an interference with privacy should not be submitted in such a way as to jeopardise the right of the accused to a fair trial. Human rights standards require the proceedings as a whole, including the way in which evidence is submitted, to be fair.<sup>595</sup>
55. The European Court has, however, accepted that the right to a fair trial is not necessarily breached where evidence is relied upon which was obtained in violation of the right to respect for private life. For example, where the impugned evidence (an illegal telephone tap) was not the only evidence against the accused in a case involving a serious crime, there was no violation of the right to a fair trial where that evidence was admitted.<sup>596</sup>
56. Similarly in a case where the police had not acted illegally as a matter of domestic law, but had nonetheless breached the right to respect for private life through the use of eavesdropping devices, the applicant's fair trial rights were not violated in a serious drugs case where he pleaded guilty to the offence. There was no violation of the right to a fair trial; notwithstanding that this was the only evidence against the applicant.<sup>597</sup>
57. Subsequent cases before the European Court have found a violation of the right to a fair trial where there has been an unlawful interference with privacy. This took place when the police used surveillance methods to obtain evidence against the applicant whilst he was being detained in police custody on suspicion of having committed murder.<sup>598</sup>
58. Relevant questions in determining the fairness of the trial will include:
- Who authorised the breach of privacy and how;
  - Whether the evidence could have been collected in another way; and
  - The weight and probative value of the evidence.

### **When is it Proportionate to Interfere with Privacy Rights?**

59. In *Klass v. Germany*, the Court underlined that, although under exceptional circumstances laws can permit the practice of covert surveillance, the State does not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. In a sentence repeated in all cases concerning surveillance since, the Court emphasised, "the danger such a law poses of undermining or

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<sup>594</sup> *Allan v UK*, but also see *Schenk v Switzerland* and *Khan v UK*

<sup>595</sup> *Texiera de Castro v Portugal*

<sup>596</sup> *Schenk v Switzerland*

<sup>597</sup> *Khan v UK*

<sup>598</sup> *Allen v UK*

even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.”<sup>599</sup>

60. As such within the context of surveillance, perhaps more than any other area regulated by Article 8, safeguards must be established by law. The security services and law enforcement agencies must be supervised and regulated. That supervision must follow the values of a democratic society and in particular the rule of law, controlled ultimately by an independent and impartial judiciary.<sup>600</sup>

61. A further interesting aspect of *Klass* was that the applicants were unable to prove that they had been the subject of any secret surveillance. However, the Court held that an individual may under certain conditions claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. It stated that the relevant conditions must be determined in each case according to the secret character of the measures objected to, and the connection between the applicant and those measures. It concluded that the mere existence of the legislation itself involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily struck at freedom of communication between users of the postal and telecommunication services and thereby constituted an “interference by a public authority” with the exercise of the applicants’ right to respect for private and family life and correspondence.

62. In *Dumitru Popescu v. Romania (no. 2)* in contrast to *Klass* the Court found that the Romanian legislation did not have adequate safeguards. In particular, the Court noted the lack of any safeguards concerning the need to keep recordings of telephone calls intact and in their entirety. The inclusion in the case files of incomplete transcriptions of the tapped telephone conversations was not in itself incompatible with the requirements of Article 8. The Court could accept that, in certain circumstances, it would be excessive, if only from a practical point of view, to transcribe and include in the investigation file of a case all of the conversations that had been recorded from a particular telephone. This could run counter to other rights, such as, for example, the right to respect for the private life of other individuals who had made calls from the telephone being tapped. The Court noted, however, that if this were the case, the applicant must be given the

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<sup>599</sup> *Klass v. Germany; Leander v. Sweden; Malone v. United Kingdom; Chahal v. United Kingdom; and Tinnelly & Son Ltd and McElduff v. United Kingdom.*

<sup>600</sup> *Klass v. Germany.*

opportunity to listen to the recordings or to challenge their accuracy, which explained the need to keep the recordings intact until the end of the criminal trial and, more generally, must be able to include in the investigation file any evidence which seemed relevant for his or her defence. It also noted that the authority empowered to certify that recordings were genuine and reliable had demonstrated a lack of independence and impartiality. The Court emphasised that, where doubts existed as to the genuineness or reliability of a recording of tapped conversations, there should be a clear and effective means of having them examined by a public or private body that was independent from the authorities which had carried out the telephone tapping.

63. The SIT Recommendation points out that in the context of measures such as resorting to surveillance or telephone tapping as part of the fight against terrorism, the requirement that there be a pressing social need to interfere with the right to private life will often be satisfied. However whether the particular interference is proportionate will depend on a number of context specific factors. These include:

- Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals.<sup>601</sup>
- States should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.<sup>602</sup>

64. In *Smirnov v Russia* a lawyer's house was searched by the police, who seized documents and his computer hard drive. The European Court of Human Rights Given found that there had been a violation of Article 8 ECHR because the lawyer himself had not been suspected of any criminal offence and the search had been carried out without sufficient and relevant grounds or safeguards against interference with professional secrecy; the interference with the lawyer's privacy was wholly disproportionate.<sup>603</sup>

65. As regards more specifically telephone tapping, the law should:

- Set out the categories of persons whose telephones may be tapped;
- Spell out the nature of the offences justifying the use of tapping;
- Indicate the duration of the measure;
- Explain the procedure for drawing up the summary reports containing intercepted conversations;

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<sup>601</sup> SIT Rec para.4

<sup>602</sup> SIT Rec para.7

<sup>603</sup> *Smirnov v Russia*

- Identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and
- Clarify the circumstances in which they are to be erased or destroyed (in particular following discharge or acquittal of the accused).<sup>604</sup>

66. The Court has laid down the principle that telephone tapping must comply with the law, considering that, where it does not, it is prohibited, regardless of whether it is for judicial purposes or for reasons of national security.<sup>605</sup>

67. The Court has also pointed out that depending on the scope of the measures and the guarantees provided by domestic law, to allow a non-judicial authority alone to decide on such operations<sup>606</sup> may constitute a violation of the Convention. Member States should therefore take appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review.<sup>607</sup>

68. Member States should ensure adequate training of competent authorities in charge of deciding to use, supervising and using special investigation techniques. Such training should comprise training on technical and operational aspects of special investigation techniques, training on criminal procedural legislation in connection with them and relevant training in human rights.<sup>608</sup>

69. Key to the Court's concerns is that recognition must be given to the fact that intrusive techniques may not only affect the rights of the person who is suspected of having committed or prepared the offence, but also, directly or indirectly, the rights of other persons. For this reason it is important that the offence in question is particularly serious one, and that no other method of obtaining the evidence is available.

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<sup>604</sup> *Huvig and Kruslin v France; Greuter v The Netherlands*

<sup>605</sup> *A. v France.*

<sup>606</sup> *Funke, Crémieux and Mialhe v France.*

<sup>607</sup> SIT Rec para.3 - The explanatory report notes that amongst the various types of control envisaged the most effective control would be a system of prior authorisation, although it would not always be appropriate to establish such a control (para.42). Whether prior authorisation or ex post facto review is required may depend on the nature of the operation and the power in question. However it is clear from *Klass v Germany* that prior judicial authorisation may not always be required. In that case the court accepted that a mechanism for supervision of telephone tapping which involved a confidential committee which reviewed authorisations rather than prior judicial authorisation, was sufficient in the circumstances for the measure not to constitute a disproportionate interference with privacy rights. In reaching this conclusion the Court acknowledged the serious nature of the interference and the real possibilities of abuse, however it was willing to accept it because it was convinced that the safeguards were both adequate and effective in the circumstances.

<sup>608</sup> SIT Rec para.12.

70. From a review of the case law before the European Court of Human Rights under the right to respect for private life two conclusions can be drawn:

- First, the right to respect for private life, as a qualified right, is capable of being effectively adapted in order to facilitate effective crime prevention and counter-terrorist action.
- Second, in order to develop such a strategy, those developing it have to know about, and understand, the demands that human rights principles will make. For instance, unless one is alive to the relationship between adequate and effective safeguards, and the proportionality test, then the measures which are adopted as part of a counter-terrorist evidence gathering strategy or crime prevention are not likely to be human rights complaint. In turn, this may have implications for the reliability and usability of that evidence.

## Data Protection

71. The ability to exchange relevant information quickly and efficiently between the police, the security services and other public bodies can be essential in developing an intelligence led approach to counter terrorism. As a result of the international nature of terrorism, this can also require the sharing of information across borders.

72. The exchange of private information, for whatever reason, about an individual between public bodies, whether internally or internationally, will engage private life rights and will almost certainly interfere with them. The question is, therefore, is that interference lawful?

73. To tackle this problem of ensuring compliance with privacy rights as well as recognising that the right to freedom of expression guarantees access to information,<sup>609</sup> the Council of Europe as long ago as 1981 adopted, the “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.” To this day, it still remains the world's only binding international legal instrument in this field. It is open to signature by any country, including countries which are not members of the Council of Europe.

### *The Council of Europe Convention on Data Protection*<sup>610</sup>

74. The Convention defines a number of principles for the fair and lawful collection and use of data. These include:

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<sup>609</sup> Although this right of access to information only relates to information a body wishes to impart (*Leander v Sweden*)

<sup>610</sup> See also the Additional Protocol to this Convention which deals with supervisory authorities and trans-border data flows, CETS No.: 181, 1 July 2004

- Data can only be collected for a specific purpose and should not be used for any other reason;
- Data must be accurate, adequate for this purpose and stored only for as long as is necessary;
- There must be a right of access to and rectification of data for the person concerned (data subject);
- Special protection must be made for data of a sensitive nature, for example on religion, political beliefs, sexual orientation, genetics or medical information.

75. To become a party to the Convention, States must ensure that their national legislation contains these basic principles in respect of the personal data of every individual on their territory. Having thus created a common, minimum, level of protection, the free flow of personal data between States is authorised amongst parties to the Convention.

76. In order to adapt the general principles set out in the Convention to specific issues, the Council of Europe has adopted a number of further Recommendations.

77. Of relevance are: police records (1987); communication of data to third persons by public institutions (1991); protection of personal data in the field of telecommunications, in particular telephone services (1995); the protection of medical and genetic data (1997); the protection of personal data collected and processed for statistical purposes (1997); for the protection of privacy on the Internet (1999). Concerning the impact of new technologies, see also:

- Progress report on the application of the principles of Convention 108 to the collection and processing of biometric data (2005)
- Guiding principles for the protection of personal data with regard to smart cards (2004)
- Report containing guiding principles for the protection of individuals with regard to the collection and processing of data by means of video surveillance (2003)
- Report on the Impact of Data Protection Principles on Judicial Data in Criminal Matters including in the framework of Judicial Co-operation in Criminal Matters (2002)

## **Racial and Religious Profiling**

78. One area of developing concern in the context of counter-terrorist strategies is the use of racial and religious profiling, which involves the collection of personal information and therefore involves interference with data protection and privacy rights. The general collection and processing of information solely by reference to criteria such as race or religion, and the use of that information as a starting point for investigations, without any specific or individual reasons to suspect the

persons involved, raises serious doubts about whether such activities are compliant with privacy rights and the protection from discrimination.

79. The German Constitutional Court held in a case challenging racial and other profiling that such profiling could only be compatible with the German human rights protection contained in the German Basic Law if there was a 'concrete' danger to highly protected rights (*rechtsgueter*), such as the life and security of the German Federation (or *Lande*), or the life of a specific person. The court, therefore, held that such racial profiling by the grid-search method could not be used preventatively to avert danger in the absence of a concrete and identifiable risk to either the person or the State.
80. The court went on to hold that the general level of threat that has been in place since 11 September 2001 was not, in and of itself, sufficient to justify the use of the grid search method. The court also held that the threat must be specific beyond a general level and relate to the preparation or realisation of actual terrorist attacks.<sup>611</sup>
81. Drawing upon the Council of Europe framework, the EU also has an extensive range of provisions dealing with data protection, most notably what is known as the Data Protection Directive (1995).<sup>612</sup> Whilst requiring similar safeguards to those within the Council of Europe, that Directive also requires the establishment of national Data Protection Commissions or Ombudsman to provide easy access for handling complaints.

### **Storage and Retention of Information**

82. As has been identified, at the European level there is a comprehensive collection of laws and guidelines on privacy and data protection. The European Court has also examined these issues on a number of occasions. The Court has accepted that intelligence services can legitimately exist in a democratic society. It has reiterated, however, that powers of secret surveillance of citizens are tolerable under the Convention only in so far as they are strictly necessary for safeguarding democratic institutions. Therefore any interference has to be supported by relevant and sufficient reasons and be proportionate to the legitimate aim or aims pursued.
83. That said, the Court has accepted that a refusal of full access to a national secret police register might be necessary where the State legitimately fears that the provision of such information could jeopardise the efficacy of a secret surveillance system designed to protect national security and to combat terrorism. As such the Court has concluded that a State was entitled to consider that the interests of national security and the fight against terrorism prevailed

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<sup>611</sup> 1 BvR 518/02

<sup>612</sup> 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

over the interests of the applicants in being advised of the full extent to which information was kept about them on the Security Police register.<sup>613</sup>

84. The Court has, however, accepted that the use of secret surveillance can have a knock on effect, and chilling effect, in relation to the enjoyment of other human rights and freedom of expression and association in particular.<sup>614</sup>

85. In *S and Marper v UK* the European Court considered a policy where fingerprints and DNA samples obtained from people suspected of committing criminal offences could be retained for an unlimited time. The Court held that this was a disproportionate interference with the applicants' Article 8 ECHR rights because the data could be retained irrespective of the nature or gravity of the offence, the age of the suspect or whether the person had actually been convicted of a criminal offence. Such a blanket and indiscriminate provision could not be justified, particularly given that there was no provision for independently reviewing the decision to retain data and there were only limited ways in which a person could have the data destroyed. The Court also held that holding data of those who had been convicted of offences alongside those who had not, violated the presumption of innocence and created a risk that those whose data was retained would face stigmatisation.<sup>615</sup>

86. Where information about peoples' private lives is held, the State must put in place clear safeguards against abuse, set out in a form that is accessible to the public.<sup>616</sup>

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<sup>613</sup> *Segerstedt-Wiberg v Sweden*

<sup>614</sup> *Ibid*

<sup>615</sup> *S and Marper v UK*

<sup>616</sup> *Shimovolos v Russia*

## VII. Human Rights and the Guarantee of Democratic Pluralism

This section of the Manual will explore how the democratic and participatory rights work. These are:

- Freedom of expression;
- Freedom of information;
- Freedom of association;
- Freedom of assembly; and
- Freedom of religion.

This section will explain why controls upon these rights must be applied with care. All of the rights described in the section are qualified rights and therefore they can be lawfully interfered with, subject to satisfying the tests of legality, necessity, proportionality and non-discrimination. If necessary, it is also possible to derogate from these rights.

### 1. Freedom of Expression

1. Article 10, ECHR<sup>617</sup> guarantees free speech. Article 19, ICCPR, mirrors this.

**What is included in the definition of freedom of expression in international human rights law?**

2. The main elements of freedom expression as guaranteed by international human rights law, include:
  - Freedom of opinion
  - Freedom of speech – orally, in writing, in print, in art
  - Freedom of information – orally, in writing, in print, in art
  - Freedom of the media
  - Freedom of international communication

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<sup>617</sup> Article 10, ECHR, reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- Freedom of electronic communication

### **General considerations**

3. It is impossible to imagine a democratic society without a free press. Freedom of expression is one of the essential foundations of a democratic society, without which it may not be possible to enjoy many of the other rights protected by human rights standards. The media in particular attracts special protection because of their role as a public watchdog. Restrictions on freedom of expression are subjected to very close scrutiny and must be convincingly established.
6. It is worth noting that the 1998 Nobel Prize winner Amartyaden Sen wrote:  
  
"In the terrible history of famines in the World, no substantial famine has ever occurred in any independent and democratic country with a free press...While India [where he grew up] continued to have famines under British rule right up to independence, they disappeared suddenly with the establishment of multi-party democracy and a free press."
7. Sen's observations are inspirational and need to be kept in mind when considering the role of freedom of expression. Individual free speech, even in the broadcast media, may irritate, or even undermine government strategy, but the value of freedom of expression within the bigger picture needs to be remembered.
8. Restrictions on free speech are a restriction on democracy. For all its faults, democracy is considered to be the most effective form of government precisely because it is subject to the glare and scrutiny of a free media. A result of which is that it has to, on a day by day basis, have its policies exposed and analysed.

### **The scope of freedom of expression protection**

9. The first sentence of Article 10(1), ECHR and Article 19(2), ICCPR asserts that everyone has the right to freedom of expression. Everyone, does mean everyone. It includes diplomats,<sup>618</sup> civil servants,<sup>619</sup> judges,<sup>620</sup> teachers,<sup>621</sup> local government officers,<sup>622</sup> trade union leaders<sup>623</sup> and members of the armed

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<sup>618</sup> *Haseldine v UK*

<sup>619</sup> *Vogt v Germany; Kwiecien v Poland*

<sup>620</sup> *H v Austria*

<sup>621</sup> *Morissens v Belgium*

<sup>622</sup> *Ahmed v UK*

<sup>623</sup> *Vellutini and Michel v France*

forces<sup>624</sup>, as well as legal persons,<sup>625</sup> such as non-governmental organisations.<sup>626</sup>

10. It is essential to understand that not all forms of expression are accorded the same protection. Some speech, because of its direct relationship with protecting democratic values is given more protection than other speech.
11. It is fundamental to the protection of free expression that a person cannot be required to prove the truth of a value judgment.<sup>627</sup> It is only statements of fact that can be susceptible to a requirement of proof, although value judgments and opinions must be made in good faith and have some reasonable factual basis.<sup>628</sup>
12. The extent to which speech is protected can be broken down into five broad categories. These will be explained in detail below and are:
  - Political and public interest expression
  - Moral and religious expression
  - Artistic and cultural expression
  - Commercial expression
  - Valueless expression
13. These include the strongest form of protection reserved for political and public interest expression to the least protected forms of speech, notably valueless expression. However, all categories of speech are to some extent covered by the right to freedom of expression.
14. Political expression is of most relevance. However without understanding how expression is protected as a whole it may not be possible to grasp the importance that is attached to political expression and why such speech can rarely, if ever, be interfered with.

### **Political and public interest expression**

15. Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech.<sup>629</sup>
16. The Strasbourg Court has made it clear that it regards expression about matters of public interest as encompassing far more than party-political issues.<sup>630</sup> Freedom of the press affords the public one of the best means of discovering and

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<sup>624</sup> *Engel v The Netherlands*

<sup>625</sup> *Autronic AG v Switzerland*

<sup>626</sup> *VgT Verein gegen Tier-fabriken v Switzerland*

<sup>627</sup> *Lingens v Austria; Karman v Russia*

<sup>628</sup> *Dabrowski v Poland; Kwiecien v Poland; Kislov v Russia*

<sup>629</sup> *Vgt Verein gegen Tierfabriken v Switzerland*

<sup>630</sup> *Thorgeirson v Iceland*

forming an opinion of the ideas and attitudes of their political leaders, therefore where political expression is engaged it will be very difficult to justify an interference with the press and media by the State.<sup>631</sup> In the context of political expression the European Court has held that officials and journalists enjoy a wide freedom to criticise the actions of government, even where their statements may lack a sound factual basis.<sup>632</sup>

17. A broad range of issues falls within political expression. These, for example, include publications on:

- Police conduct;<sup>633</sup>
- Impartiality of a court;<sup>634</sup>
- Public health;<sup>635</sup>
- State corruption;<sup>636</sup>
- State economic activity;<sup>637</sup> and
- State housing policy.<sup>638</sup>

18. Criticism of the government and government policy and criticism of politicians, monarchs<sup>639</sup> and public figures fall within its scope.<sup>640</sup> It can also include insults directed at politicians (as long as they are substantiated by fact and made in good faith)<sup>641</sup> and to a limited degree it may include criticisms of senior civil servants.<sup>642</sup> Criticism of one's country, for example an applicant's alleged "denigration of Turkishness" may also be protected.<sup>643</sup>

19. Blanket bans on particular manifestations of political expression will be difficult to justify on human rights grounds. In *Vajnay v Hungary* for example, the European Court found that the blanket ban on the wearing of a "red star", a symbol of totalitarianism, was unjustified because it required no proof that its display amounted to totalitarian propaganda or that it would incite public disorder.<sup>644</sup> Similarly the European Court has held that the conviction of non-violent demonstrators shouting political slogans in support of an illegal organisation was a violation of their Article 10 rights.<sup>645</sup>

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<sup>631</sup> *Observer & Guardian Newspapers v UK*

<sup>632</sup> *Lombardo and Others v Malta; Dyuldin v Russia*

<sup>633</sup> See for example *Guja v Moldova*

<sup>634</sup> See for example, *Kudeshkina v Russia*

<sup>635</sup> See for example *Hertel v Switzerland*

<sup>636</sup> See for example *Marchenko v Ukraine*

<sup>637</sup> See for example *Uj v Hungary*

<sup>638</sup> See for example *Lepojic v Serbia*

<sup>639</sup> *Otegi Mondragon v Spain*

<sup>640</sup> See for example *Fatullayev v Azerbaijan*

<sup>641</sup> *Rumyana Ivanova v Bulgaria; Mihaiu v Romania; Aquilina and Others v Malta*

<sup>642</sup> *Oberschlick v Austria*

<sup>643</sup> *Altuğ Taner Akçam v Turkey*

<sup>644</sup> *Vajnay v Hungary*

<sup>645</sup> *Gül and Others v Turkey*

20. In the context of terrorist activity in Northern Ireland, the European human rights system held that limiting the voices of the political wings of proscribed organisations was compliant with Article 10. In that case, the voices were dubbed, so that you could not hear the actual voice of the speaker.<sup>646</sup>
21. This approach adopted in the context of Northern Ireland has to be contrasted with the approach that the European Court of Human Rights has taken to limits on freedom of expression in Turkey connected with the problems in the south east of Anatolia.<sup>647</sup> In a string of cases involving freedom of expression and its relationship with terrorism issues, all raising slightly different facts, the Court has set down a coherent set of principles.
22. The European Court has now set down basic principles concerning the extent of State power in controlling freedom of expression in the context of counter-terrorism. These are:
- States are entitled to adopt special measures to combat terrorism<sup>648</sup> and these can extend to media restrictions. Such restrictions remain subject to the principles of freedom of expression.
  - Even in the context of political violence, Article 10 protects ideas and information that may “offend, shock or disturb the state or any section of the population”.<sup>649</sup>
  - There is an essential role for the media. It has not only a right but something close to a duty to impart information and ideas to the public and to facilitate the free expression of analysis and opinions even on difficult political issues<sup>650</sup>.
  - The positive duty to protect life may require appropriate restraints on the media to prevent reporting that may amount to an incitement.<sup>651</sup>
  - The highest protection is for criticism of governments and their policies. Public opinion expressed mainly through the media, must be free to scrutinise government actions. Governments, given their dominant position, must be

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<sup>646</sup> *Purcell v Ireland; Brind v UK*. As it happens, and with the benefit of hindsight, the merits of this approach in undermining the oxygen of publicity for such organisations are in doubt.

<sup>647</sup> A number of cases have been taken to the Strasbourg Court by newspaper owners, journalists, academics, other commentators, even poets, who were prosecuted by the Turkish authorities in the early 1990s. All of them had in some way been critical of the Turkish state’s response to the PKK, often making allegations of some kind of killing, torture and destruction by the Turkish army and police. See Davis H., ‘Lessons from Turkey’ 1 EHRLR 2005

<sup>648</sup> *Brogan v United Kingdom*

<sup>649</sup> *Handyside v United Kingdom*

<sup>650</sup> *Aslantis v Turkey*

<sup>651</sup> *Osman v United Kingdom*

prepared to accept criticism without resorting to criminal sanctions<sup>652</sup> even if the criticism can be regarded as provocative or insulting or they involve serious allegations against security forces<sup>653</sup>.

- The European Court is wary that States may use the fact of background political violence to create criminal offences in respect of political speech, particularly media reporting of banned organisations, that, though provocative, insulting, offensive, shocking or disturbing, does not incite violence and should be protected.<sup>654</sup>
- Any media ban that has a significantly detrimental effect on the communication of information and ideas, would be hard to make compatible with human rights standards.
- Criminal sanctions based on the simple fact of interviewing the leader of a proscribed organisation, thus allowing him to speak for himself in a hard hitting, one-sided and uncompromising and implacable way, could not, without more, be justified under freedom of expression.<sup>655</sup>
- The ‘duties and responsibilities’ clause in relation to limits on freedom of expression imposes particular burdens on the media in situations of conflict and tension, lest by the publication of views of representatives of organisations which resort to violence against the State, it becomes a vehicle for the dissemination of hate speech and the promotion of violence’.<sup>656</sup>
- The words in issue must be capable of being an incitement to violence and this matter, initially, can be addressed independently of context. The key question is whether violence, armed resistance or insurrection is encouraged.<sup>657</sup>
- Words such as “resistance”, “struggle” or “liberation”<sup>658</sup>, used approvingly, or accusations of “state terrorism” or “genocide”<sup>659</sup> are in themselves insufficient to constitute incitement.
- Acerbic criticism of state policy, without more, will not be incitement.

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<sup>652</sup> *Baskaya and Okcuoglu v Turkey*

<sup>653</sup> *Özgür Gündem v Turkey*

<sup>654</sup> *Sürek and Özdemir v Turkey*

<sup>655</sup> *Sürek and Özdemir*; see also *Sürek v Turkey (4)*

<sup>656</sup> *Sürek and Özdemir*, This duty is not confined to the media but to ‘persons addressing the public’, *Aslantas*,

<sup>657</sup> *Ceylan v Turkey*

<sup>658</sup> *Gerger v Turkey*

<sup>659</sup> *Ceylan*

- The authorities may claim that words have a hidden or implicit meaning of support for violence. The Court recognises this as a possibility but the burden is on the authorities to produce evidence of the double meaning.<sup>660</sup>
- In determining whether a restriction on words capable of being inciting is proportionate, the Court will also have regard to the context in which the words were published.
- Contextual matters can occasionally be significant in confirming the inciting quality of the words. Words spoken by political leaders, for example, may have this effect<sup>661</sup>.
- Naming (of politicians, officials, military officers and others involved in counter-terrorism) in a way which incites hatred and perhaps violence can legitimately be suppressed<sup>662</sup>.
- Restrictions on the identification of officials for the reason that they might then become terrorist targets can be justified under Article 10(2).<sup>663</sup> This reason, however, may not be sufficient, particularly if identification is linked to serious allegations of misconduct.
- The proportionality of a restriction on publications can also depend on the prosecution and penal practice of the state: whether or not the state moves straight to prosecution rather than seeking changes in content,<sup>664</sup> the persistency of the prosecution authorities, and, if there is a conviction, the severity of the penalty.<sup>665</sup>

23. From this brief examination of the case law from the European Court of Human Rights, it is clear that political speech in the context of terrorist activity can be limited, although context is everything. As a general rule, speech that falls short of incitement to hatred and incitement to violence is lawful and, furthermore, needs to be protected.

24. Academic expression is also protected on public interest grounds. The European Court has held that those who publish academic texts lay themselves open to potential criticism by readers or other members of the academic community.<sup>666</sup> It is in the public interest for free and critical academic debate to take place, even when that might amount to one academic calling another “an idiot”.<sup>667</sup> Similarly in

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<sup>660</sup> *Zana*, See also *Hogefeld v Germany*

<sup>661</sup> *Zana*; *Ceylan*

<sup>662</sup> *Sürek v Turkey (no 1)*

<sup>663</sup> *Sürek v Turkey (no 2)*

<sup>664</sup> *Incal v Turkey*

<sup>665</sup> *Baskaya and Okçuoglu*

<sup>666</sup> *Azevedo v Portugal*

<sup>667</sup> *Bodrožić v Serbia*

circumstances where professionals are criticised by other professionals (such as doctors), the Court will be slow to restrict freedom of speech.<sup>668</sup>

## Morals and religious beliefs

25. The Strasbourg Court has distinguished between the expression of intimate personal convictions within the sphere of morals and religion as opposed to the expression of the public interest. In doing so, they have accepted that the expression of moral or religious belief attracts less protection than political expression. However, within a counter terrorism strategy, attempts to control the expression of religious beliefs will still need to be justified to a high standard.

26. For example, the banning of a radio advert to encourage people to attend a particular church, need not amount to a violation of freedom of expression if the ban applies to all religious advertising. The State, in its desire to maintain religious pluralism, is entitled to exclude all religious groupings from broadcasting advertisements if it chooses to, rather than filter individual adverts.<sup>669</sup> However where an advert engages more than religious belief and includes an element of political conviction, such a ban may not be proportionate.<sup>670</sup>

27. As we have seen, political expression is recognised by the European Court as contributing towards a net positive outcome for a democratic society as a whole, even if it does offend some members of that society. Whereas religious or moral speech is viewed as being more personal to individuals and as such is less protected.

## Artistic expression

28. Art may be political expression and, if so, will be protected as such. But artistic expression more generally is also protected under freedom of expression. This includes where it involves shocking images such as bestiality. Even though freedom of expression permits interference on the basis of morality, this cannot be used to justify wholesale censorship.<sup>671</sup> Pornography, for example, may be controlled but it cannot be prohibited.<sup>672</sup> In *Vereinigung Bildender Künstler v Austria*, a ban on the exhibition of a painting depicting public figures in lewd sexual positions was held to be unjustified because the painting was clearly a satirical caricature of the individuals, which did not attempt to portray reality.<sup>673</sup>

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<sup>668</sup> *Frankowicz v Poland; Heinisch v Germany*

<sup>669</sup> *Murphy v Ireland*

<sup>670</sup> In *Vgt Tierfabriken* the banning of the applicants' advertisement did constitute a violation of Article 10, and the Swiss government's desire to prevent powerful financial groups from exploiting the political process was not a sufficient reason to completely ban all political advertising on the broadcast media.

<sup>671</sup> In *Muller v Switzerland* there was no violation of freedom of expression because the Swiss authorities could justify closing down an exhibition and fining the applicant because the exhibition was accessible to the general public, free of charge and without any age restrictions.

<sup>672</sup> *Scherer v Switzerland; Akdaş v Turkey*

<sup>673</sup> *Vereinigung Bildender Künstler v Austria*; see also *Alves da Silva v Portugal* but contrast with *Lindon v France*

29. The approach to be adopted is that those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. This principle means that the State is under an obligation not to encroach unduly on artistic freedom of expression. Artistic expression also includes light entertainment and satire.

### **Commercial speech**

30. Even less protected speech, is commercial expression. The State therefore has more leeway in deciding whether to impose limits and constraints on such speech. Commercial speech includes promoting commercial, economic or financial interests. Although just because a book has commercial value does not mean it ceases to amount to political expression. Commercial speech includes advertising.<sup>674</sup>

31. Fairly wide restrictions are permitted in relation to commercial speech because there is a recognised need to protect commercial and confidential information, and also preventing unfair competition has been accepted as pursuing a legitimate aim for protecting the rights of others.

### **Valueless speech**

32. Free speech also protects valueless and offensive speech and ideas that "offend, shock or disturb". This is because freedom of expression seeks to create "pluralism, tolerance and broadmindedness without which there is no democratic society".<sup>675</sup>

33. Public officials are entitled to be protected from verbal attacks in the performance of their duties unless the remarks form part of an open discussion on matters of public concern or involve the freedom of the press.<sup>676</sup>

### ***Prohibition of abuse of rights or denying the right of freedom of expression***

34. Although of general application, the principle that the individual exercise of rights cannot be exploited to deny the rights and freedoms of others is of particular relevance to freedom of expression. Put simply, free speech rights may be abused to seek to promote the destruction of other's rights through for example, the promotion of racial or religious hatred. Under those circumstances, the individual loses, or forfeits, the right to freedom of expression.<sup>677</sup>

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<sup>674</sup> *Markt Intern Verlag GmbH v Germany*. Similarly Article 19, ICCPR protects advertising. The HRC found a violation of Article 19 in *Ballantyne v Canada* in relation to the prohibition of advertising in English in Quebec.

<sup>675</sup> *Handiside v UK*

<sup>676</sup> *Janowski v Poland*

<sup>677</sup> *Glimmerveen & Hagenbeek v Netherlands*.

35. A typical fault line is between the right to freedom of expression and the right to a private life. For example, where personal, sensitive information that is not in the public interest is published (such as medical information or details about a person's sexual activities), the subject's private life rights may trump the publisher's right to free expression.<sup>678</sup>
36. These principles are therefore likely to form a key aspect of a State's arsenal in controlling speech. By extension, these principles also will require that the State ensures that it, and the media, do not fall foul of this obligation themselves and that inflammatory language is not resorted to by it, or others.
37. The prohibition of the abuse of rights is contained in Article 17, ECHR.<sup>679</sup> This Article can be applied only to those rights which are capable of being exercised so as to destroy the rights of others: it cannot be used to restrict rights designed to protect the individual, such as the right to liberty or to a fair trial. The general purpose of Article 17, ECHR is to prevent totalitarian groups from exploiting, in their own interests, the principles enunciated by the ECHR.
38. Any measure taken under these Articles must be strictly proportionate to the threat to the rights of others.<sup>680</sup> There is also a relationship between banning speech and banning political parties. This will be examined in detail in the next section on freedom of association.

## Holocaust denial

39. In most cases involving the denial of the Holocaust the European Court has held that freedom of expression does not apply because Article 17, ECHR (the prohibition on the abuse of rights) prevents the individuals concerned from relying upon free speech.<sup>681</sup>
40. The European Court has recognised, however, that as time passes the appropriate response to certain types of publication changes. The lapse of time makes it unsuitable to deal with some remarks 40 years later with the same severity as 10 or 20 years previously. This forms part of the effort that every country must make to debate its own history openly and dispassionately.<sup>682</sup>

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<sup>678</sup> *MGN Ltd. v UK*

<sup>679</sup> Article 17, ECHR states:

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

<sup>680</sup> *Lehideaux & Isorni v France; Faurison v France HRC*

<sup>681</sup> *Kuhnen v Germany*. In *Garaudy v France* the Strasbourg Court found no violation of the Convention following the six months imprisonment of the applicant who had written a book entitled *The Founding Myths of Modern Israel*.

<sup>682</sup> *Lehideux v France* - which concerned an attempt to reconsider the role of Marshall Petain in French history

## Incitement, racial hatred and hate speech

41. The relationship between incitement to violence, racial hatred and freedom of expression is complex and controversial. As we have seen, there needs to be a direct link between the expression used and the violence intended. It is therefore necessary to distinguish between the publication of views that incite or might incite violence on the one hand and the publication of views that are intransigent and convey an unwillingness to compromise with the authorities.
42. Article 20, ICCPR also prohibits hate speech. In this respect there is a close relationship between the ICCPR and the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD).<sup>683</sup> CERD also has a right of individual petition and the State's failure to protect people from racial insults has been found to be a violation.<sup>684</sup>
43. Hate speech tends to arise in two ways. The first is relatively straightforward and relates to where such speech is used by extremists to target certain individuals and/or communities. Hate speech is used by these perpetrators to blame and defame people who are considered by them to be enemies. Holocaust denial is a classic example of such hate speech. Under these circumstances it can be appropriate to stop publication of this speech and to use criminal sanctions to prevent it.
44. The second category is more insidious and, as a result, more complex. It can occur where groups and communities are publicly perceived as being close to a threat. That group or community can then become the victim of hate speech from the mainstream population. This took place in the early years of the AIDS crisis against the gay community and is happening to the Muslim community in the context of post-9/11 terrorism. Management of the manifestation of this form of hate speech requires particular vigilance on the part of the authorities.
45. The following case example from the European Court helps explain hate speech and how it is appropriate to take measures to prevent it.

The applicant, as it happened, was a Regional Organiser for an extreme right wing political party. Between November 2001 and 9 January 2002 he displayed in the window of his first-floor flat a poster (60 cm x 38 cm), supplied by that political party, with a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign.

The poster was removed by the police following a complaint from a member of the public. The following day a police officer contacted the applicant by telephone

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<sup>683</sup> See also CERD General Recommendation 15 and also ICCPR General Comment 11 on Article 20.

<sup>684</sup> *Ahmad v Denmark*

and invited him to come to the local police station for an interview. The applicant refused to attend.

The applicant was then charged with an aggravated offence under public order legislation for displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it.

The applicant pleaded not guilty and argued, in his defence, that the poster referred to Islamic extremism and was not abusive or insulting, and that to convict him would infringe his right to freedom of expression under Article 10 of the Convention. He was convicted and fined £300 (GBP).

The applicant appealed. The appeal was dismissed. The appeal court held that the poster was “a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people”.

Before the European Court, the applicant submitted that free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence. Criticism of a religion, he argued, is not to be equated with an attack upon its followers. In any event, the applicant pointed out that he lived in a rural area not greatly afflicted by racial or religious tension, and there was no evidence that a single Muslim had seen the poster.

The Court however recognised the poster as hate speech and relied therefore on the prohibition of the abuse of rights contained in Article 17 of the Convention. The general purpose of which, they pointed out, is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention, ie freedom of expression. Freedom of expression, the Court explained may not be invoked in a sense contrary to Article 17.

The Court agreed with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of freedom of expression.<sup>685</sup>

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<sup>685</sup> *Norwood v UK*. See also *Balsyte-Lideikiene v Lithuania*

46. This example can be contrasted with the case of *Giniewski v France* where the applicant had been convicted of defaming the Christian community on the basis of an article suggesting that a doctrine of Catholicism contained the seeds of the Holocaust. The European Court held that while the article may have offended, shocked or disturbed some people, it did not incite hatred and was a genuine contribution to historical debate.<sup>686</sup>
47. The European Court has not been afraid to restrict political speech on the grounds that it incites racial hatred and discrimination.<sup>687</sup>

### **Apologie or The Glorification of Terrorism**

48. The UN Security Council Resolution 1624 calls on States “to prohibit by law incitement to commit a terrorist act.”<sup>688</sup>
49. This obligation, in a Council of Europe context, is given substance by the European Convention on the Prevention of Terrorism 2005. That Convention, amongst other things, requires the creation, as criminal offences, of certain acts that may lead to the commission of terrorist offences, namely: the public provocation of terrorism, as well as the recruitment and training of people to join and/or support terrorist organisations.
50. Conscious of the difficulties that such new offences could create in the context of human rights law, the Preamble to that Convention makes it clear that it is not intended to affect established principles relating to freedom of expression and freedom of association. Therefore, to give effect to the obligation in SC 1624 and the Council of Europe Convention, special attention must be paid to the analysis of freedom of expression, particularly in relation to the regulation and control of public interest speech.
51. In a Joint Declaration in 2005, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression have sought to clarify the extent to which freedom of expression can be limited in the context of incitement to terrorism. That Joint Declaration states:

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<sup>686</sup> *Giniewski v France*

<sup>687</sup> *Féret v Belgium*

<sup>688</sup> The United Nations Security Council (UNSC) Resolution 1624 states:

“Condemning also in the strongest terms the incitement of terrorist acts and repudiating attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts ... Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) Prohibit by law incitement to commit a terrorist act or acts;

(b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”

*“The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights.*

*While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”<sup>689</sup>*

52. The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has endorsed the scheme of the Council of Europe Convention on the Prevention of Terrorism. This is because Article 5 includes a definition of “public provocation” of terrorism based on a double requirement of subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.<sup>690</sup>

53. It is worth recalling that the Johannesburg Principles on National Security, Freedom of Expression and Access to Information state, “expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.”<sup>691</sup>

54. Those Principles go on to assert that, “To penalise an expression qualified as a threat to national security, a government must prove “that:

- a) the expression is intended to incite imminent violence;
- b) it is likely to incite such violence; and
- c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”<sup>692</sup>

## ***Limits to Freedom of Expression or what is not included***

### **Right of access to information**

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<sup>689</sup> Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

<sup>690</sup> E/CN.4/2006/98.

<sup>691</sup> Johannesburg Principles, Principle 23. Principle 3 reads: “In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.”

<sup>692</sup> Johannesburg Principles, Principle 6

55. In theory in relation to the right of access to information, the Strasbourg Court has consistently held that Article 10(1), ECHR, only gives the right to receive information that people wish you to receive. As such, historically, Article 10 cannot be relied upon to require information that the State does not wish to disclose, to be made available to an individual. As will be developed below (at para 80), evidence that the Convention is a living instrument, the Court is beginning to recognise a right to information under Article 10.
56. However under the established case law, the refusal of the State to disclose a secret Police register could not constitute an interference with the applicant's right to receive information as he had no right to that information and the State did not wish him to receive it.<sup>693</sup> However, if an individual can show that his or her private life is directly affected by the State's refusal to provide information, a positive obligation under the right to respect for private life may oblige the State to provide the information in question.<sup>694</sup>
57. Similarly, there have been violations of the State's positive obligations in relation to private life rights where there was a failure to provide essential information that would enable the applicants' to assess for themselves the necessary environmental risks that they and their families were exposed to by continuing to live in a particular area.<sup>695</sup>

### ***Protection of Freedom of Expression***

58. There is a clear link between freedom of expression, freedom of protest, freedom of association and the right to manifest religious belief.
59. Dress codes, and the prohibition on the wearing of headscarves by Muslim women, for example, will require justification under freedom of expression as well as the right to manifest religious belief.

### ***Truth***

60. An element of freedom of expression which is considered to be controversial is the need not to have to prove the truth of statements, if the author has satisfied the standards of professional journalism in that the opinions expressed, are based as far as can be established, on objective facts. To require otherwise would undermine the whole value of free speech.
61. Freedom of expression protects the right to criticise, speculate, have opinions and make value judgements and is not limited to "true" statements. Once statements are presented as fact, it must be established whether the author

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<sup>693</sup> *Leander v Sweden*

<sup>694</sup> *Gaskin v UK*

<sup>695</sup> *Guerra v Italy*. See also *LCB v UK*, concerning the right to life

acted in good faith and sought to comply with the obligation to verify a factual statement.

62. Similarly it has been held that requiring a journalist to prove the truth of rumours or stories relating to Police brutality that he reported, was unreasonable. This was particularly so because the articles urged the setting up of a body to investigate complaints of Police brutality.<sup>696</sup>

### ***Justifying restrictions on freedom of expression***

63. The justifications for restricting freedom of expression are more extensive than in any of the other qualified rights. As well as including the established tests of legality, necessity, proportionality and non-discrimination, they also include the following:

### **Duties and responsibilities**

64. The right to freedom of expression specifically imposes duties and responsibilities upon those seeking to rely on the right. This is in recognition of the powerful nature of the right and an acknowledgement that there can be no freedom of expression without responsibility.

65. In relation to duties and responsibilities the medium of expression will be an important factor. Therefore, as the audio-visual media have a more immediate and powerful effect than print, greater duties and responsibilities arise in relation to those media.

66. There is a particular onus on journalists to act according to the ethics of good journalism and/or allow for different opinions.<sup>697</sup> In relation to conflict zone situations there is a need for journalists and others to take particular care when expressing themselves to avoid ambiguous statements that could be interpreted as inciting violence or disorder.

67. Similarly, there is an obligation on civil servants requiring a degree of reserve on their part. Judges are expected to show restraint in exercising their freedom of expression, particularly where their authority and impartiality will be called into question. Special conditions are also considered to attach to military life.

68. Throughout human rights standards there is a recognition that restrictions can be imposed on the Police, the Armed Forces and civil servants.<sup>698</sup>

69. Although, not all those involved in the administration of the State will be excluded from the protection of human rights under these circumstances. Schoolteachers,

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<sup>696</sup> *Thorgeirson v Iceland*

<sup>697</sup> *Fressoz v France; Times Newspaper Ltd v the UK*

<sup>698</sup> These rights have been implied into the texts and are explicit in Article 11(2), ECHR.

for example, may technically be part of the administration of the State, however they are still considered to have freedom of expression and, by implication, freedom of association rights.<sup>699</sup>

70. However a ban on the political activities of the police (in relation to freedom of expression) was justifiable on the basis that a politically neutral Police Force is in the public interest.<sup>700</sup> Similarly, it has been held that it was legitimate to interfere with the freedom of expression rights of civil servants who wish to engage in political activity.<sup>701</sup>

### ***Restrictions on freedom of expression***

71. Freedom of expression does not just protect expression itself but the conditions necessary for it. The ability of journalists to protect their sources, for example, is one of the basic conditions for press freedom. Other conditions for effective journalism include holding meetings, obtaining information and respecting confidentiality. Legislation that limits access to proscribed organisations will inevitably raise issues in relation to freedom of expression.

72. Even minor restrictions on freedom of expression can have a chilling effect thus undermining the right. Any restriction will have to be justified on the basis of legality, necessity, proportionality and non-discrimination. Below are listed some examples of restrictions on freedom of expression. This is not a finite list.

### **Prior restraint**

73. Prior restraint, where publication is prevented from going ahead, may be justified under freedom of expression, but it calls for the most careful scrutiny on the part of a court, particularly where it concerns news. This is because news is a perishable commodity and “to delay its publication, even for a short period, may well deprive it of all its value and interest”.<sup>702</sup> Penalties imposed after publication are likely to be considered more proportionate than an injunction restraining publication.<sup>703</sup> However, an injunction restricting publication was found to be justified in a case where the details of the proposed publication would have interfered with the private life of a murdered man’s family.<sup>704</sup>

### **Criminal sanctions**

74. The prosecution of individuals for exercising their freedom of expression, particularly where it engages political expression and/or other Convention rights,

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<sup>699</sup> *Vogt v Germany*

<sup>700</sup> *Rekvenyi v Hungary*

<sup>701</sup> *Ahmed v UK*

<sup>702</sup> *Observer and Guardian v UK*

<sup>703</sup> *Stoll v Switzerland*

<sup>704</sup> *Hachette Filipacchi Associés v France*

will need to be strictly justified.<sup>705</sup> It is unlikely that a custodial sentence could ever be justified for a prosecution relating to political speech, particularly where the State could have used means other than a criminal penalty to achieve the same objective.<sup>706</sup>

75. It will rarely be in the public interest to restrict freedom of expression, particularly through the use of criminal sanctions. The public interest is that there should be publication and then if necessary further actions can be taken as a result of that decision to broadcast or publish. This is particularly the case where the broadcast or publication involves criticisms of the government.<sup>707</sup>

76. For example, where journalists have breached the criminal law in disclosing confidential tax information of a managing director of a large multi-national car manufacturer during industrial unrest at the relevant company, there is no public interest in prosecuting the journalists. The public interest lies in the fact that as a result of publishing that tax information, the large salary increases of the managing director could be established, whilst he opposed salary increases for employees. Therefore to convict the journalist was disproportionate given the importance of the journalist's article, and the fact that the information on the tax returns was in fact already available to the public via their local municipality.<sup>708</sup>

77. Accordingly, even if a journalist breaks the criminal law for the purpose of publishing, his conviction may not be justified under freedom of expression rights if the breach of the criminal law appears minor when compared to the public importance of the matters on which he is reporting.

## Defamation

78. Reputation is specifically protected in the right to freedom of expression. Privacy rights also protect it. For example the applicants' prosecution for criminal defamation was held not to violate the right to freedom of expression because the programme in which they (as it turned out) unjustifiably criticised the Police Chief, had been transmitted at peak viewing times and had not sought to balance their assertions in any way.<sup>709</sup> It will not be a breach of Article 10 ECHR to require a publisher to prove on the balance of probabilities that defamatory statements of fact were substantially true.<sup>710</sup>

## Journalists' sources

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<sup>705</sup> See for example *Incal v Turkey*

<sup>706</sup> *Lehideux v France; Raichinov v Bulgaria*

<sup>707</sup> *Castells v Spain*

<sup>708</sup> *Fressoz & Roire v France*

<sup>709</sup> *Pedersen & Baadsgaard v Denmark*. See also *Rumyana Ivanova v Bulgaria, Flux v Moldova and Ruokanen and Others v Finland*

<sup>710</sup> *Europapress v Croatia*

79. The need to protect journalists' sources to ensure freedom of expression, and therefore a democratic society, is a key principle of freedom of expression.<sup>711</sup> The Court has emphasised the need to protect journalists' sources particularly where the office of a journalist's lawyer was searched, as well as the journalist's own home and office, in order to gain information concerning the journalist's source,<sup>712</sup> and where a journalist was detained with a view to compelling him to reveal his sources.<sup>713</sup>

### Access to information as human right

80. International human rights treaties did not specifically elaborate a right to information and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the content of rights is not static. International human rights law does recognise the important social role of not just freedom to express oneself – freedom to speak – but also of the more profound notion of a free flow of information and ideas in society. Human rights law recognises the importance of protecting not only the speaker, but also the recipient of information.

81. In the context of a right to access to information as forming part of freedom of expression, the breakthrough occurred in *Claude Reyes v. Chile*, where the Inter-American Court of Human Rights, expressly held that the general guarantee of freedom of expression in Article 13 of the ACHR protects the right to access information held by public bodies. Specifically, the Court stated: *"In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."*

82. Historically the European Court has held that freedom of expression does not include a right to access the information sought. The lead case on this issue, *Leander v Sweden*. The Court has approached the issue of access to information as a private life issue, not a freedom of expression one.

83. In *Gaskin v UK*, the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to

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<sup>711</sup> *Goodwin v UK*

<sup>712</sup> *Roemen & Schmit v Luxembourg; Sanoma Uitgevers B.V. v the Netherlands*

<sup>713</sup> *Voskuil v The Netherlands; Financial Times Ltd. and Others v UK*

case records about him held by the State. The Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of the third parties who had contributed the information. This placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor was not available or withheld consent for the disclosure. Since the government had not done so, the applicant's rights had been breached.

84. In *Guerra*, the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident. The Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life.
85. The Court's approach is changing. In *Sdružení Jihočeské Matky v. Czech Republic*, the Court held that a refusal to provide access to information did represent an interference with the right to freedom of expression as protected by Article 10 of the ECHR. However the Court ultimately rejected the application as inadmissible due to the fact that the refusal to disclose the information was consistent with Article 10(2), allowing for restrictions on freedom of expression.
86. In two recent cases against Hungary, the Court has gone further. In *Kenedi v Hungary* the length of proceedings on in a case involving access to information (10 ½ years) was excessive in violation of Article 6(1) and the failure to comply with orders to grant access to information was a violation of the right to an effective remedy (Article 13) read in conjunction with Article 10. *HCLU v Hungary* was the first case finding a violation of Article 10 ECHR for interference with right to access state-held information
87. In that case the Court recognised for the first time that Article 10 ECHR guarantees the "freedom to receive information" held by public authorities. The Court found that when the State has information of public interest in its possession, and is requested to disclose such information to a "watchdog" group - whether the press or NGOs that serve a watchdog role - it is obliged "not to impede the flow of information". The Court noted that states are obliged to "eliminat[e] barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities," and concluded that the Hungarian Constitutional Court's control of the requested information amounted to a similar sort of "information monopoly".

## 2. Freedom of association and the right to peaceful assembly

1. Hand in hand with freedom of expression is the right to associate, ie form political parties, and protest, or the right to peaceful assembly. These are protected by Article 21<sup>714</sup> and Article 22, ICCPR<sup>715</sup>, and Article 11, ECHR.<sup>716</sup>
2. Peaceful assembly and the right to association also engage economic and social rights. Therefore for a complete picture those treaties that protect these rights such as the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Council of Europe Social Charter and Revised Social Charter should also be examined. Additionally the OSCE has affirmed its commitment to all aspects of the rights to freedom of association and peaceful assembly as recognised in international human rights law.<sup>717</sup>

### *Peaceful Assembly – the right to protest*

3. The right to peaceful assembly guarantees the right to protest. It therefore lies at the heart of a democratic society. For many, peaceful protest is their only mechanism to promote change. Guaranteeing the right to peaceful protest can be a guarantee against more desperate methods being adopted.

### Relationship with other rights

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<sup>714</sup> Article 21, ICCPR states

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

<sup>715</sup> Article 22, ICCPR reads:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

<sup>716</sup> Article 11, ECHR states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

<sup>717</sup> OSCE Human Dimension Commitments, 2<sup>nd</sup> Edition, 2005, p.110 -111

4. Religious assemblies are also protected by the right to manifest religious belief and privacy rights probably protect private assemblies, i.e. family and friends. Protesters, however, cannot rely upon their right to peaceful assembly in order to destroy the rights of others.
5. The right to protest is principally engaged in relation to assemblies that are concerned with the discussion and promotion of ideas. If the activity is purely social, with no particular objective, the gathering is unlikely to engage the right to peaceful assembly.
6. The right to peacefully protest encapsulates the following principles:
  - Public protest provides a direct means for allowing democratic participation to occur outside of elections.
  - Peaceful assembly underpins the democratic process, but it can also be an attempt to circumvent it. Therefore controls on protest are consistent with the right.
  - Public processions and marches are protected as well as static meetings, and the right to assembly includes the right hold private meetings as well as meetings in public.
  - Positive obligations exist for the State to take reasonable and appropriate measures to enable lawful (i.e. peaceful) demonstrations to take place without participants being subjected to physical violence or other threats. As such, the right to counter-demonstrate does not extend to a right to inhibit the right to demonstrate.
  - The crucial feature in relation to an assembly or protest is that it is peaceful. Even if it turns violent, as long as its intent was peaceful, the right is still engaged.
  - The right may even apply when the assembly is illegal.
  - Where penalties have been imposed on an individual following participation in a demonstration, this may amount to an infringement on the right to peaceful assembly.
  - The European Court has given States a wide margin of appreciation in the way in which they implement this right. This is particularly the case where the State has justified an interference with the right to freedom of assembly in order to prevent disorder and crime, where such disorder was foreseeable.

- Additionally the European Court has shown little concern where assemblies have been temporarily banned, as long as the ban is for a limited period of time and does not target particular groups.
- A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder, which cannot be prevented by other less stringent measures. Banning orders must therefore be strictly justified.

## Protest controls

7. It is perfectly consistent with the State's obligations under the right to peaceful assembly to impose controls, as long as these do not undermine the right to protest.<sup>718</sup> As such the State's need to prevent disorder must not discourage people from making their beliefs known in a peaceful way,<sup>719</sup> as was the case where protestors were fined for a peaceful and authorised demonstration<sup>720</sup> and where protestors were detained so as to prevent them from participating in a demonstration.<sup>721</sup> Cordoning off protesters, where some may be violent, may also be lawful.<sup>722</sup>
8. There is no interference with assembly rights if there is a requirement of prior notice and authorisation for a march or a meeting, as long as the purpose behind such a requirement is not to frustrate the peaceful assembly. However, where notification requirements have not been precisely met, it may be disproportionate to disperse a peaceful protest for that reason alone.<sup>723</sup>
9. Overly aggressive police tactics used to control a demonstration may give rise to a breach of Article 11 ECHR,<sup>724</sup> although where the policing tactics are justified by the violent nature of the demonstration there will not be a breach of the right to protest.<sup>725</sup>
10. Overbroad public order legislation can have a chilling effect and therefore violate the right to assemble and protest.<sup>726</sup> A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder that cannot be prevented by other less stringent measures. The banning of a demonstration in

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<sup>718</sup> The right to protest was undermined in *Bączkowski and Others v Poland* where the authorities refused to grant permission for a peaceful march and meetings against homophobia. See also *Alekseyev v Russia*; *Patyi v Hungary*

<sup>719</sup> *Ezelin v France* - in that case the applicant was a lawyer who attended a protest which then turned violent, and he was then reprimanded for breach of discretion by his professional body, and this sanction was held to be disproportionate and to amount to a chilling effect on his ability to peacefully protest.

<sup>720</sup> *Sergey Kuznetsov v Russia*

<sup>721</sup> *Schwabe and M.B. v Germany*

<sup>722</sup> *Austin v UK*

<sup>723</sup> *Bukta and Others v Hungary*; *Samüt Karabulut v Turkey*

<sup>724</sup> *Aldemir v Turkey*

<sup>725</sup> *Protopapa v Turkey*

<sup>726</sup> *Kivenmaa v Finland (HRC)*; *Bączkowski v Poland*

Russia was held to be an unlawful interference with the right to protest because it was based on an “expected outbreak of terrorist activities”, which did not amount to a real danger of disorder.<sup>727</sup> Banning orders must therefore be strictly justified.

11. The protection of the right of assembly of one group cannot be used as a justification for curtailing the right of assembly of another.<sup>728</sup>

### **The company of others**

12. As long as there is a purpose to the assembly or protest, it is irrelevant what it is so long as it is peaceful; but if there is no real purpose for the assembly, the right is probably not engaged. Therefore youths who just wanted to 'hang out' together and were prevented from doing so could not rely on assembly rights.<sup>729</sup> Similarly, the right to assembly does not give a right to share the company of others. As such, a prisoner being held in isolation could not rely upon the right.<sup>730</sup>

### **Private space**

13. The extent to which the Right to Assembly gives the right to protest in quasi-public or private spaces such as shopping malls has been limited.<sup>731</sup>

### ***The right of association, or the right to form political organisations***

14. The right of freedom of association is vital to the functioning of democratic societies. Social development and democracies in particular are furthered by the joining together of individuals with a common purpose within groups to bring about change. From the trade union movement to environmental protection, this has all been achieved through associations.

### **What is an association?**

15. Individuals will be exercising their right to freedom of association where they come together on a voluntary basis to further a common interest. Political parties are classic examples of associations, and as they are essential to the proper functioning of a democracy, any interference with the rights of political parties to form must be strictly justified.<sup>732</sup> Religious groups that fulfil the criteria described below are also associations,<sup>733</sup> as are squatters' groups.<sup>734</sup>

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<sup>727</sup> *Makhmudov v Russia*

<sup>728</sup> *Ollinger v Austria*

<sup>729</sup> *Anderson v UK*

<sup>730</sup> *McFeeley v UK*

<sup>731</sup> *Appleby v UK* - In the majority of the Strasbourg Court held that Article 11 did not apply in relation to people who wished to leaflet in a shopping mall.

<sup>732</sup> *United Communist Party of Turkey v Turkey*

<sup>733</sup> *Jehovah's Witnesses of Moscow v Russia; Moscow Branch of the Salvation Army v Russia; Church of Scientology Moscow v Russia*

<sup>734</sup> *Association Rhino and Others v Switzerland*

16. The European Court has emphasised the importance to democracy of the right to form an association:

“While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.”<sup>735</sup>

17. For the right to association to be engaged there needs to be a formal association and a deliberate effort to set up an organisational structure.

18. The right to associate does not give the right to be a member of a particular association, and generally speaking associations are free to regulate their own membership and activities.<sup>736</sup>

### **What is not an association?**

19. Most professional regulatory bodies are excluded from being associations for the purposes of international human rights law. This is because membership is non-voluntary and their public nature usually excludes them.<sup>737</sup>

### **What is a Non Governmental Organisation (NGO)?**

20. Attempts to control, regulate, even criminalise organisations protected by the right to association can be a concern. It is therefore essential for there to be a clear understanding of what NGOs are and how they work. NGOs are usually synonymous with Human Rights Defenders (HRDs). The role of NGOs can be explained as follows.<sup>738</sup>

### **Scope**

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<sup>735</sup> *Baczowski v Poland*

<sup>736</sup> *Cheall v UK*

<sup>737</sup> *Le Compte, Van Leuven & De Mayer v Belgium*

<sup>738</sup> Council of Europe, Fundamental Principles on the Status of Non-Governmental Organisations in Europe, May 2003

- NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities. The terms used to describe them in national law may vary, but they include associations, charities, foundations, funds, non-profit corporations, societies and trusts. They do not include bodies that act as political parties.
- NGOs encompass bodies established by individual persons (natural and legal) and groups of such persons. They may be national or international in their composition and sphere of operation.
- NGOs are usually organisations which have a membership, but this is not necessarily the case;
- NGOs do not have the primary aim of making a profit. They do not distribute profits arising from their activities to their members or founders, but use them for the pursuit of their objectives.
- NGOs can be either informal bodies, or organisations that have legal personality. They may enjoy different statuses under national law in order to reflect differences in the financial or other benefits, which they are accorded in addition to legal personality.

### ***Basic principles***

- NGOs come into being through the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage their creation.
- All NGOs enjoy the right to freedom of expression.
- NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions generally applicable to them.
- Any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction.

### ***Objectives***

- An NGO is free to pursue its objectives, provided that both the objectives and the means employed are lawful. These can, for instance, include research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with stated government policy.

- An NGO may also be established to pursue, as an objective, a change in the law.
- An NGO that supports a particular candidate or party in an election should be transparent in declaring its motivation. Any such support should also be subject to legislation on the funding of political parties. Involvement in political activities may be a relevant consideration in any decision to grant it financial or other benefits in addition to legal personality.
- An NGO with legal personality may engage in any lawful economic, business or commercial activities in order to support its non-profit making activities without there being any need for special authorisation, but always subject to any licensing or regulatory requirements applicable to the activities concerned.
- NGOs may pursue their objectives through membership of federations and confederations of NGOs.

## Trades unions

21. Freedom of association specifically recognises the right to join a trade union.<sup>739</sup> This right has also been interpreted to include a right not to join a trade union.<sup>740</sup> Freedom of association can also be relied upon by trades unions to protect the broader interests of their members. For example, by requiring there to be facilities to enable a union to do its job properly - thus incorporating elements of the European Social Charter into the ECHR.<sup>741</sup>
22. Trade unions are free to choose their members to reflect their particular values, goals and ideals. An individual's right of association is not interpreted to mean that there is a general right to join a union of one's choice irrespective of the rules of the union.<sup>742</sup>
23. Inherent in the right to associate is the right to take industrial action, although this right may be limited.<sup>743</sup> No specific rights such as the right to strike or for employers to engage in collective bargaining can be read into the right to associate. However, the instigation of disciplinary action against employees or public servants for taking part in strike action is not justifiable.<sup>744</sup>

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<sup>739</sup> *Demir and Baykara v Turkey*

<sup>740</sup> *Young, James & Webster v UK*

<sup>741</sup> *Sanchez Navajas v Spain*

<sup>742</sup> *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK*

<sup>743</sup> *Schmidt & Dahlstrom v Sweden*

<sup>744</sup> *Enerji Yapi-Yol Sen v Turkey; Şişman and Others v Turkey*

24. The negative right of freedom of association - i.e. the right not to associate - may need to be protected by the State.<sup>745</sup>

### Restricting association

25. The right to association is not necessarily violated by requirements to register or license the association, so long as these schemes do not impair the activities of the association and have a chilling effect;<sup>746</sup> the dissolution of a political party for failing to comply with the precise licensing requirements was deemed a disproportionate interference with the right to free association.<sup>747</sup>

26. Restrictions such as requiring members of a particular association to get State permission to travel abroad for meetings have been held to unlawfully interfere with the right to free association.<sup>748</sup>

27. Freedom of association will be violated if a political party or NGO is banned when it did not call for the use of violence. If a political party is not rejecting democratic principles it should not be restricted.<sup>749</sup> Associations should also not be banned on the basis that once they are up and running they could lawfully be banned if they carried out certain activities. They need to be given the benefit of the doubt in the first instance; suspicion about an association's aims and intentions is insufficient to justify it being banned or restricted.<sup>750</sup>

28. There will be situations where banning a political association is justified. For example, if it has established links with a terrorist organisation,<sup>751</sup> if it advocates undemocratic values, endangers political pluralism or uses illegitimate means to gain support, even in situations where the association has the electoral support of the population.<sup>752</sup>

29. Rules governing the funding of political parties, which have an impact on their financial capacity to carry out their functions, may interfere with the right to freedom of association.<sup>753</sup>

### *Why banning the Refah Party was justified*

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<sup>745</sup> *Vörður Ólafsson v Iceland*

<sup>746</sup> In *Sidiropoulos v Greece* the right to associate was violated when the Greek authorities refused to register a Macedonian organisation which sought to promote the traditions, history and symbols of Macedonia.

<sup>747</sup> *Republican Party of Russia v Russia*

<sup>748</sup> *Izmir Savas Karsitlari Dernegi v Turkey*

<sup>749</sup> *Socialist Party of Turkey v Turkey*

<sup>750</sup> *Bozgan v Romania; Bekir-Ousta and Others v Greece*

<sup>751</sup> *Herri Batasuna and Batasuna v Spain*

<sup>752</sup> *Refah Partisi and Others v Turkey; Christian Democratic People's Party v Moldova; Tsonev v Bulgaria*

<sup>753</sup> *Parti Nationaliste Basque-Organisation Regionale d'Iparralde v France*

1. The European Court of Human Rights' decision upholding the ruling of the Turkish courts to ban the Refah Party is particularly instructive in relation to how the right to freedom of association works.
2. The Refah Party was banned just before it was about to be elected as the largest political party in Turkey. By definition this was an interference with that Party's right to associate. However, the ban was justified on the basis that even though it is lawful to advocate change, some of those in the Refah Party were proposing undemocratic values such as the introduction of certain aspects of Sha'ria law which do not conform with the values of the ECHR.
3. The European Court held that the State had a duty to protect its institutions and even though it is perfectly lawful and human rights compliant for a political party to campaign for changes in the law and the structure of the State, those political parties must satisfy the following requirements:
  - the means used must be legal and democratic in every respect; and
  - the changes proposed must be compatible with fundamental democratic principles.
4. It is clear that associations that advocate undemocratic values can be outlawed, even when they have the electoral support of the population.

### **Proscribing, or blacklisting, organisations**

30. Both the UN and the EU have lists proscribing, or banning certain terrorist organisations or people. Additionally, domestic frameworks may also blacklist certain groups connected with terrorism. The act of proscribing organisations will raise issues under freedom of association, unless those organisations are using their freedom of association rights to destroy the rights and freedoms of others. Under those circumstances, they do not have freedom of association rights.
31. Where freedom of association is engaged by proscription, any interference will have to be necessary, proportionate and non-discriminatory. Furthermore there will need to be a clear legal basis for it and there will need to be a framework in place to be able to challenge the proscription.<sup>754</sup>
32. The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has stressed that the decision to proscribe an organisation must be done on a case-by-case basis. He points out, affirming the general principles in relation to the right to association identified above, that:

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<sup>754</sup> The issues raised by proscription affecting fair trial rights, are dealt with above at pp. xx-yy.

- The State may not make a determination that an organisation is a terrorist organisation on the basis of presumptions before that association has started to engage in its activities;
- The decision to proscribe must be made by an independent judicial body and there must always be a possibility to appeal a proscription decision to a judicial body;
- Decisions to criminalise an individual belonging to a terrorist organisation should only apply after that organisation has been declared as such by a judicial body. This will not absolve an individual from their own criminal responsibility for the preparation of terrorist acts.<sup>755</sup>

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<sup>755</sup> Second Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, A/61/267, 16 August 2006.

### 3. Obligation to Protect Religious Pluralism

1. Religion is protected by Article 9, ECHR.<sup>756</sup> Similar protection is also contained in Article 18, ICCPR.
2. Religious rights in international human rights law combine a classic, qualified right with elements of an absolute right. The right to freedom of thought, conscience and religion is absolute, as is the right to change one's religion and belief. This aspect is often referred to as its 'internal' quality. Equally absolute is that no one can be required to think, believe or follow a particular religion.
3. The qualified element, or external nature, of the right arises in relation to the manifestation of religion and belief. It is for the applicant to prove that their right to manifest religion and belief has been interfered with, and it is then for the State to justify their actions on the basis of legality, necessity, proportionality and non-discrimination.
4. Central to the guarantee of religious freedom is the obligation on the part of the State to ensure respect for religious pluralism. In a society, in which several religions coexist within one and the same population, the State may place restrictions on the freedom of religion only in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.<sup>757</sup> When exercising its regulatory power the state has, however, a duty to remain neutral and impartial.<sup>758</sup>
5. If a State opts to interfere with the management of a religious community, or to assume any power in relation to a religious community, or part of it, it cannot impose its views on that community, including who it considers would be best placed to lead it. Nor can it refuse to accept a religious leader supported by the community.<sup>759</sup>
6. A further element of religious freedom, which marks it out as slightly different from the other qualified rights, is that it recognises the notion of collective rights -

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<sup>756</sup> Article 9, ECHR states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as 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.

<sup>757</sup> *Kokkinakis v Greece*

<sup>758</sup> *Metropolitan Church of Bessarabia v Moldova*

<sup>759</sup> *Supreme Holy Council of the Muslim Community; Agga v Greece*

i.e. that the exercise of this right may be in community with others. Therefore religious communities will also have rights under it.

### **For freedom of religion and thought to be engaged**

7. For the right to be engaged there needs to be a degree of structure to the belief system. The European Court of Human Rights has not been willing to specify what a religion or a belief is for the purposes of the right to religion. However, they will look for identifiable elements of a belief system in order to offer the protection of the ECHR.

### **The nature of religion and thought**

8. All genuinely held belief systems are protected. This includes all the main World faiths such as Islam, Christianity, Judaism, Buddhism, Hinduism and Sikhism. The right to religion and belief also extends to the minor faiths such as the Krishna Consciousness, Jehovah's Witnesses, the Church of Scientology and Druidism.
9. Non-religious beliefs can also be protected, such as pacifism, veganism and atheism. The right is therefore "... *also a precious asset for atheists, agnostics, sceptics and the unconcerned.*"<sup>760</sup>
10. Idealistic, altruistic or political beliefs are not covered. These are almost certainly protected by freedom of expression and/or association.
11. The existence of a State established faith does not offend the right to religion as long as membership is not compulsory.<sup>761</sup> The promulgation of policies based on religious beliefs is also compatible.<sup>762</sup> Although a requirement to take an oath that includes swearing allegiance to a particular religion is not compatible with Article 9.<sup>763</sup> Similarly, a requirement to state one's religion on a national identity card is not compatible with Article 9.<sup>764</sup>

### ***Manifesting religion or thought***

#### **What is a manifestation?**

12. The issue of what is a manifestation of religious belief is not one of theology and doctrine. Rather the question is whether an alleged manifestation is motivated or influenced by a religious belief.

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<sup>760</sup> *Kokkinakis v Greece*

<sup>761</sup> *Darby v Sweden*

<sup>762</sup> *Johnston v Ireland*

<sup>763</sup> *Dimitras and Others v Greece*

<sup>764</sup> *Sinan Işık v Turkey*

## Practice

13. The manifestation of religion and belief in practice does not always include actions or behaviour that are merely motivated by the belief system. Therefore to be able to rely upon a right to manifest a belief in practice, the applicant must show that it is a 'necessary part' of the practice.<sup>765</sup> For example, States must respect the right of Jews and Muslims not to eat pork or the right of Buddhists not to eat meat, this includes providing tailored diets in State institutions such as prisons and hospitals.<sup>766</sup>
14. The wearing of headscarves for Muslim women will almost certainly engage issues under the right to manifest religious belief. Therefore if women are being prevented from wearing scarves under certain circumstances, the questions to be addressed are:
  - How serious an interference is this with their rights to manifest religion?
  - Is it a necessary and proportionate response?
  - Can limiting the wearing of headscarves be justified?
15. It would appear within the context of some secular constitutions that it is a lawful interference with the right to manifest religious belief to require that headscarves are not worn in public institutions.<sup>767</sup> Similarly the European Court has held that the expulsion of female pupils from State schools for refusing to remove their headscarves during sports lessons did not violate their Article 9 rights.<sup>768</sup>
16. In the context of education, the European Court ruled inadmissible a complaint that Article 9 had been violated when a number of pupils were prohibited from wearing conspicuous symbols of religious affiliation in classes.<sup>769</sup> However, the criminalisation of wearing religious attire in public has been found to violate Article 9.<sup>770</sup>
17. It has been held that ritual slaughter is capable of constituting practice for the purposes of manifesting religious belief.<sup>771</sup>

## Does manifesting religious beliefs justify breaking the law?

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<sup>765</sup> In *X v UK* a Buddhist prisoner sought to argue that his religion required him to communicate with others and therefore he should not be prevented from publishing articles in a religious magazine. However, it was held that this was not a necessary part of the practice of his Buddhist faith.

<sup>766</sup> *Jakóbski v Poland*

<sup>767</sup> *Sahin v Turkey, Dahlab v Switzerland and Karaduman v Turkey*

<sup>768</sup> *Dogru v France; Kervanci v France*

<sup>769</sup> *Aktas v France, Bayrak v France, Gamaleddyn v France, Ghazal v France, J. Singh v France, R. Singh v France*

<sup>770</sup> *Ahmet Arslan and Others v Turkey*

<sup>771</sup> *Jewish Liturgical Association Cha' Are Shalom Ve Tsedek v France*

18. What is particularly controversial is where it is argued that in order to manifest their belief system people are required to break a law of general application. The European Court has been unwilling to recognise the right extends this far.<sup>772</sup>

### What is not a manifestation?

19. In a case brought by students who were Jehovah's Witnesses, who objected to having to attend National Day celebrations on the basis that the parades involved the military, the Strasbourg Court held that the military aspect of the parade was only an element and therefore the requirement to attend the parade could not amount to a significant interference with the applicant's belief system.<sup>773</sup> Similarly it was held that the act of leafleting soldiers was not a clear manifestation of the belief system of pacifism.<sup>774</sup>

20. The interference by the State with the expression of religious or philosophical beliefs is generally considered under Article 10 rather than Article 9 ECHR.<sup>775</sup>

### Conscientious objection

21. Historically conscientious objectors could not derive the right not to do military service, or to have access to alternatives to military service from the right to religion.<sup>776</sup> Human rights law appeared to offer little comfort for conscientious objectors; the European Court has held that the criminal conviction of a conscientious objector for refusing to do military service did not violate Article 9.<sup>777</sup>

22. However, most Member States do recognise the right to conscientious objection and in *Bayatyan v Armenia* the European Court held that although not explicitly conferring a right to conscientious objection, the opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual's conscience or deeply held religious or other beliefs was of sufficient cogency, cohesion and importance to attract protection under Article 9. The European Court noted that the UN Human Rights Committee considered that the right to conscientious objection could be derived from Article

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<sup>772</sup> In *C v UK*, which involved members of the Quaker faith not wishing to pay tax that would go to fund nuclear weapons, the European Court held that "Article 9, ECHR does not confer on the applicant the right to refuse, on the basis of his convictions, to abide by legislation ... which applies neutrally and generally in the public sphere, without impinging on the freedoms guaranteed by Article 9". The HRC came to a similar conclusion in *J.P. v Canada*. Another example where the right to manifest religious belief could not be used to get around a law of general application is the case of *Khan v UK*. The applicant failed in his attempt to rely on Article 9(1) ECHR and the teachings of Islam to permit him to marry a 14-year-old girl.

<sup>773</sup> *Efstratiou and Valsamis v Greece*

<sup>774</sup> *Arrowsmith v UK*

<sup>775</sup> *Klein v Slovakia*

<sup>776</sup> *X v Austria*

<sup>777</sup> *Bayatyan v Armenia*

18 of the ICCPR and Article 9 of the Charter of Fundamental Rights of the European Union explicitly recognises the right to conscientious objection.<sup>778</sup>

23. It has been found to be discriminatory to discriminate against someone on the basis of their criminal conviction in relation to conscientious objection.<sup>779</sup>

## Teaching

24. In relation to teaching the right to religion specifically protects the idea of religious schools. This includes the display of crucifixes in school classrooms.<sup>780</sup>

25. The right to education also requires that education must protect the parents' belief systems.<sup>781</sup> This means that pupils should be allowed to be exempted from religious education classes where, for example, they only teach Christianity. Religious education should promote understanding, respect and dialogue between people of different beliefs.<sup>782</sup>

26. Controversially, proselytising is protected by the right to religion.<sup>783</sup> For example, in *Perry v Latvia*, a violation of Article 9 was found where the applicant had been granted a temporary residence visa but was not permitted to perform pastoral duties in Latvia.<sup>784</sup> A careful balance should be struck between the rights of those who want to convert others, and the rights of those who do not want to be converted.

27. It is legitimate to prohibit improper proselytism; such proselytism may take the form of activities offering material or social advantages with a view to gaining new members for a church, or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally it is not compatible with respect for the freedom of thought, conscience or religion of others.

## Employment

28. In relation to military service it has been held that military discipline implies by its very nature the possibility of placing certain limitations on the rights and freedoms of members of the Armed Forces which could not be imposed on civilians.<sup>785</sup> Similarly in cases where professional obligations required individuals to work on Sundays for Christians or Friday afternoon for Muslims, there was no

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<sup>778</sup> *Bayatyan v Armenia*

<sup>779</sup> *Thilimmenos v Greece*

<sup>780</sup> *Lautsi v Italy*

<sup>781</sup> Protected by Article 2 of the First Protocol, ECHR

<sup>782</sup> *Folgero and Others v Norway*, violation of Article 9 in combination with Article 2, Protocol 1 ECHR

<sup>783</sup> The leading case is *Kokkinakis v Greece*

<sup>784</sup> *Perry v Latvia*

<sup>785</sup> *Yanasik v Turkey*. In *Kalac v Turkey* there was no violation of Article 9 concerning the dismissal from the army of a judge advocate who was a member of a religious sect.

violation of the right to manifest religious belief.<sup>786</sup> However, where a person is forced to disclose their religious affiliation in order to join a profession, such as where a lawyer was forced to admit that he was not a member of the Orthodox Church when he refused to take a religious oath, Article 9 will be violated.<sup>787</sup>

29. In *X v United Kingdom* the European Court held that school authorities must consider a teacher's religious position but that the refusal to rearrange a school timetable so that a teacher might practise his religion did not breach Article 9 where the teacher had accepted the post without notifying the authorities of his particular situation.<sup>788</sup>

### ***State Interference with Religious Communities***

30. As the Right to Association has confirmed, human rights standards lay down clear rules that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest.<sup>789</sup> This includes religion.<sup>790</sup>

31. As has already been established, the right to form an association, and to obtain legal personality, can be restricted and the State may require prior authorisation and impose restrictions serving specified public interests.<sup>791</sup> Such restrictions must be provided for by law and be proportionate to the public interest reason for them. Consistent with freedom of association principles, States are entitled to verify whether a movement or an association carries out, ostensibly in pursuit of religious aims, activities that are harmful to the population or public safety.<sup>792</sup>

32. States must not impose unduly harsh or arbitrary requirements upon religious groups to qualify for legal recognition. For example, a delay of twenty years between a religious group's request for legal recognition and the granting of legal personality was held to violate Article 9.<sup>793</sup>

33. Where the State imposes requirements on religious associations to register, it will amount to discrimination under Article 14 ECHR if those requirements are imposed more strictly on some groups than others, or if the privileges enjoyed by some religious associations are denied to others.<sup>794</sup>

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<sup>786</sup> *Khan v UK; Stedman v UK*

<sup>787</sup> *Alexandridis v Greece*

<sup>788</sup> *X v UK; Ivanova v Bulgaria*

<sup>789</sup> *Sidiropoulos v Greece*

<sup>790</sup> *Metropolitan Church of Bessarabia; Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*

<sup>791</sup> *Hasan and Chaush v Bulgaria; Metropolitan Church of Bessarabia v Moldova; Biserica Adevrat Ortodox din Moldova v Moldova; Church of Scientology Moscow v Russia*

<sup>792</sup> *Manoussakis and Others*

<sup>793</sup> *Kimlya and Others v Russia*

<sup>794</sup> *Religionsgemeinschaft der Zeugen Jehovas v Austria; Tsirlis and Kouloumpas v Greece; Association Les Témoins de Jéhovah v France*

34. While States have the power to put in place requirements for religious denominations to register, it is a violation of Article 9 for the state to penalise individuals who pray or manifest their beliefs in accordance with a religion that has not been registered by the State.<sup>795</sup>
35. The mere tolerance of the activities of a religious community cannot replace legal recognition.<sup>796</sup>
36. Laws providing for a right on the part of the authorities to interfere with the internal organisation of a religious community must be surrounded by such safeguards that they do not allow any unfettered discretion to the executive or otherwise arbitrary actions. These laws should be clear and foreseeable.<sup>797</sup>
37. Religious communities must have the right of access to courts on issues relating to their civil rights and obligations,<sup>798</sup> or otherwise to ensure judicial protection of the community, its members or its assets,<sup>799</sup> including judicial review of decisions to refuse legal personality.
38. Refusals of legal personality may not be based on mere speculations as to the dangers posed to the relevant public interests,<sup>800</sup> but have to be clearly established, normally through the acts of the association in question. As has already been established in relation to associations generally, vague threats to the constitutional order, territorial integrity or public order as justifications for refusals of recognition not acceptable.<sup>801</sup>
39. The granting of legal personality for the religious community should guarantee:
- Different forms which the manifestation of one's religion or religious beliefs may take, namely worship, teaching, practice and observance;
  - Access to an effective remedy before an independent authority meeting;
  - A fair and speedy procedure in order to challenge any alleged violation of its human rights.
40. Religious associations, as with all associations, enjoy property rights, including the right to manage and acquire property. The State cannot through legislation impose special limitations as to the manner in which religious communities may prove ownership as compared to the general law. Neither may the state discriminate between different religious associations' right to acquire property or impose undue duties to restore properties that have been acquired.

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<sup>795</sup> *Masaev v Moldova*

<sup>796</sup> *Metropolitan Church of Bessarabia*

<sup>797</sup> *Supreme Holy Council of the Muslim Community*

<sup>798</sup> *Catholic Church of Canea v Turkey*

<sup>799</sup> *Holy Monasteries v Greece*

<sup>800</sup> *Nolan and K. v Russia*

<sup>801</sup> *Metropolitan Church of Bessarabia*

41. In a democratic society, in which several religions coexist within one and the same population, the State may place restrictions on the freedom of religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.<sup>802</sup> When exercising its regulatory power the State has, however, a duty to remain neutral and impartial.<sup>803</sup>
42. States must not when granting legal personality, or when interfering with the management of a religious community, assume any power of assessment of the legitimacy of different religious beliefs or make such decisions dependent on the will of an ecclesiastical authority.<sup>804</sup> Similarly, where a State dissolves a religious association, it must give relevant, lawful and sufficient reasons for doing so.<sup>805</sup>
43. State measures favouring a particular leader of a divided religious community<sup>806</sup> or seeking to compel the community, or part of it, to place itself under a single leadership against its will constitute an infringement of freedom of religion,<sup>807</sup> as will refusing to accept a religious leader supported by his community.<sup>808</sup>

### ***Protecting Religious and other Beliefs***

#### **Criminalising causing offence to religious beliefs**

44. In relation to protecting the religious rights of others, the Human Rights Committee has observed that, "The State party should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs."<sup>809</sup>

#### **Protection of majority beliefs through blasphemy laws**

45. Blasphemy laws that protect the Anglican Christian faith from insult have been held to be compatible with the ECHR.<sup>810</sup> Therefore, such laws can take precedence over the applicant's right to freedom of expression.

#### **Failure to protect minority beliefs**

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<sup>802</sup> *Kokkinakis*

<sup>803</sup> *Metropolitan Church of Bessarabia v Moldova*

<sup>804</sup> *Metropolitan Church of Bessarabia v Moldova*

<sup>805</sup> *Jehovah's Witnesses of Moscow v Russia*

<sup>806</sup> *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria; MiroJubovs and Others v Latvia*

<sup>807</sup> *Supreme Holy Council of the Muslim Community*

<sup>808</sup> *Agga v Greece*

<sup>809</sup> *CCPR/CO/73/UK*, para.14 (2001)

<sup>810</sup> *Lemon v UK*

46. In *Choudhury v UK* the applicant sought to challenge the failure of the UK authorities to prosecute Salman Rushdie for blasphemy for insulting the Islamic faith in *The Satanic Verses*. The applicant argued that the blasphemy laws in the UK were discriminatory because they only applied to the Anglican Christian faith and to no other religious beliefs. The application was rejected under the ECHR as being inadmissible on the basis that pluralism demands that there be a balance between different religions and beliefs.

### **Does an obligation exist to criminalise offending religious beliefs?**

47. In a case concerning a prosecution for insulting Catholic beliefs,<sup>811</sup> the Strasbourg Court reaffirmed the principle that pluralism demands tolerance of views that are critical of religion and that there must be toleration and acceptance of the denial by others of faith and belief systems. However, the Court held that a balance must be struck and therefore, in that case, the respect for religious feelings of believers, as protected by Article 9, was violated by the provocative portrayals of objects of religious veneration. The Court's argument was that such portrayals violated the spirit of tolerance inherent in the Convention as a whole.

### **Extent of the obligation to criminalise offending religious belief**

48. In another case, also involving Catholics who considered that their right to manifest religious belief had been violated as a result of insults to the Catholic faith, it was held that "there may be certain positive obligations on the part of the State ... which may involve the adoption of measures designed to secure respect for freedom of religion ... these may, in certain circumstances, constitute a legal means of ensuring that an individual will not be disturbed in his worship by the activities of others".<sup>812</sup>

49. However, in that case there was no violation of the right to manifest religion when the public prosecutor decided not to prosecute for insulting the Catholic faith. This was because it was considered sufficient that the prosecutor had examined whether, on the facts, an offence had been committed and formed the view that no such criminal activity had taken place.

50. From these principles it is clear that the State has to put in place measures that protect religion and belief. However, those sanctions have to be compatible with and read in a way that is compliant with both freedom of expression and the prohibition on discrimination.

51. A case example that seeks to explain this principle is as follows:<sup>813</sup>

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<sup>811</sup> *Otto Preminger Institut v Austria*

<sup>812</sup> *Dubowska & Skup v Poland*

<sup>813</sup> *Giniewski v France*

The applicant writer and historian was found guilty of criminal defamation of the Christian community as a result of writing an article that criticised the then Pope John Paul II and linked a particular doctrine to the Holocaust. On appeal the conviction was quashed but a subsequent civil action found against the applicant and he was required to print an apology and was fined one French Franc.

The European Court, finding a violation of the right to freedom of expression, held that the applicant had sought to develop an argument about the scope of a particular doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution to a wide-ranging and ongoing ideological debate, without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought.

The Court acknowledged that the issue concerned a doctrine upheld by the Catholic Church, and hence was a religious matter. But on analysis of the article, the Court found that it did not contain attacks on religious beliefs as such, but expressed a view. In that connection, the Court considered it essential in a democratic society that debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.

The applicant himself acknowledged that his conclusions might offend, shock or disturb some people, however, the Court found that the article had not been “gratuitously offensive” or insulting and had not incited disrespect or hatred. Nor had it cast doubt in any way on clearly established historical facts. In those circumstances, the Court considered that the reasons given by the domestic courts could not be regarded as sufficient to justify the interference with the applicant’s right to freedom of expression.

With regard to the penalty imposed on the applicant, the Court noted that, after being acquitted in the criminal proceedings, in the civil action he had been ordered to pay one franc in damages and, in particular, to publish a notice of the ruling in a national newspaper at his own expense. While the publication of such a notice did not in principle appear to constitute an excessive restriction on freedom of expression, the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect, and the sanction thus imposed appeared disproportionate in view of the importance and interest of the debate in which the applicant had legitimately sought to take part.

## VIII. The Right to Peaceful Enjoyment of Possessions

### What is a property right?

1. To fall within the meaning of a possession the applicant must be able to show a legal entitlement to the economic benefit at issue or a legitimate expectation that the entitlement will materialise.<sup>814</sup>
2. Licenses are possessions so long as they give rise to a reasonable and legitimate expectation of a lasting nature.<sup>815</sup>
3. The right to property and its peaceful enjoyment includes the right to exclude others from land. In *Chassagnou v France* the fact that land had to be used for hunting violated the applicant's rights.<sup>816</sup>
4. Income can only be a possession where it has already been earned or where there is an enforceable claim to it.<sup>817</sup>
5. An arbitration award that is enforceable is a possession and so is a pending claim in civil proceedings so long as it is sufficiently established.<sup>818</sup>
6. There is no guarantee to obtain possessions through inheritance, although differences in treatment in matters of inheritance could raise discrimination issues.<sup>819</sup>

### When is it lawful to interfere with property?

7. Temporary interference is not a deprivation. There was no violation in *Air Canada v UK* where their aircraft was temporarily seized to enforce special provisions in drug legislation.<sup>820</sup> As to whether there has been a deprivation, the Court will look at the reality of the situation rather than legal formalities.<sup>821</sup>
8. Deprivation thus includes measures which can be equated with deprivation of possessions or which detract from the substance of ownership to such an extent that they are equivalent to expropriation.<sup>822</sup>

### Public interest

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<sup>814</sup> *Stran Greek Refineries & Stratis Andreadis v Greece*

<sup>815</sup> *Tre Traktorer AB v Sweden*

<sup>816</sup> *Chassagnou v France*

<sup>817</sup> *Greek Federation of Customs Officers v Greece*

<sup>818</sup> *Pressos Compania Naviera SA v Belgium*

<sup>819</sup> *Marckx v Belgium*

<sup>820</sup> *Air Canada v UK*

<sup>821</sup> *Sporrong and Lonnroth v Sweden*

<sup>822</sup> *Hentrich v France*

9. In *Holy Monasteries v Greece*, the Court held that a statutory provision amounting to a rebuttable presumption that designated monastery property belonged to the State could not in practice be discharged by the monasteries. As such, the Court held that the provision in effect transferred full ownership of the land in question to the State and constituted a deprivation of property.
10. In relation to the destruction of homes, properties and possessions by the security forces in Turkey, the Strasbourg Court held that these were property rights and had therefore to examine whether the interference was lawful, in the public interest and whether a fair balance had been struck.<sup>823</sup>
11. Similarly, property rights were engaged following the destruction of the applicant's home over a rubbish tip which exploded.<sup>824</sup> Even though the land on which his home was built was not in possession and the house had been erected in breach of planning controls, the Court held that the applicant was the *de facto* owner of the structure. As such, he had a substantial pecuniary interest despite the fact that he had no valid claim to transfer of title to the land.
12. The Court held that the authorities had a positive obligation to protect the applicant's possessions and therefore take all measures necessary to prevent the risk of an explosion.
13. The Court has held that damage of private property caused by military or police operations can amount to a violation of Article 1 Protocol 1.<sup>825</sup>
14. The European Court is increasingly aware of the need for procedural safeguards to protect those who lack mental capacity from unlawful interference with their right to property.<sup>826</sup>

### **Fair balance**

15. For the fair balance test to be satisfied what has to be shown is that a fair balance has been struck between the demands of the general public interest and the protection of the individual right to peaceful enjoyment of possessions. The fact that there was an alternative means of achieving the public interest aim does not make the deprivation of property unlawful as long as the method chosen falls within the State's margin of appreciation.
16. The margin of appreciation is relied upon in deciding these matters, but a measure that is truly arbitrary may mean that no relationship of reasonable

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<sup>823</sup> *Dulas and others etc. v Turkey*

<sup>824</sup> *Oneryildiz v Turkey*

<sup>825</sup> *Khamidov v Russia*

<sup>826</sup> *Zehentner v Austria*

proportionality can be established.<sup>827</sup> Similarly, where a measure discriminates for no rational or legitimate reason Article 1 Protocol 1 may be violated.<sup>828</sup>

## **Compensation**

17. The payment of compensation will in principle justify depriving people of property rights. The Court has held that the taking of property without payment of an amount reasonably related to its value will not normally constitute a disproportionate interference. The total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.<sup>829</sup> Where compensation is payable, the State must take into account all relevant factors when assessing the amount due.<sup>830</sup>
18. An irrefutable statutory presumption that all landowners have derived benefit from a scheme which therefore influences the compensation payable will breach Protocol 1, Article 1 because it does not allow individuals to argue the particular circumstances of their individual cases. Also long delays in payment of compensation can violate Protocol 1, Article 1.
19. Payment of compensation is also relevant in relation to the restitution to the original owner of property confiscated by the State and then acquired in good faith by a third party.<sup>831</sup>

## **Control of possessions**

20. Justification for controlling possessions follows a similar test to that for deprivation of possessions. The test of necessity should therefore be interpreted in the same way as the fair balance test for depriving people on their possessions.
21. Positive requirements to use property in a certain way will amount to control, as will negative requirements such as rent restrictions.
22. In relation to the control of possessions, unlike with the deprivation of property compensation will not necessarily be required in striking the fair balance test.

## **Taxes, contributions and penalties**

23. The collection of taxes inevitably interferes with the right to peaceful enjoyment of property.

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<sup>827</sup> *Papachelas v Greece; Islamic Republic of Iran Shipping Lines v Turkey; Megadat.com SRL v Moldova*

<sup>828</sup> *Meïdanis v Greece*

<sup>829</sup> *Holy Monasteries v Greece*

<sup>830</sup> *Bistrovič v Croatia; Kozacioğlu v Turkey; Urbárska Obec Trenčianske Biskupice v Slovakia; Kozacioglu v Turkey*

<sup>831</sup> *Pincova & Pink v Czech Republic*

24. Whether tax collection is deemed necessary involves an assessment of whether a reasonable relationship of proportionality between the means employed and the aims pursued can be shown. In this tax context a wide discretion is left with the relevant authorities on the question. The Court is therefore very unwilling to interfere with the fiscal laws passed by States that they feel are necessary as long as these measures do not amount to arbitrary confiscation.<sup>832</sup>
25. However, arbitrary or discriminatory restrictions on matters such as the inheritance of property<sup>833</sup> or the fixing of interest rates, have been held to violate the right to property.<sup>834</sup>
26. Similarly, the means by which taxes or fines are collected can engage Article 1 Protocol 1. For example, where bailiffs' fees are disproportionately high or tax debts are executed uncompromisingly.<sup>835</sup>
27. Financial penalties must not be disproportionate. In *Griffhorst v France* for example, the European Court held that a customs penalty that consisted of automatic confiscation and a fine was disproportionate.<sup>836</sup>

### ***Issues arising out of the right to property***

#### **Welfare payments and pensions**

28. Welfare payments can give rise to a property interest.<sup>837</sup> For example, where an applicant's nationality prohibited him from being affiliated to a social security scheme, the European Court found a violation of Article 1 Protocol 1.<sup>838</sup> Similarly the payments of contributions to a pension fund may create a property right in a portion of such a fund.<sup>839</sup> The right is, however, a right to derive benefit from the scheme not a right to a particular amount.<sup>840</sup>
29. The European Court has held that the complete loss of pension and welfare benefit rights following a criminal conviction is an unlawful interference with Article 1 Protocol 1.<sup>841</sup> Similarly the loss of pension rights following disqualification from a profession has been held to violate the right to property.<sup>842</sup>

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<sup>832</sup> *National and Provincial Building Society v UK*

<sup>833</sup> *Nacaryan and Deryan v Turkey*

<sup>834</sup> *Zouboulidis v Greece [no. 2]*

<sup>835</sup> *AO Neftyanaya Kompaniya Yukos v Russia*

<sup>836</sup> *Griffhorst v France*

<sup>837</sup> *Moskal v Poland; Lakićević and Others v Montenegro and Serbia*

<sup>838</sup> *Luczak v Poland*

<sup>839</sup> *Muller v Austria*

<sup>840</sup> *Zeïbek v Greece*

<sup>841</sup> *Apostolakis v Greece*

<sup>842</sup> *Klein v Austria*

30. The application of Article 1 Protocol 1 is not restricted to interferences with property that involve the transfer of some benefit to the State. The Article is capable of applying to measures introduced by the State which affect an individual's property rights by transferring them to, or otherwise benefiting, another individual or individuals, or which otherwise regulate the property of an individual.

### **Whose property rights and private parties**

31. If you can demonstrate the existence of a right to the property at issue, it is possible to rely on Protocol 1, Article 1, which applies to every natural or legal person. Company shareholders may therefore be able to rely upon it, as may trustees.

32. Where an association seeks to bring a claim on behalf of its members, it must be able to identify the individuals it represents and demonstrate that it has received specific instructions from each one.

### **The right to a fair trial**

33. In most instances where Article 1 Protocol 1 is engaged a determination of civil rights will be involved. As such, Article 6 and the right to a fair trial will govern any proceedings where such a determination is made. Ordinary measures to enforce tax payments, however, do not determine such civil rights or a criminal charge. Certain exceptions may apply.<sup>843</sup> As a general rule article 6(1) will apply to disputes about welfare payments and pensions.

34. Property rights will be engaged where property is seized for use in criminal proceedings. In *Smirnov v Russia* for example, the lengthy retention of a lawyer's computer for evidence in a criminal case amounted to a violation of Article 1 Protocol 1.<sup>844</sup> Similarly a person may have the right under Article 1 Protocol 1 to access seized property in order to be able to challenge sanctions taken against them or participate effectively in their trial.<sup>845</sup> Where seized property has been damaged or lost, a right to compensation is likely to arise.<sup>846</sup>

### **Environment**

35. In *Rainer v UK* it was held that noise pollution resulting from proximity to an airport could seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. As such, it may be relevant to consider Article 1 Protocol 1 in an environmental rights context.

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<sup>843</sup> *Perrin v France; Editions Pariscope v France*

<sup>844</sup> *Smirnov v Russia*

<sup>845</sup> *Družstevní Záložna Pria and Others v the Czech Republic*

<sup>846</sup> *Tendam v Spain*

## IX. The Prohibition on Discrimination

1. As has already been established, there are extensive equality and non-discrimination provisions within the wider human rights framework at the UN. This section on discrimination will mainly focus on the Council of Europe and the way that the ECHR in particular promotes equality and protects against discrimination. However, Council of Europe institutions such as the Commissioner for Human Rights, the Committee for the Prevention of Torture, the European Commission on Racism and Intolerance (ECRI) and the Venice Commission, which play a vital role in guaranteeing equality and non-discrimination, will also be explored briefly.

### ***European Convention on Human Rights***

2. The main discrimination guarantee is contained in Article 14 of the ECHR, which provides that:

*“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.”*

3. Article 14 does not provide a free standing protection against discrimination. It does not protect against discrimination *per se*. It only applies if the main substantive articles of the ECHR are engaged. As such, it has frequently been referred to as a “parasitic” provision. A free standing right to equality is now provided for by Protocol 12 to the ECHR. As will be seen below, Article 1 of Protocol 12 is in significantly stronger terms. The Protocol has not been ratified by Russia. Protocol 12 to the ECHR is discussed below.
4. Nevertheless, Article 14 has proved to be an important provision. The Court has held that the rights guaranteed under the Convention must be read as though Article 14 “formed an integral part of each of the articles laying down rights and freedoms”.<sup>847</sup>
5. Case law from the Court demonstrates that Article 14 will be violated where:
  - The alleged discrimination falls within the ambit of another Convention Article; and
  - There is a difference of treatment between the applicant and other persons in relevantly similar situations; and
  - The difference of treatment is on a ground protected (explicitly or otherwise) by Article 14; and
  - The difference in treatment is not justifiable.

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<sup>847</sup> *Belgian Linguistic Case (No 2)*

## 'Within the ambit'

6. Discrimination is caught by Article 14 only when it is within the *ambit* of another ECHR right. However, Article 14 does not require a breach of another provision before it can be violated.<sup>848</sup> Indeed the Court has shown itself unwilling to consider the application of Article 14 in cases in which a breach of the other Court right has been established (meaning that there is not as much dicta from the Court on Article 14 than might otherwise be the case).<sup>849</sup> To this extent Article 14 is treated as a “subsidiary guarantee”.
7. Whilst there have been cases in which the Court has considered Article 14 notwithstanding a proven violation of another ECHR right, these are not common. In *Petropoulou-Tsakiris v Greece*, for example, the court found a breach of the procedural aspect of Article 3 and went on to consider Article 14 and found that the failure of the authorities to investigate possible racial motives for the applicant's ill-treatment, combined with their attitude during the investigation, constituted discrimination contrary to Article 14 taken in conjunction with Article 3.
8. By contrast, where the discrimination complaint raises an additional question it may be treated separately,<sup>850</sup> and where the discrimination complaint is the essence of the complaint the ECtHR may choose to assess the conjunction of Article 14 and the other substantive right, rather than solely looking at the substantive right.<sup>851</sup>
9. The Court also uses a number of other expressions, apart from “ambit”, to describe the degree to which a substantive right must be in play before Article 14 is engaged, including that the subject matter of the disadvantage must “constitute one of the modalities of the exercise of a right guaranteed” or be “linked to the exercise of the right guaranteed”. Article 14 will not be engaged where there is only a tenuous connection with a substantive Convention right.<sup>852</sup>
10. However described, the “ambit” requirement permits a rather wider scope for Article 14 than at first glance might appear. This is because the obligation on Member States not to discriminate applies not only to rights which it is obliged to protect under the ECHR but also to complaints which relate to one of the ways in which the State demonstrates respect for the guarantees contained within the EHRC (“one of the modalities of the exercise of a right guaranteed”). As a result, if a State chooses to provide additional rights which fall within the general scope

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<sup>848</sup> *Belgian Linguistic Case (No 2)*

<sup>849</sup> *Airey v Ireland; Dudgeon v UK*

<sup>850</sup> *Marckx v Belgium; Canea Catholic Church v Greece*

<sup>851</sup> *Sutherland v UK; Salgueiro da Silva Mouta v Portugal*

<sup>852</sup> *Botta v Italy*

of the EHRC rights, it must do so in a non-discriminatory way.<sup>853</sup>

11. In the seminal *Belgian Linguistic Case (No 2)*, the Court observed that:

*“Article 6 ... does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligation under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions”.*

12. The Court went on to consider a complaint concerning access to language-based State education. It found that there was no obligation on the State to provide any particular system of education but that, if it did so, access to the system could not be restricted on discriminatory grounds. Similarly, in *Abdulaziz, Cabales and Balkandali v UK*, the Court accepted that Article 14 was breached by discrimination between non-patrial men and women in the UK in connection with access to the UK of their spouses and fiancé(e)s. This was so notwithstanding that the EHRC did not impose any freestanding obligation to permit access to fiancé(e)s because the discrimination in issue fell within the right to respect for family life provided by Article 8. In the same way, although Article 8 does not protect the right to adopt or to found a family, where national legislation grants a right to apply for adoption, such is within the ambit of Article 8 and therefore engages Article 14.

13. Similarly, although Article 8 does not require the grant of particular social security benefits, if a state chooses to grant a benefit such as parental leave allowance<sup>854</sup> or child benefit<sup>855</sup> the allowance is likely to fall within the scope of Article 8 (where it promotes respect for family life), and Article 14 is again engaged. The same reasoning has been applied to the creation of a benefits scheme; Article 1 of Protocol 1 does not include, *per se*, a right to social security payments, but if a benefits system is created it must be compatible with Article 14.<sup>856</sup>

14. It has proved difficult to establish what falls within and without the ambit of Article 8. The areas of inheritance,<sup>857</sup> adoption,<sup>858</sup> <sup>859</sup>and social security<sup>860</sup> have all revealed this difficulty.

15. In the context of social welfare benefits, Article 1 of Protocol 1 has also proved

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<sup>853</sup> *EB v France; Spottl v Austria*

<sup>854</sup> *Petrovic v Austria*

<sup>855</sup> *Okpiz v Germany*

<sup>856</sup> *Stec v UK*

<sup>857</sup> *Hass v Netherlands*

<sup>858</sup> *Frette v France; EB v France*

<sup>859</sup> *Stec v UK;*

<sup>860</sup> *Petrovic v Austria; Glor v Switzerland*

an area of difficulty, with a distinction seemingly drawn in the case law between payments made under a national social security scheme (where Article 1 of Protocol 1 does apply) and claims for one-off, specific and non-general compensation where applicants have been denied access (where Article 1 does not apply).<sup>861</sup> Somewhat confusingly, however, it appears that not every difference in treatment in conditions of entitlement to benefits will fall within the ambit of Article 1.<sup>862</sup>

16. The ambit of other substantive Convention rights has also been discussed, albeit with less regularity in the Court's case law:
  - a. Articles 2 and 3. It is not entirely clear whether a case will fall within the ambit of Articles 2 or 3 where there has been no substantive breach. Early cases suggested this would not be the case.<sup>863</sup> More recent cases have suggested that consideration be given to whether discriminatory treatment/intent amounted to a violation of Articles 2 or 3.<sup>864</sup>
  - b. Article 4 has been interpreted as having a wide ambit.<sup>865</sup>
  - c. Article 6. Substantive and procedural differences may fall within the ambit of Article 6.<sup>866</sup>
  - d. Article 9. The ECtHR has tended to take a generous approach to its ambit.<sup>867</sup>

### **Difference of treatment**

17. As to the meaning of discrimination, as indicated above, generally, case law under Article 14 has required a complainant to prove a difference of treatment (though the burden may be shifted to the State on proof of sufficient evidence of the possibility of discrimination<sup>868</sup>). Thus the case law "establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations."<sup>869</sup> Not every difference in treatment will amount to a violation of Article 14. Instead, it must be established that the other persons in an analogous or relevantly similar situation enjoy more favourable treatment, and that there is no objective or reasonable justification for the distinction. In this way "direct" discrimination is covered by Article 14.

18. Further, case law from the Court now makes clear that "indirect discrimination" (or where disability discrimination is engaged, a failure to make adjustments) is

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<sup>861</sup> See, for example: *Ernewein v Germany*; *Smiljanic v Slovenia*

<sup>862</sup> *Van den Bouwhuijsen v Netherlands*

<sup>863</sup> *East African Asians v UK*

<sup>864</sup> *Moldovan v Romania*

<sup>865</sup> *Van der Mussele v Belgium*; *Adami v Malta*

<sup>866</sup> *Stubbings v UK*

<sup>867</sup> *Thlimmenos v Greece*; *Kosteski v Former Yugoslav Republic of Macedonia*

<sup>868</sup> *Nachova v Bulgaria*

<sup>869</sup> *Willis v UK*

also addressed by Article 14.

19. In *Belgian Linguistics*, the Court indicated that Article 14 was concerned with the “aims and effects” of any measure under challenge, suggesting that indirect as well as direct discrimination might be covered. In *Abdulaziz*, however, in which the complainants claimed that immigration rules requiring that fiancé(e)s must have previously met discriminated indirectly against those from the Asian sub-continent (who were particularly likely to enter arranged marriages), the Court did not consider such complaint. Instead the Court held that: “In the Court’s view...such a requirement cannot be taken as an indication of racial discrimination: its main purpose was to prevent evasion of the rules by means of bogus marriages or engagements...”. The Court did not engage in any discussion about the *indirectly* discriminatory nature of the rules. Similarly, there have been cases indicating that rules of general application do not constitute “religious discrimination” even where they have disproportionate impact on certain religious minorities.<sup>870</sup>
20. However, in *Thlimmenos v Greece* the Court held that discrimination contrary to Articles 9 and 14 had occurred when a man who had been criminalised because of his refusal (as a Jehovah’s witness) to wear a military uniform during compulsory military service, was refused admission as a chartered accountant because of his criminal conviction:  
  
*“The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification...this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”*
21. The obligation to treat different cases differently was reiterated in *Sampanis v Greece*, the Court holding that the particular vulnerability of Roma children placed an obligation on the State to take measures to ensure that they had proper access to the primary education.
22. Further, in *Jordan v UK* the Court ruled that: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group”.
23. The fact that Article 14 applies to indirect discrimination has now been put beyond doubt by the landmark decision of the Grand Chamber in *DH v Czech*

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<sup>870</sup> *Stedman v UK*

*Republic*, itself proceeded by developments in this area in the cases of *McShane v UK*, *Hoogendijk v Netherlands* and *Zarb Adami v Malta*. In *DH* the Court went further than its previous holdings in ruling that disparate outcomes – including *de facto* segregation – may violate Article 14, absent proof that they are not connected to one of the protected characteristics (race, gender etc) and absent justification. Article 14 then may address what is commonly described as “institutional” (caused by policies and practices which disadvantage one group or another) and “structural” (caused by *de facto* segregation and exclusion) discrimination and imposes a duty upon the State to take steps to avoid it.

24. In *DH v Czech Republic* the Court found a violation of Article 14 on the basis of facts demonstrating that more than half of Roma children in the Czech Republic attend special schools (those for children with a “social or mental handicap”). According to the Court:

*“The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations...However, Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article...The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group..., and that discrimination potentially contrary to the Convention may result from a de facto situation...*

*Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment...The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures...*

*As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified....*

*As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, ...there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by*

*the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake...*

*Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases...[T]here could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.” (paragraphs 175-181).*

25. The Court confirmed that a claim for indirect discrimination may succeed in the absence of statistical evidence, and also made it clear that statistics may be sufficient to establish a *prima facie* case of discrimination within Article 14. The effect, then, of the judgment in *DH* is that where there is statistical evidence showing that some protected groups are experiencing specific and serious forms of discrimination or disadvantage falling within the “ambit” of the other Convention rights, a State may be under a positive obligation to address it, unless it can show that the differences are as a result of objective factors unrelated to ethnic origin or that they are objectively justified. Where there is *prima facie* evidence of indirect discrimination the burden of proof will shift to the State to show that the differential treatment was justified. In *DH* the Court held that no justification had been provided given the doubts expressed about the educational tests being used and the lack of safeguards to ensure that those tests did not disproportionately affect a disadvantaged minority (see more on justification below).
26. Cases following *DH* have shown that it may be possible to demonstrate differential treatment without statistical evidence, for example, where there is evidence of how policy is applied in reality, even where this is not supported by statistics.<sup>871</sup>
27. Article 14 imposes positive duties on the State to take steps to prevent and remove discrimination insofar as it affects matters falling within the scope of other Convention rights. This includes an obligation to take action to protect against acts of discrimination by private persons in connection, for example, with

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<sup>871</sup> *Orsus v Croatia*

membership of private associations,<sup>872</sup> expression which gratuitously insults religious feelings<sup>873</sup> and racially inflammatory speech. The State is also under a duty to combat racism and racial violence,<sup>874</sup> ensure trade union members are protected from anti-union discrimination,<sup>875</sup> and the State may also be required to take account of the needs of particular groups when organising its education system.<sup>876</sup> Recent case law demonstrates that Article 14, with Articles 2 and 3, imposes a duty upon States Parties to protect women against domestic violence (a gendered form of violence).<sup>877</sup>

28. Further, it permits positive action or discrimination. In such circumstances differential treatment may be justified where its purpose is to assist a disadvantaged group.<sup>878</sup> Thus in the *Belgian Linguistic Case* the Court indicated that not all differential treatment contravenes Article 14 because certain legal inequalities correct factual inequalities. Accordingly, a tax advantage to married women which fell within the ambit of the right to peaceful possessions of property under Article 1 of the First Protocol had the objective and reasonable justification of providing positive discrimination to encourage married women back to work.<sup>879</sup>
29. Where *differential* treatment is relied upon under Article 14 (i.e. direct discrimination), as mentioned above, case law demonstrates that a complainant must show that she has been treated less favourably than another or others who are relevantly similarly situated.<sup>880</sup> The identification of the proper comparator can sometimes prove problematic. In *Van der Musselle v Belgium*, for example, the applicant, a trainee barrister, was required to act on a *pro bono* basis in legally aided cases while other professionals, including other lawyers, involved in the same cases were paid for their services. The Court rejected his attempts to compare himself with members of other professions and trained legal professionals, holding that he was not in an “analogous situation”.
30. In *Johnston v Ireland* the Court rejected a complaint that Article 14 was violated because the applicant could not obtain a divorce in Ireland whereas others who were resident in Ireland but had the means to do so could obtain a divorce elsewhere. It concluded that the situations were not analogous because as a matter of private international law foreign divorces were only recognised where the parties were domiciled abroad: the situations of foreign domiciles and the applicants were therefore not analogous.

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<sup>872</sup> *Young James and Webster v UK*

<sup>873</sup> *Otto-Preminger-Institute v Austria*

<sup>874</sup> See, *inter alia*: *Nachova v Bulgaria*; *Turan Cakir v Belgium*

<sup>875</sup> *Danilenkov v Russia*

<sup>876</sup> *Sampanis v Greece*

<sup>877</sup> *Opuz v Turkey*

<sup>878</sup> For example, see: *Wiggins v UK*; *Kilbourn v UK*

<sup>879</sup> *DG and DW Lindsay v UK*

<sup>880</sup> *Stubbings v UK*

31. In *Shackell v UK* the Court held, in response to a challenge to the differential treatment by British social security regulations of married and unmarried surviving partners, that unmarried and married couples:

*“are not [in] analogous situations. Though in some fields, the de facto relationship of cohabiters is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit.”*

The Court adopted the same approach in the recent case of *Korelc v Slovenia*.

32. By contrast, in *PM v UK* the Court held that married and unmarried parents are in a comparable position when they are living apart from the family. In *Konstantin Markin v Russia*, the Court held that male and female parents serving in the armed forces were similarly placed for the purposes of considering different provisions on parental-leave allowances between men and women.
33. Other examples in the case law of situations deemed not to be analogous include different categories of prisoner<sup>881</sup> and those with different residence.<sup>882</sup>

### **The difference of treatment is on a protected ground**

34. As to the grounds protected by Article 14, these include those enumerated (sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property birth) and “other status”. Differential treatment on these grounds requires justification. The Court has also suggested in recent case law that arbitrary decision-making which might appear to be indiscriminate and based on no ground at all can still violate Article 14.<sup>883</sup>
35. The concept of “other status” has been interpreted by reference to the French text which uses the phrase “*toute autre situation*”.<sup>884</sup> In *Kjeldsen Madsen and Pedersen v Denmark* the Court concluded that “other status” must refer to some “personal characteristic”. This point has been repeated in subsequent cases.
36. The concepts of “other status” and “personal characteristic” have been given a fairly wide reach so as to include not just intrinsically personal qualities, such as genetic medical features,<sup>885</sup> but also social categorisations or classifications such as marital status,<sup>886</sup> legitimacy,<sup>887</sup> military rank,<sup>888</sup> types of compulsory service,<sup>889</sup>

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<sup>881</sup> *Kafkaris v Cyprus; King v UK*

<sup>882</sup> *Carson v UK; Zollman v UK; Sevinger and Eman v Netherlands*

<sup>883</sup> *Paroisse Greco Catholique Sambata Bihor v Romania; Hamer v Belgium*

<sup>884</sup> *Engel v Netherlands*

<sup>885</sup> *GN v Italy*

<sup>886</sup> *Rasmussen v Denmark; Abdulaziz, Cabalas and Balkandali v UK*

professional status,<sup>890</sup> trade union status,<sup>891</sup> membership of another association body,<sup>892</sup> financial situation,<sup>893</sup> former membership of the KGB,<sup>894</sup> and imprisonment.<sup>895</sup> Indeed, in some cases Article 14 has been applied to differences in treatment which are related only to an applicant's actual factual circumstances which themselves are determined by reference to the complaint of discrimination.

37. These include discrimination between owners of non-residential and residential buildings,<sup>896</sup> large and small landowners,<sup>897</sup> holders of different types of planning permission<sup>898</sup> and tenants of private or public landlords.<sup>899</sup> Place of residence may fall within Article 14.<sup>900</sup>

38. The Court's approach has varied, however, and certain factual classifications or distinctions have been held to fall outside Article 14, including where a person lives within a State,<sup>901</sup> distinctions between types of criminal offence depending on the legislature's view of their gravity,<sup>902</sup> and distinctions between high security prisoners and prisoners who pose no security risk.<sup>903</sup>

## Justification

39. As mentioned above, discrimination under Article 14 is lawful if "justified". Justification will only be made out where the discrimination complained of pursues a legitimate aim and "there is [a]...reasonable relationship of proportionality between the means employed and the aim sought to be realised". Generally the identification of a legitimate aim is the easier part of the burden to discharge. In *Marckx v Belgium* (relating to distinctions based on illegitimacy) the state identified its aim as the support and encouragement of the traditional family. In *Abdulaziz, Cabales and Balkandali v UK* (on immigration law) the aim was to protect the labour market and protect public order, and in the *Belgian Linguistic Case (No 2)* (language based teaching) the development of linguistic unity was

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<sup>887</sup> *Inze v Austria*

<sup>888</sup> *Engels v Netherlands*

<sup>889</sup> *Beian v Romania*

<sup>890</sup> *Van der Mussele v Belgium; Driha v Romania*

<sup>891</sup> *National Union of Belgian Police v Belgium; Danilenkov v Russia*

<sup>892</sup> *Grand Oriente d'Italia di Palazzo Giustiniani v Italy (No.2)*

<sup>893</sup> *C v Netherlands*

<sup>894</sup> *Sidabras and Džiautas v Lithuania*

<sup>895</sup> *RM v UK; Shelley v UK*

<sup>896</sup> *Spadea and Scalebrino v Italy*

<sup>897</sup> *Chassagnou v France*

<sup>898</sup> *Pine Valley Developments v Ireland*

<sup>899</sup> *Larkos v Cyprus*

<sup>900</sup> *Moksal v Poland; Carson v UK*

<sup>901</sup> *Magee v UK*

<sup>902</sup> *Gerger v Turkey; Taxquet v Belgium; Kafkaris v Cyprus*

<sup>903</sup> *PK v UK*

considered a legitimate aim.

40. As to establishing *proportionality*, the ground of discrimination relied upon will be highly relevant. In some cases the Court will apply strict standards, in others a wide margin of appreciation is accorded to States. The case law from the Court has identified a number of “suspect” classifications which require “very weighty reasons” to justify a difference in treatment.<sup>904</sup> These are: race<sup>905</sup>; legitimacy<sup>906</sup>; sex<sup>907</sup>; religion<sup>908</sup>; nationality<sup>909</sup>; sexual orientation.<sup>910</sup> The *margin of appreciation* will be very narrow indeed in relation to the “suspect categories”.
41. With regard to proportionality, the Court has noted that the State is not required to show that there was no alternative non-discriminatory means of achieving the same aim,<sup>911</sup> although this is likely to be a relevant factor in the Court’s assessment.<sup>912</sup> The fact that provisions allowing differential treatment were later altered to remove the differential effect does not prove disproportionality.<sup>913</sup> However, justification is a flexible assessment and a measure that was held to be justified at the time of its introduction may cease to be justified in the light of changes in society.<sup>914</sup> Further, the State cannot necessarily seek to justify differential treatment on the grounds that the people affected could have avoided the differential effect by changing their behaviour.<sup>915</sup>
42. As to width of the margin of appreciation generally, this will depend to a large extent on whether there is common consensus between contracting States on the issue in question. In *Rasmussen v Denmark* for example, the Court held that differential time limits for bringing paternity proceedings between men and women was not out of line with the practice in other European states and accordingly the treatment was within Denmark’s margin of appreciation.
43. Similarly, in *Petrovic v Austria*, discrimination between mothers and fathers in relation to a parental leave allowance fell within the margin of appreciation as there was no common standard among the Contracting States. The margin, then, may change in relation to any particular issue as standards change (reflecting the dynamic nature of the ECHR, that it is a “living instrument”). Thus in *Fretté v France* the Court held, in dismissing a claim under Article 14, that the fact that

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<sup>904</sup> *Carson v UK*

<sup>905</sup> *Timishev v Russia*: “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified.”

<sup>906</sup> *Marckx v Belgium*

<sup>907</sup> *Abdulaziz, Cabales and Balkandali v UK*

<sup>908</sup> *Hoffmann v Austria*

<sup>909</sup> *Gaygusuz v Austria*

<sup>910</sup> *L & V v Austria; Karner v Austria*

<sup>911</sup> *Rasmussen v Denmark*

<sup>912</sup> *Finci v Bosnia and Herzegovina*

<sup>913</sup> *Abdulaziz, Cabales and Balkandali v UK*

<sup>914</sup> *Zeman v Austria; Finci v Bosnia and Herzegovina*

<sup>915</sup> *Andrejeva v Latvia; Munoz Diaz v Spain*

there was no common ground between contracting States in relation to adoption by same sex partners meant that States enjoyed a wide margin of appreciation. However, in *EB v France* the Grand Chamber emphasised the importance of sexual orientation as a “suspect category” effectively overruling *Fretté*, less than a decade later.

44. Subject to those observations then, a difference in treatment will violate Article 14 if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.
45. A recent example of the Court’s approach to justification, including the width of the margin of appreciation afforded to the State, can be found in *Konstantin Markin v Russia*, a case concerning different parental leave provisions for military personnel as between men and women. The male applicant had been denied parental leave on the grounds of his sex and his military status. On the issue of sex, the Russian authorities argued that the differential treatment was justified by the special role of mothers in the upbringing of children. The Court rejected this argument, stating that unlike maternity leave, parental leave was not linked to recuperation following childbirth and/or breastfeeding, but was aimed at allowing a parent of either sex to remain at home to look after their children. Significantly, the Court noted that society had moved towards a more general consensus on the equal sharing of between men and women of responsibility for the upbringing of their children, as demonstrated by the fact that the legislation in an absolute majority of Contracting States now provided that parental leave could be taken by both mothers and fathers. In these circumstances the margin of appreciation was narrowed and Russia was not entitled to rely on the absence of a common standard within the Council of Europe to justify differential treatment.
46. On the issue of military status, the Court was unconvinced by Russia’s reliance on what was characterised as an unsubstantiated assumption that allowing servicemen to take parental leave would adversely affect the fighting power and operational effectiveness of the armed forces. The Court accepted that this could amount to a legitimate aim requiring a limitation of servicemen’s rights, but there had been no evidentiary or statistical support which would justify promoting operational effectiveness over the rights of servicemen not to suffer discrimination and the best interests of their children. The fact that in the armed forces women were less numerous than men could not justify disadvantaging the latter, and Russia’s argument that servicemen wishing to take personal care of their children were free to resign was particularly striking, and unattractive, given the difficulty they would be liable to encounter in directly transferring essentially military qualifications and experience to civilian life.
47. This case was referred to the Grand Chamber at Russia’s request in February 2011, and the case was heard in June 2011. At the time of writing the judgment of the Grand Chamber is still pending.

## Burden of proof

48. It is generally for the applicant to show that their complaint falls within the ambit of a Convention right and that they have been treated differently from a person in a comparable situation.<sup>916</sup> Where there is sufficient evidence of possible discrimination in cases where the facts are wholly or largely within the authorities' exclusive knowledge, the burden of proof may shift to the State or the Court may draw negative inferences.<sup>917</sup>
49. In cases of indirect discrimination, the applicant must produce prima facie evidence of differential treatment from a neutral measure. Once this is shown, the State must then prove that the difference was justified.<sup>918</sup>

## Protocol 12, ECHR

50. As mentioned above, Article 14 does not provide freestanding protection against discrimination. Protocol No. 12 to the ECHR, however, which opened for signature by Contracting States on 4 November 2000, provides that:

*“Article 1 – General prohibition of discrimination*

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.”*

51. The Protocol therefore provides protection against discrimination in the enjoyment of rights already set down by law and in addition creates a prohibition against discrimination by public authorities. It thus provides greater protection against discrimination as compared to Article 14. It more closely matches the constitutional level guarantees seen in other jurisdictions, including an equal protection guarantee, as well as a prohibition on discrimination by public authorities.
52. The Protocol entered into force on 1<sup>st</sup> April 2005. Russia has signed (4 November 2000) but has not ratified Protocol No. 12.
53. Two recent decisions have been given under Article 1 of Protocol 12. In *Finci v Bosnia and Herzegovina*, the Grand Chamber considered a provision of the Constitution of Bosnia and Herzegovina which provided that only Bosniacs, Croats and Serbs, described as “constituent peoples”, were eligible to stand for election to the tripartite State presidency and the upper chamber of the State

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<sup>916</sup> See, for example, *Fredin v Sweden*

<sup>917</sup> *Nachova v Bulgaria*

<sup>918</sup> *Dh v Czech Republic*

Parliament, the House of Peoples. The applicants were two prominent public figures who considered themselves Roma and Jewish respectively, and refused to declare an affiliation with one of the “constituent peoples”. The applicants complained that despite having comparable experience to the highest elected officials, they were prevented from standing for office on grounds of their ethnicity. The Grand Chamber noted that the “constituent peoples” provision had originally pursued the legitimate aim of securing peace, but that in light of the developments that had been made since then, the measure was no longer objectively justified. The Grand Chamber found a violation of Article 14 combined with Article 3 of Protocol 1, but made clear that had Article 3 of Protocol 1 not been engaged, the case fell within Article 1 of Protocol 12 in any event. As a result, the inability of the applicants to stand for the Presidency was discriminatory by virtue of Article 1 of Protocol 12.

54. In *Savez crkava “Riječ života” and Others v Croatia*, the Court held that the applicant church’s complaint concerned alleged discrimination by a public authority in the exercise of a discretionary power, as set out in the third category of the explanatory note on Protocol 12. However, given the finding of a violation of Article 14 with Article 9, the Court did not go on to consider the issue under Protocol 12.

### **Social Charter**

55. Russia is also a party to the Council of Europe’s European Social Charter (1961). This addresses economic and social rights, much like the ICESCR. The Charter recognises a wide range of social and economic rights including:
- The right to just conditions of work;
  - The right to safe and healthy working conditions;
  - The right to fair remuneration sufficient for a decent standard of living for themselves and their families for workers.
56. The Charter does not contain a specific non-discrimination guarantee. However, it does address discrimination both in its preamble and in the substantive provisions. Its preamble provides that “the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin”. Further, it contains an “equal pay” guarantee recognising “the right of men and women workers to equal pay for work of equal value”.<sup>919</sup>
57. In 1996 the Revised Social Charter was open for signature. This entered into force in 1999 and it is intended that it will replace the Social Charter. Importantly, Russia has signed (14 September 2000) and ratified (16 October 2009) the Charter, but has yet to accept the collective complaints procedure.

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<sup>919</sup> Article 4

58. Unlike the original Charter, the Revised Charter does contain an explicit non-discrimination guarantee. Part V, Article E provides that:

***“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.”***

59. This provision is materially the same as that contained in Article 14 of the ECHR and it is therefore likely to be interpreted in much the same way.

60. The Revised Social Charter was introduced to take account of developments in labour law and social policies since the Charter was drawn up in 1961 and to bring together in a single instrument all the rights guaranteed in the Charter and the 1988 Additional Protocol (relating to equality as between men and women<sup>920</sup>).

### ***Framework Convention for the Protection of National Minorities***

61. The most important Council of Europe instrument concerning minorities is the Framework Convention for the Protection of National Minorities (1995). It provides 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”*.<sup>921</sup> The rights provided for by the Convention are to be enjoyed *“individually as well as in community with others”*.<sup>922</sup> The Convention contains a non-discrimination guarantee, in Article 4(1), conferring *“to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited”*.

62. This Convention has been ratified by Russia.

63. Importantly, Article 4(2) requires States Parties to promote, in all areas of economic, social and cultural life, full and effective equality between persons belonging to a national minority and to the majority and *“in this respect, they shall take due account of the specific conditions of the persons belonging to national minorities”*. Article 5 in turn, calls for measures creating conditions for preserving identity and developing cultural diversity of minorities and along with Article 4 might be regarded as giving the Convention *“special significance”*.<sup>923</sup> As has

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<sup>920</sup> The UK has neither signed nor ratified the Additional Protocol

<sup>921</sup> Article 3.

<sup>922</sup> Article 3.

<sup>923</sup> *“The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?”* A. Verstichel, et al

been argued, this combination of rights makes it possible for minorities to say: *“we demand to be accepted and respected for what we are, and at the same time we demand full equality and economic, social and political life”*.

64. The “enforcement” mechanisms applicable to violations of the Convention reflect those found in other instruments. The Convention imposes a reporting obligation on States Parties with an Advisory Committee of experts then analysing those reports. The Advisory Committee then promulgates opinions for submission to the Committee of Ministers which may in turn adopt recommendations in respect of States Parties. At the time of its adoption, certain aspects of the Framework Convention attracted criticism from a number of academic writers, activists and commentators. This was especially true as regards the monitoring mechanisms. However, notwithstanding the formal institutional arrangements for monitoring which might appear quite weak, recent commentators have noted that the Convention has *“gained in authority and efficacy due to the dynamic monitoring practice of its advisory committee and the willingness of a number of States to ‘play the game’.”* Indeed, it has been remarked that the mechanisms adopted have proved fairly compelling in practice.
65. So far, Ministers of the Council of Europe have largely followed the advice of the experts, leading to recommendations and thus exerting pressure on States Parties to adopt best practice as formulated by an expert body. This in some ways has proved to be more strategically effective than the mechanism adopted under the ECHR because, whilst important, decisions of the Court are necessarily constrained by the facts of any individual case and thus the procedure permits of limited opportunity to address structural issues. Significant exceptions, in relation to equality, include the Court’s decision in *DH*, referred to above.