



UNITED NATIONS HUMAN RIGHTS COMMITTEE  
**106<sup>th</sup> Session of the UN Human Rights Committee**  
15 October to 2 November 2012

**INTERNATIONAL COMMISSION OF JURISTS (ICJ) COMMENTS  
TO THE UN HUMAN RIGHTS COMMITTEE ON ITS HALF-DAY OF GENERAL DISCUSSION  
IN PREPARATION FOR A GENERAL COMMENT ON ARTICLE 9  
(LIBERTY AND SECURITY OF THE PERSON) OF THE INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS**

Submitted September 2012

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

## **ICJ SUBMISSION TO THE HUMAN RIGHTS COMMITTEE ON ITS HALF-DAY OF GENERAL DISCUSSION IN PREPARATION FOR A GENERAL COMMENT ON ARTICLE 9 OF THE ICCPR**

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the half-day of general discussion to be convened by the Human Rights Committee (the Committee) in preparation for a General Comment on article 9 of the International Covenant on Civil and Political Rights (ICCPR). The ICJ intends to be actively engaged in following the process leading to the establishment of this General Comment and intends to provide detailed substantive comments on the first draft of the General Comment, as well as providing any further information or analysis sought by the Committee wherever possible.

### **Issues Identified by the Special Rapporteur**

2. The ICJ notes that the Committee's Special Rapporteur on the General Comment has prepared a list of issues for potential expansion within the General Comment.<sup>1</sup> The ICJ believes that this list forms a sound basis for the preparation of a first draft of the General Comment. Certain emphases or clarifications are suggested below. The ICJ would be happy to provide further comments on these issues prior to the preparation of the first draft of the General Comment if the Committee and Special Rapporteur so wish.

#### Article 9(1): Meaning of "arbitrary" as applied to arrest and detention

3. The ICJ notes that, in 2011, the Human Rights Council's Working Group on Arbitrary Detention commenced at its own initiative a process for preparing what will become Deliberation No 9 on the scope and definition of arbitrary deprivation of liberty under customary international law. The deliberation aims to identify existing law and practice, rather than establishing new standards or criteria, and will build upon the opinions of the Working Group since its creation in 1991.<sup>2</sup>

4. The ICJ provided a detailed submission to the Working Group on the subject. The ICJ's submission is annexed hereto (Annex 1).

#### Article 9(3): Being brought promptly before a judge or other authorised officer

5. In its General Comment 8, the Committee has expressed that the period of time between arrest and being brought before a judge or officer is to be determined on a case-by-case basis and must not exceed a few days. The Committee may wish to take a more precise position in this regard, including by identifying what factors would be relevant in the case-by-case approach to be taken.

6. Some further clarity on the meaning of an "other officer authorized by law to exercise judicial power", as relevant to determinations called for under article 9(3), would be welcomed.

#### Article 9(4): Habeas Corpus

7. The ICJ wishes to bring to the attention of the Committee the fact that, under its resolution 20/16 (2012), the UN Human Rights Council has requested the Working Group on Arbitrary Detention to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of her or his liberty. For the purpose of preparing a first draft, the Council has requested the Working Group to seek views of all stakeholders in this regard, including the Human Rights Committee. The Working Group has been asked to present the draft basic principles and guidelines to the Council before the end of 2015.

### **Thematic Issues**

8. In the course of preparing its General Comment on article 9 of the ICCPR, the ICJ suggests that express consideration be given to the thematic issues listed below. Should the Committee and the Special Rapporteur decide to make reference to those issues in the General Comment, the ICJ would be prepared to provide further analyses of the issues mentioned, including prior to the preparation of the first draft of the General Comment if desired.

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<sup>1</sup> UN Doc CCPR/C/105/3 (2012).

<sup>2</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/19/57 (2011), paras. 6, 69 and 78. A copy of the ICJ's submission to the Working Group, in response to the Working Group's Note Verbale of 31 October 2011, is available at URL <<http://www.icj.org/icj-submission-to-the-working-group-on-arbitrary-detention/>>.

Application of article 9 in international and non-international armed conflicts

9. In addition to considering the complementarity and concurrent application of article 9 to international and non-international armed conflicts, it is suggested that the Committee should address the threshold question of when a situation rises to the level of armed conflict to the extent that international humanitarian law applies. This clarification is very important since there have been situations where States have mischaracterised a situation of internal disturbance or increased terrorism as an armed conflict and treated this as a basis for not fully respecting Covenant obligations, particularly as regards article 9.

Administrative detention

10. Administrative detention is generally incompatible with the rule of law and international human rights obligations, particularly when it is prolonged and results in detainees being subjected to torture, ill-treatment or other violations of human rights. This is a matter further explored in the ICJ's submission to the Working Group on Arbitrary Detention (Annex 1 hereto).

Control orders and surveillance orders

11. While measures falling short of the deprivation of liberty are to be generally encouraged, recent practice in the area of what are known as control orders and surveillance orders – as used by the United Kingdom and Australia – warrants careful attention. Both regimes call into question the precise boundary between liberty and measures falling short of liberty (e.g. as this pertains to curfews), as well as the engagement of other rights enumerated within the ICCPR (e.g. the right to a fair hearing in situations where control and surveillance orders are sought based on classified information that is not disclosed to the subjects of such orders).

Detention of asylum-seekers and irregular migrants

12. Many countries provide for the detention of asylum-seekers and irregular migrants. In some cases, such detention is automatic, or in practice frequent. Detention facilities for such persons are in many cases over-crowded and operate without adequate attention to the situation from which asylum-seekers have fled (e.g. without the provision of counselling or other care for persons that have been subjected to torture in their country of origin). Annexed hereto is chapter 4 from the ICJ's Practitioners Guide on Migration and International Human Rights Law, concerning migrants in detention (Annex 2).

Alternatives to incarceration

13. It is suggested that attention should also be paid to the relationship between article 9 and the sentencing of persons convicted of criminal offences, including as this pertains to the necessity to deprive persons of their liberty and what alternatives to incarceration might be available.

Annexes:

1. ICJ submission to the Working Group on Arbitrary Detention, *The definition and scope of arbitrary deprivation of liberty in customary international law* (February 2012)
2. ICJ Practitioners Guide No 6, *Migration and International Human Rights Law* (2011), chapter 4 on "Migrants in Detention"





INTERNATIONAL  
COMMISSION  
OF JURISTS

UNITED NATIONS HUMAN RIGHTS COUNCIL  
**62<sup>nd</sup> session of the Working Group on Arbitrary Detention**

**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION TO THE  
WORKING GROUP ON ARBITRARY DETENTION**  
*“The definition and scope of arbitrary deprivation of liberty in customary  
international law”*

Submitted February 2012

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

*“The definition and scope of arbitrary deprivation of liberty in customary international law”*

Pursuant to the call by the Working Group on Arbitrary for written information to assist in its deliberations on “the definition and scope arbitrary deprivation of liberty under customary international law”, the International Commission of Jurists (ICJ) offers this submission pertaining to the definition, scope and content of arbitrary detention, under international standards and jurisprudence. This submission surveys primarily international and not domestic legal sources. The ICJ considers that the standards and jurisprudence from universal and regional human rights instruments, courts, treaty bodies and other authoritative sources, taken as a whole, constitutes the general international law in this area.

In general terms, the ICJ notes that exists reasonably clarity as to the definition and scope of arbitrary deprivation of liberty in ordinary situations involving detention before, during and after ordinary criminal proceedings. It is more irregular forms of detention that will warrant particular concern. Accordingly, following a general exposition of standards and jurisprudence, this submission will accent the question of administrative and preventive detention, including in respect of counter-terrorism measures, which has given rise to the most abusive practices by States in respect of the rights to liberty. It will also briefly highlight the question of detention of migrants. The submission will not cover all forms of non-criminal detention, such as involuntary confinement in psychiatric institutions or childcare facilities. Nor will it discuss detention in situations of detention in armed conflict. These areas, of course, nonetheless warrant substantial treatment in order to give a full accounting of the scope of arbitrary deprivation of liberty.

## **I. DEFINITION AND SCOPE OF ARBITRARY DETENTION**

- a) International Standards. The following universal and regional standards establish the normative of arbitrary deprivation of liberty.

### United Nations

- Universal Declaration of Human Rights: articles 3, 8, 9 and 10;
- International Covenant on Civil and Political Rights (ICCPR): articles 2 (3), 4, 5, 9, 10 (1), and 14 (1);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: articles 16 (1, 4, 5, 7, 8 and 9), 17 (1, 5, 6 and 7), and 18 (1);
- Standard Minimum Rules for the Treatment of Prisoners: rules 4 (1), 95, Part I and Part II-C;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: 1, 2, 4, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 32, 33 and 35;
- Basic Principles on the Role of Lawyers: principles 1, 7, 19, 21 and 22;
- International Convention for the Protection of All Persons From Enforced Disappearances: articles 1, 17, 18, 20, 21, and 22;
- General Assembly Resolution 34/178 (habeas corpus) and Commission on Human Rights Resolution 1992/35 (habeas corpus) and Resolution 1993/36 (para. 16);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>1</sup>: part III and rule K;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”).<sup>2</sup>

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<sup>1</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

<sup>2</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Adopted by General Assembly resolution 40/33 of 29 November 1985.

#### Council of Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms: articles 5, 6 (1) and 15;
- Council of Europe Guidelines on Human Rights and the Fight Against Terrorism: guidelines II, III, VII, VIII, and XI;
- Standard Minimum Rules for the Treatment of Prisoners:<sup>3</sup> rules 6, 37, and 38;
- Recommendation No. R (79) 6 concerning the search for missing persons: Para. 1 and 2;
- Recommendation Rec (2000) 21 on the freedom of exercise of the profession of lawyer: rule IV (1);
- European Prison Rules.<sup>4</sup>

#### European Union

- Charter of Fundamental Rights of the European Union: articles 6 and 47.

#### Inter-American System

- American Declaration of the Rights and Duties of Man: articles I, XVIII, XXV, and XXVIII;
- American Convention on Human Rights: articles 5, 7, 8 (1), 25, and 27;
- Inter-American Convention on Forced Disappearance of Persons: articles X and XI.

#### African System

- African Charter on Human and Peoples' Rights: articles 6 and 7;
- Principles and guidelines on the right to a fair trial and legal assistance in Africa:<sup>5</sup> Principle M;
- Guidelines and Measures for the Prohibition and Prevention of Torture or Degrading Treatment or Punishment in Africa (Robben Island Guidelines):<sup>6</sup> guidelines 20 to 37.

#### Arab Charter

- Arab Charter on Human Rights: articles 4, 12, 14 and 20.

#### Others

- United Nations Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile<sup>7</sup>: principles 34, 35, 36, 37 and 38;
- United Nations Draft Third Protocol to the International Covenant on Civil and Political Rights: article 1;
- Syracuse Principles about the Limitation and Derogation of Rights in the International Covenant on Civil and Political Rights: Principle 70.

#### b) Jurisprudence and commentary of international authorities

##### **United Nations**

Detention is the deprivation of a person's liberty. The primary permissible basis for a lawful deprivation of liberty, with narrow and limited exceptions, is the enforcement of criminal law. The International Covenant on Civil and Political Rights (ICCPR)

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<sup>3</sup> Recommendation No. (73)5 adopted by the Council of Europe Committee of Ministers on 19 January 1973.

<sup>4</sup> Recommendation Rec(2006)2, adopted by the Council of Europe Committee of Ministers on 11 January 2006.

<sup>5</sup> African Union Doc. DOC/OS (XXX) 247.

<sup>6</sup> Resolution adopted by the African Commission on Human and People's Rights on 23 October 2002.

<sup>7</sup> Draft principles elaborated by the Committee of the Commission on Human Rights in charge of the study. UN Doc. E/CN.4/826/Rev.1, Annex.

provides for the obligation (under article 9) of states to respect and protect the right to liberty, including by ensuring that any such deprivation is not arbitrary.

Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The UN Human Rights Committee, pursuant to its mandate under the ICCPR, has considered a significant number of cases involving alleged breaches of obligations under article 9. In its jurisprudence, the Committee has clarified the scope of two key criteria provided under article 9(1): that arrest and detention must be lawful and not arbitrary, and that there be an enforceable right to reparation for violations of this right.

*Lawful*

The grounds and procedures for arrest and detention must be prescribed by law (ICCPR, art. 9(1)).<sup>8</sup> This means that the law must be accessible understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including authorities, and be consistent with other applicable law. Lawfulness under the ICCPR relates to both domestic and international legal standards.<sup>9</sup>

*Not arbitrary*

- Lawfulness is a necessary but insufficient condition to satisfy the requirements of ICCPR article 9. Deprivations of liberty “must not only be lawful, but also reasonable and necessary in all the circumstances”.<sup>10</sup>

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<sup>8</sup> The Human Rights Committee emphasizes that “maintenance of the principles of legality and rule of law” is especially important and needed during states of emergency. Human Rights Committee, General Comment No. 29 – States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, (2001), para.2. The Committee states further: “When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.”

<sup>9</sup> See *Report of the Working Group on Arbitrary Detention, Addendum, Mission to China*, (2004) UN Doc. E/CN.4/2005/6/Add.4, para. 54.

<sup>10</sup> Communication No. 305/1988, *Case Hugo van Alphen vs The Netherlands*, CCPR/C/39/D/305/1988, 15 August 1990, para.5.8. See also Communication N° 631/1995, *Case Aage vs Norway*, para. 6.3 (CCPR/C/67/D/631/1995), 5 November 1999; Communication N° 458/1991, *Case Albert Womah Mukong vs. Cameroon*, (CCPR/C/51/D/458/1991), 21 July 1994, para.9(8); Communication No 560/1993, *Case A (name deleted) vs. Australia*, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997, para. 9.



- The criteria of reasonableness and necessity relate both to the substantive nature of the law and to procedural safeguards, as set out below.

#### *Procedural safeguards*

- The following safeguards apply at all times, including during proclaimed states of emergency (under ICCPR article 4):
  - a) *Inform detainee*: Detainees must be promptly informed of the grounds for arrest and detention (ICCPR article 9(2)) and of their rights and how to avail themselves of those rights, including safeguards against torture or other ill-treatment.<sup>11</sup> Indefinite detention without charge is prohibited.<sup>12</sup>
  - b) *Inform others*: Incommunicado detention is strictly prohibited and detainees must be kept in a recognized place of detention.<sup>13</sup> “In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.”<sup>14</sup> Registries of both detainees and responsible officials must be accessible to those concerned, including doctors, lawyers, relatives and friends.<sup>15</sup>
  - c) *Facilitate access to lawyers*: A detainee must be given prompt and regular access to legal counsel within 24 hours of arrest.<sup>16</sup>
  - d) *Ensure judicial control*: A detainee must be brought promptly before a judge or other competent authority (ICCPR, art. 9(3)) and has a right to have a court determine the lawfulness of the detention (ICCPR, art. 9(4)).<sup>17</sup>

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<sup>11</sup> *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para.30-33, affirming and elaborating on principles 13 and 14 in *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988. The prohibition against torture and procedures to enforce this prohibition are non-derogable rights of detainees.

<sup>12</sup> *Concluding observations of the Human Rights Committee - Zambia*, CCPR/C/79/Add.62, 3 April 1996, para.14, regarding two journalists “held in indefinite detention before release, contrary to the provisions of article 9 of the Covenant.”

<sup>13</sup> Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. “To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against *incommunicado* detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.” See also *Concluding Observations of the Human Rights Committee- Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “incommunicado detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.”

<sup>14</sup> *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 31. See also, E/CN.4/2003/68, para. 26 (g)). See also *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 16-17.

<sup>15</sup> Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. Principle 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988.

<sup>16</sup> Principles 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988; Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 32, citing Commission on Human Rights Resolution 1994/37; Human Rights Committee, *Concluding observations of the Human Rights Committee - Israel*, CCPR/CO/78/ISR, 21 August 2003, para 13. In paragraph 12 of the latter report, the Committee examined Israel’s emergency derogation practices, expressing concern regarding “the frequent use of various forms of administrative detention”, including “restrictions on access to counsel”, that endanger “the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee’s view is permissible pursuant to article 4.

<sup>17</sup> *Body of Principles on Detention*, Principles 11, 32, 37; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39; Human Rights Committee, *Concluding Observations of the Human Rights Committee - Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “incommunicado detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.” See also *Concluding observations of the Human Rights Committee - Israel*,

The *habeas corpus* writ or similar remedy must not be limited or restricted under any circumstances.<sup>18</sup> Any delay of judicial scrutiny beyond 48 hours would be hard to justify under international law.<sup>19</sup>

- e) Provide human treatment: All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, art.10)<sup>20</sup> and have access to prompt medical care.<sup>21</sup>
- f) Ensure right to fair trial: If charges are brought, the detainee is entitled to a fair trial by a competent, independent and impartial tribunal established by law within reasonable time or release (ICCPR, art. 9(3), art.14).<sup>22</sup> The trial must be conducted in accordance with international fair trial standards.<sup>23</sup>

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CCPR/CO/78/ISR, 21 August 2003, para 12, where the Committee expressed concern regarding “the frequent use of various forms of administrative detention particularly for Palestinians from the Occupied Territories entailing restrictions on access to counsel and to full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4.” Regarding these rights during states of emergency, the Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)*, para. 15, states that “The presumption of innocence must be respected. In order to protect non-derogable rights [including the right to life; the prohibition against torture, inhuman or degrading treatment; prohibition against discrimination; the principle of legality; recognition of everyone as a person before the law; freedom of thought conscience and religion], the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.”

<sup>18</sup> During non-international armed conflict, the right to fair trial continues with all judicial guarantees. See ICRC, Rule 100. With regard to international human rights law in general, see UN Human Rights Committee, *General Comment No. 29*, paras. 14 and 16; *Concluding Observations of the Human Rights Committee: Japan*, CCPR/C/79/Add.102, 19 November 1998, para. 24; Also see, among others, the *Concluding Observations of the Human Rights Committee: Nigeria*, CCPR/C/79/Add.64, para. 7; *Views of 26 October 1979, Communication No. 9/1977, Edgardo Dante Santullo Valcada vs. Uruguay*, CCPR/C/8/D/9/1977; *Views of 29 July 1980, Communication No. 6/1977, Miguel A. Millan Sequeira vs. Uruguay*, CCPR/C/10/D/6/1977; and *Views of 27 March 1981, Communication No. 37/1978, Esther Soriano de Bouton vs. Uruguay*, CCPR/C/12/D/37/1978; *Concluding Observations of the Human Rights Committee: Dominican Republic*, CCPR/CO/71/DOM, 26 March 2001.

<sup>19</sup> See *Aksoy v Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417; and *Concluding Observations of the UN Human Rights Committee on Thailand*, CCPR/CO/84/THA (13), 28 July 2005.

<sup>20</sup> ICCPR, art. 10. See also Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.13(a).

<sup>21</sup> *Body of Principles on Detention*, Principle 24; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 42.

<sup>22</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee - Jordan*, 10 August 1994, CCPR/C/79/Add.35, section 4, expressing concern about administrative detention and prolonged pre-trial detention without charge; *Concluding observations of the Human Rights Committee: Viet Nam*, 5 August 2002, CCPR/CO/75/VNM, para.8, expressing concern regarding prolonged administrative detention (referred to by State as ‘probation’) and recommending “that no persons are subjected to arbitrary restriction of their liberty and that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgement based on law, as required by article 9, para.3-4, of the Covenant”. See also *Concluding observations of the Human Rights Committee - Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para.19, expressing concern about the “indefinite extension” of administrative detention without remedy by way of appeal or habeas corpus. Regarding these rights during states of emergency, see Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)*, para.16: “The Committee is of the opinion that the 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.”

<sup>23</sup> ICCPR, article 14; *Human Rights Committee, General Comment 32*, para. 6: “While article 14 is not included in the list of non-derogable rights of article 4, para.2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”

## The European Court of Human Rights

The European Court of Human Rights (ECHR) has indicated that “the list of exceptions to the right to liberty secured in Article 5 § 1 [of the European Convention] is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty.”<sup>24</sup> The ECHR has also considered that “judicial control of interferences by the executive with the individual's right to liberty provided for by article 5 (art. 5) is implied by one of the fundamental principles of a democratic society, namely the rule of law.”<sup>25</sup>

The ECHR has ruled that any deprivation of liberty must comply with “the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.”<sup>26</sup> The European Court has also recalled

“that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimize the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5§3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (...). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.”<sup>27</sup>

In addition, the ECHR has held that “the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts.”<sup>28</sup>

## The Inter-America system

The Inter-American Court of Human Rights has considered the question of arbitrary deprivation of liberty extensively.

The Court has determined that

“[a]rticle 7 of the Convention [...] contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly

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<sup>24</sup> Judgment of 6 April 2000, *Labita v. Italy*, para. 170. Along the same lines, see judgment of 22 March 1995, *Quinn v. France*, para. 42; and judgment of 25 May 1998, *Kurt v. Turkey*, para.122.

<sup>25</sup> Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, para.48. See also judgment of 29 November 1988, *Brogan and others v. United Kingdom*, para.32; Judgment of 27 September 2001, *Günay and others v. Turkey*, para.22; Judgment of 26 November 1997, *Murat Sakik and others v. Turkey*, para.44.

<sup>26</sup> See, *inter alia*, judgment of 15 November 1996, *Chahal v. United Kingdom*, para.118.

<sup>27</sup> Judgment of 25 May 1998, *Kurt v. Turkey*, para. 123

<sup>28</sup> *Ibid.*, para. 124.

defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.<sup>29</sup>

Concerning *habeas corpus*, the Inter-American Court has affirmed that:

"In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. [...] it follows that writs of *habeas corpus* and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society."<sup>30</sup>

The Court has also indicated that: "the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees."<sup>31</sup> The Inter-American Court has also stated that writs of *habeas corpus* and of "amparo" aim "to prevent abuse and illegal detention practiced by the State", and that these writs are reinforced by the condition that States have the responsibility to guarantee the rights of individuals under their custody and to provide information and evidence relating to the detainee".<sup>32</sup> The Court has underlined that "safeguarding against an arbitrary exercise of the public power is the fundamental objective of the international protection of human rights. In this sense, the non-existence of an effective internal remedy places a person in a defenceless state."<sup>33</sup>

The Inter-American Commission on Human Rights (IACHR) has considered that Article 7 of the Inter-American Convention on the right to personal liberty "guarantees a basic human right, which is protection of the individual against arbitrary interference by the State in exercising his or her right to personal liberty."<sup>34</sup> The IACHR has stated that "[i]n circumstances not involving a state of emergency as strictly defined under applicable human rights instruments, states are fully bound by the restrictions and limitations under international human rights law governing deprivations of personal liberty. These include the rights of persons:

<sup>29</sup> Judgment of 21 January 1994, *Gangaram Panday v. Suriname*, paras. 46-47. See also Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 83; Judgment of 23 November 2003, *Maritza Urrutia v. Guatemala*, para. 65; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 125; Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, para. 78.

<sup>30</sup> Advisory Opinion No. OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, paras. 35 and 42.

<sup>31</sup> Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, para. 38.

<sup>32</sup> Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 129 (original version in Spanish, free translation). See also: Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 98; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 138.

<sup>33</sup> Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 130 (original version in Spanish, free translation).

<sup>34</sup> Report No. 28/96, Case 11.297 (Guatemala) of 16 October 1996, para. 51.

- Not to be deprived of physical liberty except for the reasons and under conditions established by law;
- To be informed, in a language they understand, of the reasons for their detention and to be promptly notified of the charge(s) against them;
- When detained, to prompt contact with his or her immediate family and to legal and medical assistance;
- To be brought promptly before a competent court to determine the lawfulness of his or her arrest or detention and to order his or her release if the arrest or detention is unlawful;
- To be tried within a reasonable time or to be released without prejudice to the proceedings, which release may be subject to guarantees to assure his or her appearance for trial;
- To information on consular assistance in cases involving the arrest, commitment to prison or custody pending trial, or detention in any other manner, of foreign nationals;
- To implementation of an effective system for registering arrests and detentions and providing that information to family members, attorneys, and other persons with a legitimate interest in the information.”<sup>35</sup>

### The African system

The African Commission on Human and Peoples’ Rights (ACHPR) has noted that the “[p]rohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.”<sup>36</sup>

In a case in which several political opponents had been arrested upon order of a military government and had been detained without charges, the ACHPR considered that detaining persons on the basis of their political belief, particularly in instances in which charges have not been brought against the detained individuals, makes the detention arbitrary.<sup>37</sup> In a case concerning the detention of persons for State security reasons, without charge or trial during several months, the African Commission has stated that “[t]he detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d)”<sup>38</sup>.

The Commission has also determined that the decree suspending a *habeas corpus* remedy for persons detained for State security reasons “must be seen as a further violation of Articles 6 and 7(1)(a) and (d).”<sup>39</sup>

In a case in which an Act provided that the Chief of General Staff may order that a person be detained without charge for State security reasons, and that a panel consisting of the Attorney-General, the Director of the Prison Service, a representative appointed by the Inspector-General of Police, and six persons appointed by the President had a mandate to review the detention every six weeks, the Commission held such detention to be incompatible with the provisions of the African Charter and that, under this system, persons could effectively be detained indefinitely.<sup>40</sup> The Commission also declared that the panel could not be considered

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<sup>35</sup> *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 138.

<sup>36</sup> Decision on May 2003, Communication No. 241/01, *Purohit and Morre v. Gambia*, para. 65.

<sup>37</sup> Decision of November 1999, Communications No. 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil liberties Organization and Media Rights Agenda v. Nigeria*, para. 51.

<sup>38</sup> Decision of 15 November 1999, Communications No. 143/95, and 150/96, *Constitutional Rights Project and Civil liberties Organization v. Nigeria*, para. 28.

<sup>39</sup> *Ibid.*, para. 31.

<sup>40</sup> Decision of 15 November 1999, Communication No. 153/96, *Constitutional Rights Project v. Nigeria*, para. 12.

impartial or be said to meet judicial standards,<sup>41</sup> as the majority of its members were appointed by the President (the Executive), and the other three were also representatives of the executive branch. The ACHPR stated that this detention was arbitrary, and therefore in violation of the right to a fair trial within a reasonable delay and to a remedy.<sup>42</sup>

In a case about a decree that empowered a Minister of Interior to detain without charge and to extend the period of detention indefinitely,<sup>43</sup> the African Commission considered that “this power granted to the Minister renders valueless the provision enshrined in article 7-1-d of the Charter.”<sup>44</sup>

## II. EXCEPTIONAL SITUATIONS OF DETENTION

### a) Administrative/Preventive Detention

Preventive detention is a form of administrative deprivation of liberty ordered by the executive branch of the Government without judicial authorization or the bringing of criminal charges. The detainee may not even be suspected of criminal conduct. Under certain forms of preventive detention, the detainee is held for purposes on the assumption that he or she poses a future threat to national security or public safety. In other cases, not considered here, an individual may be preventively detained in order to address other risks, such as capacity to inflict harm due to mental illness, flight from immigration proceedings, or a failure to appear in court.

Preventive detention, as a general matter, is a practice anathema to respect for human rights under the rule of law, creating conditions not only for arbitrary detention, but also related human rights violations. The ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights concluded the following in its 2008 Report, after extensive international deliberations and public hearings:

“States should repeal laws authorizing administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the rights to *habeas corpus* must be granted to all detainees and in all circumstances.”

To the extent that a state may resort to preventive detention, they may only do so to the extent strictly necessary to meet a threat to the life of a nation, and then only during a properly declared state of emergency pursuant to Article 4 of the ICCPR.

Security justifications are alleged in many of the preventive detention cases examined by the Human Rights Committee. The Committee typically has held these justifications to be inadequate and the practice to be in breach of the state party’s obligations under article 9 of the ICCPR. In applying article 9 standards, the Committee has determined that preventive detention is arbitrary when States are unable to demonstrate “that other, less intrusive, measures could not have achieved the same end,” or that “it is not necessary in all circumstances of the case and proportionate to the ends sought.”

Administrative detention, more broadly speaking, covers deprivation of liberty ordered by the executive on any number of grounds, including preventive reasons, where criminal charges are not brought against a detainee.<sup>45</sup> Generally, it is defined as

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<sup>41</sup> *Ibid.*, paras. 14 and 15.

<sup>42</sup> Along the same lines, see decision of 31 October 1998, Communications No. 137/94, 139/94 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro v. Nigeria*, paras. 83 and following.

<sup>43</sup> Decision of 11 May 2002, Communications No. 147/95 and 149/96, *Sir Dawda K. Jawara v. Gambia*, para.61.

<sup>44</sup> *Ibidem.*

<sup>45</sup> This categorization does not include pre-trial detention or cases where criminal charges are imminent.

“*detention without charge or trial*”. The UN Working Group on Arbitrary Detention has described ‘administrative detention’ as “*arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants*”.<sup>46</sup> Administrative detention is typically situated outside the ordinary process of arrest with a view to bringing suspects into the criminal justice system.<sup>47</sup> Administrative detention is sometimes seen as necessary for security reasons, even without any suspicion of criminal conduct of the detained person.<sup>48</sup>

**Administrative detention, with limited exceptions, is generally incompatible with the Rule of Law and international human rights obligations**

Administrative detention, as a general matter, is a practice anathema to respect for human rights under the Rule of Law. Administrative detention, particularly where it is prolonged, renders persons held to torture, ill-treatment and other violations of human rights.<sup>49</sup> The widespread use of administrative detention also poses a danger beyond the violation of rights in individual cases, as the practice can serve to erode or even displace the normal criminal justice system. So serious is this danger, that the widespread or systematic use of administrative detention may in some circumstances constitute a crime under international law. In this respect, the Rome Statute of the International Criminal Court, provides that “*imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law*”, when committed “*as part of a widespread or systematic attack directed against any civilian population*” is a crime against humanity.<sup>50</sup>

The jurisprudence from UN treaty bodies and regional courts is largely in concurrence that detention without charge is incompatible with international law and standards. For instance, the UN Human Rights Committee has generally found the practice of preventive detention to be in breach of the state party’s obligations under article 9 of the ICCPR and has disproved of purported security concerns as a ground to undermine the right to liberty.<sup>51</sup>

The Committee against Torture has considered certain forms of administrative detention constitute proscribed ill-treatment under article 16 of the Convention against Torture.<sup>52</sup> For this reason, the Committee has recommended in the elimination of all forms of administrative detention<sup>53</sup> and has applauded the abolition of administrative detention

<sup>46</sup> *Report of the Working Group on Arbitrary Detention*, (WGAD), UN Doc. A/HRC/13/30, 18 January 2010, para. 77.

<sup>47</sup> *Human Rights and Pre-Trial detention*, Center for Human Rights, Professional Training Series N°3, 1994, para. 177.

<sup>48</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 77. The UN Human Rights Committee expressed its concern towards the placement of criminal defendants under renewable one-year terms of civil preventive detention because of ‘dangerousness’, even after they have completed their original prison sentence. See *Concluding Observations of the Human Rights Committee: France*, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008.

<sup>49</sup> See *Concluding Observations of the Committee against Torture: Jordan*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 60 (13); *Concluding Observations of the Human Rights Committee: Egypt*, UN Doc. CCPR/C/79/Add.23, para. 10; and *on Ukraine*, UN Doc. CCPR/C/79/Add.52, A/50/40, paras. 305-333.

<sup>50</sup> Article 7 of the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998), 2187 UNTS 90.

<sup>51</sup> See for example: Human Rights Committee, *Shafiqe v. Australia*, Communication 1324/2004, UN Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2; Human Rights Committee, *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, 1982, para. 18.1. See also: *Report of the Human Rights Committee A/65/40* (Vol. I), 2010, p. 78, *Concluding Observations on Jordan*, UN Doc. CCPR/C/JOR/CO/4, 2010, para. 11; *on Colombia*, UN Doc. CCPR/C/COL/CO/6, 2010, para. 20; *on New Zealand*, UN Doc. CCPR/C/79/Add. 47, 1995, para. 14; *Comments on Jordan*, UN Doc. A/49/40, 1994, para. 241.

<sup>52</sup> Human Rights Committee, *Conclusions and recommendations: Israel*, UN Doc. A/57/44, paras. 47-53.

<sup>53</sup> *Concluding Observations: Jordan*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 60 (13); *Conclusions and recommendations of the Committee against torture: Republic of Moldova*, UN Doc. CAT/C/CR/30/7, 27 May 2003, para. 6(d); *on Egypt*, UN Doc. CAT/C/CR/29/4, 23 December 2002 para. 6 (f); *on China*, A/55/44, para.101.

in certain countries<sup>54</sup> The UN Special Rapporteur on Torture in 2002 concluded that “countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention.”<sup>55</sup>

In the context of the European Convention, Article 5 § 1 sub-paragraphs (a) to (f) of the ECHR contain an exhaustive list of permissible grounds for deprivation of liberty. No deprivation of liberty will be lawful unless it falls within one of those grounds.<sup>56</sup> Under the case-law of the ECtHR, it has long been established that “the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”<sup>57</sup>

The Inter American Commission, similarly has affirmed that:

“No [...] international legal norm justifies, merely by invoking this special power, the holding of detainees in prison for long and unspecified periods, without any charges being brought against them for violation of the Law of National Security or another criminal law, and without their being brought to trial so that they might exercise the right to a fair trial and to due process of law.”<sup>58</sup>

In a case in which a number of political opponents had been detained without charges, the ACHPR considered that detaining persons on the basis of their political belief, particularly in instances in which charges have not been brought against the detained individuals, rendered the detention arbitrary.<sup>59</sup> Also in a case of detention of persons for State security reasons, without a charge or trial during several months, the ACHPR has stated that: “detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d)”.<sup>60</sup>

### **Exception to the prohibition: Public emergency, pursuant to a lawful derogation**

A State may resort to administrative (preventive) detention in limited circumstances, namely when lawfully derogating from the right to liberty namely under a properly declared state of emergency. Any such derogation may not extinguish the right to liberty, but may only be made to the extent strictly necessary to meet a threat to the life of a nation.<sup>61</sup> As noted by the UN Human Rights Committee stressed that “*derogating from the provisions of the Covenant must be of an exceptional and temporary nature and be*

<sup>54</sup> *Conclusions and recommendations of the Committee against Torture: Finland*, UN Doc. A/51/44, para.127.

<sup>55</sup> *Report of the Special Rapporteur on the question of torture*, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (h).

<sup>56</sup> See *inter alia*, ECtHR, Judgment of 19 January 2012, case *Reiner v. Germany*, para. 77; ECtHR Judgment of 17 December 2009, case *M. v. Germany*, para. 86; ECtHR, Judgment of 6 November 1980, case *Guzzardi v. Italy*, para. 96.

<sup>57</sup> See, *inter alia*, ECtHR, Judgment of 7 July 2011, case *Al-Jedda v. the United Kingdom*, para. 100; Judgment of 19 February 2009, case *A. and others v. the United Kingdom*, para. 172; ECtHR, case of *Guzzardi v. Italy*, *op.cit.*, fn. ..., para. 102; ECtHR, Judgment of 1 July 1961, case *Lawless v. Ireland (no. 3)*, paras. 13 and 14.

<sup>58</sup> *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1, Chapter IV, of 31 January 1978, para. 10.

<sup>59</sup> Decision of November 1999, Communications No. 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria*, para. 51.

<sup>60</sup> Decision of 15 November 1999, Communications No. 143/95, and 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 28.

<sup>61</sup> See, Human Rights Committee, General Comment 29, the *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; ECtHR, Judgment of 28 October 1994, case *Murray v. United Kingdom*, para. 51; ECtHR, Judgment of 30 August 1990, case *Fox, Campbell and Hartley v. United Kingdom*, para. 32; ECtHR, Judgment of 18 January 1978, case *Ireland v. United Kingdom*, para. 214; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ..., paras. 13, 15 and 20; IACHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 138; *Concluding Observations of the Human Rights Committee: Jordan*, UN Doc. CCPR/C/79/Add.35, 27 July 1994, paras. 226-244; and *Morocco*, UN Doc. CCPR/C/79/Add.44, 2 November 1994, para. 21; and *Annual Report of the IACHR*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Section II, Part I.



*limited to the extent strictly required*".<sup>62</sup> In that respect the Committee considered that measures of administrative detention must be restricted to very limited and exceptional cases,<sup>63</sup> such as where a detainee would constitute a clear and serious threat to society that cannot be contained in any other manner.<sup>64</sup>

Under article 5 of the ECHR, all persons are entitled not to be deprived, or not to continue to be deprived, of their liberty.<sup>65</sup> The European Court has considered "extrajudicial" deprivation of liberty (detention without trial) to be only permissible in the framework of the derogations allowed in article 15 of the Convention, ie times of public emergency threatening the life of the nation.<sup>66</sup> The Court recently recalled "that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15."<sup>67</sup>

Similarly, the Inter American Commission recognised that deprivation of liberty may be justified in connection with the "administration of state authority" outside the criminal justice context where such measures are "strictly necessary" in times of emergency.<sup>68</sup> In such emergency times, "the rule of law does not preclude, under certain circumstances, the adoption of extraordinary measures".<sup>69</sup>

Derogations to the right to liberty and security are subject to a number of strict conditions and constraints.<sup>70</sup> The following principles are applicable:

- **Principles of legality and primacy of the law.** Legality, ie. legal certainty, as a general principle must be observed at all times in a context of deprivation of liberty.<sup>71</sup> The constitution or legislation should set out the circumstances, the permissible grounds for detaining a person administratively and the procedural rules regulating states of emergency, including the proceedings and safeguards available to individuals whose rights are thereby affected.<sup>72</sup> States must act within these constitutional and other provisions when governing the emergency powers. A state of emergency should moreover be officially proclaimed, with notice to the UN Secretary General, and ratified by the legislature.<sup>73</sup>

<sup>62</sup> *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 7.

<sup>63</sup> *Concluding Observations of the Human Rights Committee: Jordan*, UN Doc. CCPR/C/79/Add.35; A/49/40, paras. 226-244; and *Morocco*, UN Doc. CCPR/C/79/Add.44, para. 21.

<sup>64</sup> Case *David Alberto Campora Schweizer vs. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/17/D/66/1980, Views of 12 October 1982, para. 18.1.

<sup>65</sup> ECtHR, Judgment of 18 February 2010, case *Garkavyov v. Ukraine*, para. 63.

<sup>66</sup> ECtHR, case *Ireland v. United Kingdom*, *op.cit.*, fn. ..., para. 214 ; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ..., paras. 13, 15, 20 and following; ECtHR, case *Ireland v. United Kingdom*, *op.cit.*, fn. ..., para. 214.

<sup>67</sup> ECtHR, case *A. and others v. the United Kingdom*, *op. cit.*, fn. ..., para. 172.

<sup>68</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, rev. 1 corr., 22 October 2002, para. 124.

<sup>69</sup> *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1, 11 April 1980, Chapter I.

<sup>70</sup> The Human Rights Committee has emphasized that the totality of ICCPR Article 9 safeguards apply even when there is a "clear and serious threat to society which cannot be contained in any other manner" except through preventive detention. See case *Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, CCPR, Views of 12 October 1982, para. 18.1.

<sup>71</sup> See ECtHR, case *Garkavyov v. Ukraine*, *op. cit.*, fn. ..., para. 64.

<sup>72</sup> Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2: "When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers."; *State of Emergency – Their Impact on Human Rights*, International Commission of Jurists, Geneva, 1983.

<sup>73</sup> *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

- **Principle of legitimacy.** Derogation measures that serve the legitimate goal of responding to a public emergency, must be the least restrictive means of achieving that goal, and must not be used to curtail the legitimate exercise of fundamental rights or freedoms, such as freedoms of opinion, expression, assembly and association. They must be of “*an exceptional and temporary nature*”, and aimed at “*restoration of a state of normalcy*” as expeditiously as possible.<sup>74</sup>

- **Temporary character.** Administrative detention must be strictly limited to a brief period of time and may never be indefinite.<sup>75</sup> When a state of emergency is terminated, the authority to detain administratively should cease automatically and administrative detainees should be released.<sup>76</sup> The UN Human Rights Committee further considers that any measure of administrative detention, as well as its prolongation, must be based both on objective grounds and necessity and proportionality criteria, and must be a reasonable measure. In case these grounds and/or criteria do not exist or do not exist anymore during the prolongation of the administrative detention, the detention becomes arbitrary.<sup>77</sup>

The IACHR has stressed that “the declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom.”<sup>78</sup> Even in extraordinary situations,<sup>79</sup> the IACHR has determined that “[t]he detention of persons without trial, for prolonged or indefinite periods of time, constitutes a serious violation of the rights to freedom, liberty and justice and of the right to due process of law.”<sup>80</sup>

- **Principles of necessity and proportionality.** Any specific derogation measures taken pursuant to ICCPR article 4, based on a “*careful analysis*”,<sup>81</sup> must be necessary and proportionate to real and demonstrable threats to the life of the nation that give rise to the emergency situation, taking into account its “*duration, geographical coverage and material scope*”.<sup>82</sup> The UN Human Rights Committee has, for example, determined that preventive detention is arbitrary and a breach of article 9 of the ICCPR as a State could not show “*that other, less intrusive, measures could not have achieved the same end*,”<sup>83</sup> or that “*it is not necessary in all the circumstances of the case and proportionate to the ends sought*”.<sup>84</sup> The Committee has also been emphatic that the totality of ICCPR article 9 procedural safeguards applies when there is “*a clear and serious threat to society which cannot be*

<sup>74</sup> *Ibid.*, paras. 1 and 2.

<sup>75</sup> *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, 2003, para. 19; on Cameroon, CCPR/C/79/Add.33, 1994, para. 22; on Israel, CCPR/CO/78/ISR, 1996, para 12; on Switzerland, CCPR/C/79/Add.70, para. 26.

<sup>76</sup> *State of Emergency – Their Impact on Human Rights*, International Commission of Jurists, Geneva, 1983.

<sup>77</sup> *Case A (name deleted) v. Australia*, Communication No 560/1993, UN Doc. CCPR/C/59/D/560/1993, Views of 3 April 1997, para. 9.4.

<sup>78</sup> *Inter-American Commission on Human Rights – Annual Report of 1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Section II, Part I.

<sup>79</sup> See Press Release, *10 Years After Detentions in Guantanamo Began, the IACHR Repeats its Call to Close the Detention Center*, 11 January 2012, available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/003.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/003.asp).

<sup>80</sup> *Inter-American Commission on Human Rights - Annual Report of 1978*, OAS Doc. OEA/Ser.L/V/II.47, Doc. 13 rev. 1, 29 June 1979, Part II; and *Annual Report 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V. See also: *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1, 11 April 1980, Chapter IV; *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1, 31 January 1978, Chapter IV, para. 11.

<sup>81</sup> Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, UN. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 6.

<sup>82</sup> *Ibid.*, para 3.

<sup>83</sup> Human Rights Committee, case *Bakhtiyari v. Australia*, Communication 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, 29 October 2003, para. 9.3.

<sup>84</sup> Human Rights Committee, case *Shafique v. Australia*, Communication 1324/2004, UN. Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2.

contained in any other manner” except through preventive detention.<sup>85</sup> The European Court has held that the use of administrative detention must be shown to be “strictly required by the exigencies of the situation” and necessary, proportionate and non-discriminatory in the context of the particular emergency situation that prevails.<sup>86</sup>

- **Principle of non-discrimination.** Derogation measures must not discriminate on grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>87</sup>

- **Right to judicial review and reparation.** Cutting across the aforementioned principles is the unrestricted right of all persons without discrimination to a legal remedy for violations of the right to liberty and security at all times and in all circumstances, as well as to appeal to a judicial body.<sup>88</sup> The right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention is effectively a non-derogable right, even during a state of emergency. According to the UN Working Group on Arbitrary Detention, these guarantees are customary international law and as a result, they are also binding on States that are not parties to the ICCPR.<sup>89</sup>

Judicial supervision of the lawfulness of administrative detention, including the right to *habeas corpus* and protected by Article 9.4 ICCPR, Article 5.4 ECHR, Article 7.6 ACHR and Article 14.6 ArCHR, assumes a crucial role in a system based on the Rule of Law,

<sup>85</sup> Human Rights Committee, case *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, CCPR, Views of 12 October 1982, para. 18.1; See also: *Concluding Remarks on New Zealand*, UN Doc. CCPR/C/79/Add. 47, 1995, para. 14; *Comments on Jordan*, UN Doc. A/49/40, 1994, para. 241.

<sup>86</sup> ECtHR, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ...., para. 172.

ECtHR, case *Ireland v. United Kingdom*, *op. cit.*; fn. ...., paras. 194-196 and 212-213; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ...., paras. 13 and 14.

<sup>87</sup> ICCPR, article 26. See also ECtHR, Judgment of 19 February 2009, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ...., para. 164, 172, 190.

<sup>88</sup> See *inter alia*: *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1, 1964, paras. 783 to 787; *Concluding Observations of the Human Rights Committee: Lithuania*, UN Doc. CCPR/CO/80/LTU, 1 April 2004, para. 13; *on the Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, 25 July 2002, para. 11; *on Cameroon* UN Doc. CCPR/C/79/Add.116, 3 November 1999, para. 19; *on Cameroon*, UN Doc. CCPR/C/79/Add.33, 7 April 1994, para. 22; Human Rights Committee, case *Mansour Ahani v. Canada*, Communication N° 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, Views of the 29 March 2004, 15 June 2004, para. 10.2; case *Henry Kalenga v. Zambia*, Communication N° 326/1988, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, 2 August 1993, para. 6.3; Case *William Torres Ramirez v. Uruguay*, Communication N° 4/1977, UN Doc. CCPR/C/10/D/4/1977, Views of 23 July 1980, 8 April 1980, para. 18; Case *Alba Pietrarroia v. Uruguay*, Communication N° 44/1979, UN Doc. CCPR/C/12/D/44/1979, Views of 27 March 1981, 9 April 1981, para. 17; *Conclusions and recommendations of the Committee against Torture: Israel*, UN Doc. A/57/44, paras. 47-53; *Report of the Special Rapporteur on Torture*, UN Doc A/57/173, 2 July 2002, paras. 39, 16; UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); *Report of the Independent Expert on the question of protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/ CN.4/2005/103, 7 February 2005, para. 37; *Report on the practice of administrative detention*, UN Doc. E/CN.4/Sub.2/1990/29, 24 July 1990, paras. 64 and ff; *Study of the implication for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982, para. 203; European Court of Human Rights: case *Lawless v. Ireland*, *op. cit.*, fn. ....; case *Ireland v. United Kingdom*, *op. cit.*, fn. ....; Judgment of 26 May 1993, case *Brannigan and McBride v. United Kingdom*, Application N° 14553/89, 14554/89; Inter-American Commission on Human Rights: *Report on the Situation of Human Rights in Paraguay*, OAS Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, 31 January 1978, Chapter VIII, Recommendations 1 to 4.5; *Report on the Status of Human Rights in Chile*, OAS Doc. OEA/Ser.L/V/II.34, doc. 21 corr.1, 25 October 1974, Chapter XVII Recommendations, Recommendation N° 3; *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7; the African Commission on Human and Peoples' Rights: *Constitutional Rights Project and Civil liberties Organisation v. Nigeria*, Communications 143/95, 150/96, 15 November 1999. The ACommHPR has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR), see ACommHPR, 43<sup>rd</sup> Ordinary Session, 7-22 May 2008, *IHRDA and others v. Republic of Angola*, Communication No. 292/2004, paras. 58-60; ACommHPR, 20<sup>th</sup> Ordinary Session, October 1996, *RADDH v. Zambia*, Communication No. 71/92, para. 30.

<sup>89</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 67. See also *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 74.

and its absence violates the fundamental principle of the separation of powers.<sup>90</sup> Judicial review of detention constitutes a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention,<sup>91</sup> and is essential for the protection of various rights.<sup>92</sup>

Periodic review of the lawfulness of administrative detention without delay, even in cases of prolonged or extended detention, must be guaranteed to explore the reasonableness and the justification on substantial grounds of the measure.<sup>93</sup> In this respect, the Human Rights Committee has affirmed that detainees “shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (Article 9 (4) of the ICCPR).”<sup>94</sup>

The European Court has affirmed that the deprivation of the detainee’s right to *habeas corpus* or any other judicial review, on national security grounds, to challenge the lawfulness of the detention is not compatible with article 5 paragraph 4 of the ECHR (speedy decision on the lawfulness of the detention by a court and the release of the detainee in case the detention is not lawful).<sup>95</sup>

The InterAmerican Commission specified that where an administrative detention is not subject to review by the judiciary, “the negation of the functions of the latter power, which constitutes an attempted violation of the separation of public powers which is one of the bases of any democratic society.”<sup>96</sup>

The African Commission on Human and Peoples Rights, for its part, has indicated that the “prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.”<sup>97</sup>

<sup>90</sup> Report of the Special Rapporteur on Torture, UN Doc. A/57/173, 2 July 2002, para. 15; IACHR– 1980-1981, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V.

<sup>91</sup> See, *inter alia*, IACtHR, case of *Yvon Neptune v. Haiti*, para. 115; IACtHR, Judgment of 1 March 2005, case of *Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 79; IACtHR, Judgment of 29 November 2006, case *La Cantuta v. Peru*, IACtHR, Series C No. 162, para. 111.

<sup>92</sup> Preliminary note of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Equatorial Guinea, UN Doc. A/HRC/10/44/Add. 1, 23 January 2009, para. 17; IACtHR, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations (arts. 27 (2), 25 (1) and 7 (6) American Convention on Human Rights)*.

<sup>93</sup> See *inter alia*: Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; Human Rights Committee, case *Mansour Ahani v. Canada*, *op. cit.*, fn. 43; case *A (name deleted) v. Australia*, *op. cit.*, fn. ..., para. 9.4; *Concluding Observations of the Human Rights Committee: Israel*, *op. cit.*, fn. ..., para. 21; Report WGAD, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 77; Report of the Special Rapporteur on Torture, UN Doc A/57/173, 2 July 2002, paras. 16, 39 and UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); ECtHR: Case *Lawless v. Ireland*, *op. cit.*, fn. .... ; case *Ireland v. United Kingdom*, *op. cit.*, fn. .... ; case *Brannigan and McBride v. United Kingdom*, *op. cit.*, fn. .... ; IACHR: Report on Terrorism and Human Rights, *op. cit.*, fn. ..., 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7; The African Commission on Human and Peoples’ Rights has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR), see ACommHPR, Communication No. 292/2004, 43<sup>rd</sup> Ordinary Session, 7-22 May 2008, *IHRDA and others v. Republic of Angola*, paras. 58-60; ACommHPR, Communication No. 71/92, 20<sup>th</sup> Ordinary Session, October 1996, *RADDH v. Zambia*, para. 30.

<sup>94</sup> *Concluding Observations of the Human Rights Committee: Cameroon*, UN Doc. CCPR/C/79/Add.33, para. 22; *on Lithuania*, UN Doc. CCPR/CO/80/LTU, para. 13; *on Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, para. 11; *on Cameroon*, UN Doc. CCPR/C/79/Add.116, para. 19; Human Rights Committee, case *Mansour Ahani vs. Canada*, *op. cit.*, fn. ..., para 10.2, case *Henry Kalenga vs. Zambia*, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, para. 6.3; case *Alba Pietraroaia vs. Uruguay*, Communication No. 44/197, UN. Doc. CCPR/C/12/D/44/1979, Views of 23 July 1980, para. 17; Case *William Torres Ramirez vs. Uruguay*, UN Doc. CCPR/C/10/D/4/1977, Communication No. 4/1977, Views of 27 March 1981, para. 18.

<sup>95</sup> ECtHR, Judgment of 15 November 1996, case *Chahal v. United Kingdom*, paras. 132 et 133.

<sup>96</sup> *Inter-American Commission on Human Rights – Annual Report 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V.

<sup>97</sup> Decision on May 2003, *Purohit and Morre v. Gambia*, Communication No. 241/01, para. 65.

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, whether lawful or unlawful, and requires effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that the persons or their representative have the opportunity to be heard before the court.<sup>98</sup> There must be prompt access to court when a person is first detained, and thereafter there must be periodic judicial review of the lawfulness of the detention.<sup>99</sup> Particular public interest concerns, such as national security, are not grounds to restrict the right to judicial review of detention, in the absence of derogation.<sup>100</sup>

The right to review of the lawfulness of the detention is designed to protect against arbitrariness: it is therefore a right to review not only of the detention's compliance with national law, but also of its compliance with principles of human rights law, including freedom from arbitrary detention.<sup>101</sup> Judicial review of detention must provide a practical, effective and accessible means of challenging detention. The principle of accessibility implies that the State must ensure that the detainee has a realistic possibility of using the remedy, in practice as well as in law.<sup>102</sup>

This judicial review must be frequent and deal with "*substantive justification of detention*" and with the "*reasonableness*" of the measure of detention. The judicial decision must be made "*without delay*".<sup>103</sup> The Human Rights Committee has observed that the prolongation of the procedure of judicial review over several months is incompatible with article 9 (4) of the ICCPR.<sup>104</sup> The judicial review also must be effective – substantive and not only formal, ie, the tribunals must be authorized to order the person's release. According to the Committee:

"court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant."<sup>105</sup>

- **Other guarantees.** Aside from the right of access to a legal remedy and the possibility of reparation for unlawful detention, the detainee should in principle enjoy the same rights as other detainees and, in particular, benefit from the *Body of Principles and the Standard Minimum Rules for the Treatment of Prisoners*.<sup>106</sup> Whatever the nature of emergency, detainees should be the subject of several minimum rights and principles that should be recognised in states subscribing the Rule of Law. Such rights and principles include among others: communication with and representation by a legal

<sup>98</sup> See, *inter alia*, ECtHR, Judgment of 20 June 2002, case *Al-Nashif v. Bulgaria*, para. 92; ECtHR, Judgment of 24 October 1979, case *Winterwerp v. the Netherlands*. See also IACtHR, Judgment of 23 November 2010, case *Vélez Looz v. Panama*, para. 124.

<sup>99</sup> IACtHR, case *Vélez Looz v. Panama*, *op. cit.*, fn. ... , para. 107-109.

<sup>100</sup> ECtHR, case *Al-Nashif v. Bulgaria*, *op. cit.*, fn. ... , para. 94.

<sup>101</sup> ECtHR, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ... , para. 202.

<sup>102</sup> ECtHR, Judgment of 11 October 2007, case *Nasrulloev v. Russia*, para. 86. See also IACtHR, case of *Vélez Looz v. Panama*, *op. cit.*, fn. ... , para. 129.

<sup>103</sup> Human Rights Committee, case *Mansour Ahani vs. Canada*, *op. cit.*, fn. ... , para 10.3.

<sup>104</sup> *Ibidem*.

<sup>105</sup> Human Rights Committee, case *A v. Australia*, *op. cit.*, fn ... , para 9.5.

<sup>106</sup> Rule 95 of the *UN Standard Minimum Rules for the Treatment of Prisoners*. See also *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, of 17 December 2002, para. 26(h).

advisor,<sup>107</sup> humane treatment with respect for the inherent dignity of the human person,<sup>108</sup> notification of the reasons and grounds of the detention,<sup>109</sup> being informed of the remedies to which the detainee is entitled,<sup>110</sup> the allowance of visits from family members<sup>111</sup> and medical personnel,<sup>112</sup> and the obligation to publicly register the name of the detainee.<sup>113</sup>

### **Detention in the context of counter-terrorism measures**

The UN Working Group on Arbitrary Detention has been concerned at the increased use of administrative detention in relation to the fight against terrorism and in 2009 concluded that administrative detention is inadmissible in relation to persons suspected of terrorism-related conduct.<sup>114</sup> The Working Group has emphasized that counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination. In undertaking counterterrorism measures, States should apply and, where necessary, adapt existing criminal laws, rather than create new broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty. It should be underscored the right to *habeas corpus* necessarily applies to individuals detained on suspicion of terrorism-related offences.<sup>115</sup>

The UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism pointed out that detention for prolonged periods without contact with lawyers or other persons and without access to courts or other appropriate tribunals to supervise the legality and conditions of their detentions are

<sup>107</sup> See *Concluding observations of the Human Rights Committee : Israel*, UN Doc. CCPR/CO/78/ISR, Communication No 326/1988, para 13; *on Switzerland*, UN Doc. CCPR/C/79/Add.70, para. 26; *on Australia*, CCPR, *Report of the Human Rights Committee to the General Assembly*, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526; Human Rights Committee, case *Henry Kalenga v. Zambia*, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, para. 6.3; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. ..., Guideline XI.5 and 6. The IACtHR has held that the provision of legal assistance is an obligation inherent to Article 7.6 (right to *habeas corpus*) and Article 8 (due process), and that in cases involving detention free legal assistance is an “imperative interest of justice” (IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 132-133, 146).

<sup>108</sup> ICCPR, article 10.

<sup>109</sup> This right is protected by Article 5.2 ECHR, Article 9.2 ICCPR, Article 7 and 8 ACHR, and Article 14.3 ArCHR. Although Article 5.2 ECHR refers expressly only to the provision of reasons for “arrest”, the ECtHR has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty (see ECtHR, Judgment of 22 september 2009, case *Abdolkhani and Karimnia v. Turkey*, paras. 136-137; ECtHR, Judgment of 12 april 2005, case *Shamayev and Others v. Georgia and Russia*, paras. 413-414). The Inter-American Court has held that information on the reasons for detention must be provided “when the detention takes place, [which] constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained.” (IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., para. 160 and 180). See also IACtHR, case *Yvon Neptune v. Haiti*, *op. cit.*, fn. ..., para. 105; IACtHR, Judgment of 7 June 2003, case *Humberto Sanchez v. Honduras*, para. 82.

<sup>110</sup> *Concluding Observations of the Human Rights Committee: Jordan*, UN. Doc. CCPR/C/79/Add.35; A/49/40, paras.226-244; *on Morocco*, UN Doc. CCPR/C/79/Add.44, para. 21; *on Vietnam*, UN Doc. CCPR/CO/75/VNM, para. 8; *on Cameroon*, UN Doc. CCPR/C/79/Add.116, para. 19

<sup>111</sup> See article 18.1 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

<sup>112</sup> ECtHR, case *Algür v. Turkey*, *op. cit.*, fn. ..., para. 44; IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 220, 225, 227.

<sup>113</sup> The ECtHR, for instance, considered in the context of administrative detention that “ (...) *the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention*” (Judgment of 9 March 2006, case *Menesheva v. Russia*, para. 87). See also Judgement of 25 October 2005, case *Fedotov v. Russia*, para. 78 and the Report of the WGAD, UN. Doc. A/HRC/7/4, 10 January 2008, para. 69: “ (...) *It is obvious that a proper registration book is essential for preventing disappearances, abuse of power for corruption purposes and excessive detention beyond the authorized period of time, which amounts to arbitrary detention without any legal basis*”.

<sup>114</sup> Report of the WGAD, UN Doc. A/HRC/10/21, 16 February 2009, para. 54.

<sup>115</sup> Report of the WGAD, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 75.

prohibited under international human rights law, even during states of emergency.<sup>116</sup> Any deprivation of liberty should be based upon grounds and procedures established by law and should be of a reasonable length, detainees should equally be informed of the reasons of the detention, be promptly notified of the charges against them, and they should have access to legal remedies and provided with access to legal counsel.<sup>117</sup> The Independent Expert concluded: “At all times, therefore, States must refrain from detaining suspected terrorists for indefinite or prolonged periods and must provide them with access to legal counsel, as well as prompt and effective access to courts or other appropriate tribunals for the protection of their non-derogable rights.”<sup>118</sup>

The UN Special Rapporteur on Torture has stressed that extensive periods of detention in custody without charge or trial are said to have been contemplated or enacted in order to provide sufficient time to collect evidence leading to charges under anti-terrorist legislation. Indefinite administration detention furthermore has been used as an alternative to prosecution. As such “states have created informal criminal justice systems in which detainees are denied rights that they would normally have in the ordinary judicial systems.”<sup>119</sup> The Special Rapporteur has pointed in this context that “judicial control of interference by the executive power with the individual’s right to liberty is an essential feature of the rule of law.”<sup>120</sup>

### **Detention of migrants for purposes of immigration control**

According to the Working on Arbitrary Detention, mandatory detention of illegal immigrants and asylum-seekers, who are not held as criminal suspects or convicts, is a growing concern.<sup>121</sup> International standards establish that, in immigration control, detention must be the exception, rather than the rule, and should undertaken as a measure be a measure of last resort.<sup>122</sup> States can resort to it only in exceptional circumstances.<sup>123</sup> The Working Group on Arbitrary Detention, while “fully aware of the sovereign right of States to regulate migration” has stated that “immigration detention should gradually be abolished”.<sup>124</sup>

The deprivation of liberty of migrants can only be justified if adequately prescribed by law. This safeguard reflects the human rights principle of legal certainty, being a particularly vital principle in cases where individual liberty is at stake.<sup>125</sup> Not only must

<sup>116</sup> *Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 37.

<sup>117</sup> *Ibidem*.

<sup>118</sup> *Ibidem*.

<sup>119</sup> *Report of the Special Rapporteur*, UN Doc. A/57/173, of 2 July 2002, para. 7.

<sup>120</sup> *Ibid*, para. 15.

<sup>121</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/7/4, 10 January 2008, para. 45; *Concluding observations of the Committee against Torture: Finland*, UN Doc. A/66/44, 2010-2011, Annual Report of the Committee against Torture 2010-2011, para. 54 (15) and (17).

<sup>122</sup> *Concluding observations of the Committee Against Torture: Finland*, A/66/44, Committee against Torture – Annual Report 2010-2011, para. 54 (17); *on Liechtenstein*, Committee against Torture-Annual Report 2009-2010, UN Doc. A/65/44, para. 61 (16); *Report of the WGAD*, UN. Doc. A/HRC/13/30, 18 January 2010, para. 59; *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 51; WGAD, *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062<sup>nd</sup> meeting of the Ministers’ Deputies, principle XI.1. See also, *Conclusion No. 7 (XXVIII)*, UNHCR, *Expulsion*, ExCom, UNHCR 28<sup>th</sup> Session, 1977, para. e: “an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged”. See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37<sup>th</sup> Session, 1986, para. B; *Concluding Observations on Bahamas*, CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17; IACtHR, case *Yvon Neptune v. Haiti*, *op. cit.*, fn. ...para. 90; IACtHR, Judgement of 21 November 2007, case *Álvarez and Iñiguez v. Ecuador*, Series C No. 170, para. 53; IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 116, 166-171.

<sup>123</sup> *Concluding Observations of the Committee against Torture: Switzerland*, Annual Report of the Committee against Torture 2009-2010, A/65/44, para. 62 (13).

<sup>124</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 58.

<sup>125</sup> ECtHR, Judgment of 29 March 2010, case *Medvedyev v. France*, para. 80.

detention be in accordance with the law, the law should also be sufficiently prescriptive to protect the individual from arbitrariness.<sup>126</sup>

The detention of migrants must not be arbitrary, unnecessary or disproportionate in the circumstances of the individual case.<sup>127</sup> In this regard, the WGAD has determined that “while administrative detention of asylum-seekers and illegal immigrants is not prohibited a priori by international law, it can amount to arbitrary detention if it is not necessary in all circumstances of the case”.<sup>128</sup>

In the case of *C v. Australia*, the UN Human Rights Committee found a violation of Article 9.1 on the basis that the State did not consider less intrusive means other than detention.<sup>129</sup> States thus have the obligation to consider alternatives to administrative custody from which foreigners can benefit.<sup>130</sup> If detention is nonetheless applied, a maximum period of detention must be established by law and upon expiry of this period, the detainee should be automatically released.<sup>131</sup> In any event, the detention period must be as short as possible.<sup>132</sup>

Particular attention should be given to the detention of migrants that are vulnerable by their age, state of health or past traumatic experiences.<sup>133</sup> Concerning unaccompanied children, the Committee against Torture stressed that States should ensure that administrative detention is not at all practiced.<sup>134</sup>

In case the detention of migrants can be justified, international human rights law poses further requirements and constraints on the place and regime of detention, the conditions of detention, and the access to social and medical services. The most relevant standard for the treatment of detainees is the prohibition of cruel, inhuman and degrading treatment.<sup>135</sup>

<sup>126</sup> See, *inter alia*, ECtHR, Judgement of 5 February 2002, case *Conka v. Belgium*, para. 39; IACtHR, Judgment of 21 September 2006, case *Servellón-García et al. v. Honduras*, paras. 88-89. See also, UN WGAD, *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 “Situations regarding immigrants and asylum-seekers”, Principle 6; WGAD, *Annual Report 2008*, UN Doc. A/HCR/10/21, 16 February 2009, paras. 67 and 82.

<sup>127</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/13/30, 18 January 2010, para. 59 and 64; *Concluding Observations of the Committee against Torture: Switzerland*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 62 (13); Human Rights Committee: case *A v. Australia*, *op. cit.*, fn. ..., para. 9.3: “The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author’s particular circumstances, there were no less invasive means of achieving the same ends.”; case *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; case *Samba Jalloh v. the Netherlands*, Communication No. 794/1998, Views of 15 April 2002: “‘arbitrariness’ must be interpreted more broadly than ‘against the law’ to include elements of unreasonableness”.

<sup>128</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 46.

<sup>129</sup> Human Rights Committee, *C. v. Australia*, *op. cit.*, fn. ....

<sup>130</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, pag. 2; *Annual Report of the Committee Against Torture*, UN Doc. A/66/44, 2010-2011, Concluding observations on Finland, para. 54 (17), stressing that states should increase the use of non-custodial measures towards illegal foreigners.

<sup>131</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 61.

<sup>132</sup> See, *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 61 (16); UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to Detention of Asylum-Seekers*, 26 February 1999, para. 3. See also WGAD, *Annual Report 1998*, *op. cit.*, fn. ..., para. 69, Guarantee 10; WGAD, *Annual Report 1999*, *op. cit.*, fn. ..., Principle 7; WGAD, *Annual Report 2008*, *op. cit.*, fn. ..., paras. 67 and 82.

<sup>133</sup> Regarding persons for whom detention is likely to have a particularly serious effect on psychological well-being, see UNHCR *Revised Guidelines*, *op. cit.*, fn. 66, guideline 7. See also Human Rights Committee, case *C. v. Australia*, *op. cit.*, fn. ....; see also, regarding the detention of minors, *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 60; *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, A/65/44, para. 61 (17).

<sup>134</sup> *Concluding Observations of the Committee Against Torture: Finland*, Annual Report of the Commission against Torture 2010-2011, UN. Doc. A/66/44, para. 54 (17).

<sup>135</sup> Article 16 CAT, Article 7 and 10.1 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR, Article 8 ArCHR. All illegal immigrants should be detained with dignity and in a humane fashion in accordance with article 1 of the UDHR and the Body Principles for the Protection of All Persons under Any Form of Detention



More particular international guidance provides that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.<sup>136</sup> Facilities where migrants are detained must moreover provide conditions that are sufficiently clean, safe, and healthy.<sup>137</sup> Poor or overcrowded conditions of detention for migrants have regularly been found by international courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment.<sup>138</sup>

Concerning procedural guarantees, comparable minimum rights and principles apply to persons detained for purposes of immigration control as for persons detained for other reasons. The procedural protections for migrants include the right to be informed promptly and comprehensively about the reasons for detention,<sup>139</sup> the right of free access to a lawyer<sup>140</sup> and to medical care,<sup>141</sup> the right to judicial review of detention and reparation for unlawful detention,<sup>142</sup> and the right to inform family members or others of the detention.<sup>143</sup> Detained migrants also should be guaranteed the right to access to the UNHCR<sup>144</sup> and the right to consular access.<sup>145</sup>

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or Imprisonment (adopted by the General Assembly in resolution 43/173), see *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 50.

<sup>136</sup> European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), *The CPT Standards*, CoE Doc. CPT/Inf/E (2002) 1 – Rev. 2010, Strasbourg, December 2010, page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; CMCE, *European Guidelines on accelerated asylum procedures*, op. cit., fn. ..., Principle XI.7: “detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.” See also, IACtHR, *Vélez Loo v. Panama*, op. cit., fn. ..., para. 209.

<sup>137</sup> See for example ECtHR, Judgment of 11 June 2007, case *S.D. v. Greece*, paras. 52-53; IACtHR, Judgment of 5 July 2006, case *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Series C No. 150, para. 97; IACtHR, case *Vélez Loo v. Panama*, op. cit., fn. ..., paras. 215-216.

<sup>138</sup> See for example ECtHR, Judgment of 21 June 2007, case *Kanttyrev v. Russia*, paras. 50-51; ECtHR, Judgment of 16 June 2005, case *Labzov v. Russia*, para. 44; ECtHR, Judgment of 22 October 2009, case *Orchowski v. Poland*, para 122.

<sup>139</sup> See, for example, ECtHR, 22 september 2009, case *Abdolkhani and Karimnia v. Turkey*, paras. 136-137; ECtHR, Judgment of 29 January 2008, case *Saadi v. United Kingdom*, para. 70-74; ECtHR, Judgment of 12 April 2005, case *Shamayev and Others v. Georgia and Russia*, paras. 413-414; IACtHR, case *Yvon Neptune v. Haiti*, op. cit., fn. ..., paras. 106-107; IACtHR, case *Vélez Loo v. Panama*, op. cit. fn. ..., para. 116.

<sup>140</sup> *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 61 (16); *Concluding Observations on Australia*, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right”. See also ECtHR, Judgment of 12 March 2003, case *Öcalan v. Turkey*, para. 72.

<sup>141</sup> See, for example, ECtHR, Judgment of 22 October 2002, case *Algür v. Turkey*, para. 44; IACtHR, case *Vélez Loo v. Panama*, op. cit., fn. ..., paras. 220, 225 and 227.

<sup>142</sup> See general comments about the right to judicial review above. About the detention of migrants in particular, see *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 61.

<sup>143</sup> Protected by, among others, the following international standards: Article 17.2(d) CPED; Article 10.2, UN Declaration on the Protection of All Persons from Enforced Disappearance; Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty*; CPT, *2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36.

<sup>144</sup> *Body of Principles for the Protection of all Persons Deprived of their Liberty*, Principle 16.2; *European Guidelines on accelerated asylum procedures*, CMCE, op. cit., fn. ..., Principle XIV.

<sup>145</sup> See article 36 of the Vienna Convention on Consular Relations of 1963.



## Chapter 4: Migrants in Detention

Under international human rights law, detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out pursuant to a legal basis.<sup>579</sup> International standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort,<sup>580</sup> to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case. European Convention standards are in some respects less exacting, however, and have been held to permit short-term detention for purposes of immigration control without individualised consideration of alternative measures.<sup>581</sup>

This Chapter explains how international human rights standards apply to detention for the purposes of immigration control, increasingly used by government as a means of both processing entrants to the country and of facilitating deportations. It assesses when individuals will be considered by international law to be deprived of their liberty; justification for detention in accordance with principles of necessity, proportionality, and protection against arbitrary conduct; procedural safeguards, in particular judicial review of detention and reparation for unjustified detention. It also considers standards on the treatment of detainees and conditions of detention, and the implications of overcrowded or unsuitable conditions for detainees, increasingly a feature of over-burdened immigration detention systems in many countries.

### I. The nature of “detention”<sup>582</sup>

Whether individuals are in fact deprived of their liberty in a way that engages protection of Article 9 ICCPR, Article 5 ECHR, Article 6 ACHPR, Article 7 ACHR or Article 14 ArCHR, or are merely subject to restrictions on their freedom of movement, will not always be clear. In international human rights law, a deprivation of liberty is not defined with reference to the classification imposed by national law, but rather takes

579. Article 9 ICCPR, Article 5 ECHR, Article 6 ACHPR, Article 7 ACHR, Articles I and XXV ADRDM, Article 14 ArCHR.

580. UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, principle XI.1. See also, *Conclusion No. 7*, UNHCR, *op. cit.*, fn. 179, para. e: “an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged”. See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986, para. B; *Concluding Observations on Bahamas*, CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17; *Yvon Neptune v. Haiti*, IACtHR, Series C No. 180, Judgment of 6 May 2008, para. 90; *Álvarez and Iñiguez v. Ecuador*, IACtHR, Series C No. 170, Judgment of 21 November 2007, para. 53; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 116, 166-171.

581. *Saadi v. United Kingdom*, ECtHR, GC, Application No. 13229/03, Judgment of 29 January 2008, paras. 70-74.

582. The term “detention” will be used throughout the Guide as a shorthand for “deprivation of liberty”.

into account the reality of the restrictions imposed on the individual concerned.<sup>583</sup> Since classification in national law is not determinative, persons accommodated at a facility classified as a “reception”, “holding” or “accommodation” centre and ostensibly not imposing detention, may, depending on the nature of the restrictions on their freedom of movement, and their cumulative impact, be considered under international human rights law to be deprived of their liberty.<sup>584</sup> Holding centres in international zones at airports or other points of entry have also been found to impose restrictions amounting to deprivation of liberty.<sup>585</sup> In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors will include the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure.<sup>586</sup> There is no clear line between restrictions on freedom of movement and deprivation of liberty: the difference is one of degree or intensity, not one of nature or substance.<sup>587</sup>

A series of restrictions, which in themselves would not cross the threshold of deprivation of liberty, may cumulatively amount to such deprivation. The European Court of Human Rights found this to be the case, for example, in *Guzzardi v. Italy*,<sup>588</sup> where the applicant was confined on a small island and subject to a curfew, reporting requirements, restrictions on movement and communications.<sup>589</sup>

Restrictions on liberty, imposed for a short time at points of entry to the country, to address practical necessities such as checking identity or processing of asylum applications, and which, if applied for a short period only, would not usually amount to detention, will do so where they are excessively prolonged.<sup>590</sup> For example, it

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583. *Amuur v. France*, ECtHR, *op. cit.*, fn. 45, para. 42; *Nolan and K. v. Russia*, ECtHR, *op. cit.*, fn. 444, paras.93-96; *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08, Judgment of 22 September 2009, paras. 125-127; *Ashingdane v. United Kingdom*, ECtHR, Application No. 8225/78, Judgment of 28 March 1985, para. 42.

584. *Abdolkhai and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, para. 127, finding that detention at an accommodation centre, although not classified as detention in national law, did in fact amount to a deprivation of liberty.

585. *Amuur v. France*, ECtHR, *op. cit.*, fn. 45; *The CPT Standards*, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 (“CPT Standards”), pages 53-54.

586. *Engel and Others v. Netherlands*, ECtHR, Plenary, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1986, para. 59; *Guzzardi v. Italy*, ECtHR, Plenary, Application No.7367/76, Judgment of 6 November 1980, para. 92.

587. *Guzzardi v. Italy*, ECtHR, *op. cit.*, fn. 586, para. 93.

588. *Ibid.*, para. 93.

589. See, by contrast, *Engel and Others v. Netherlands*, ECtHR, *op. cit.*, fn. 586, para. 61, where there was found to be no deprivation of liberty involved in military disciplinary measures of “light arrest” and “aggravated arrest” involving restrictions on movement whilst off duty, but where the applicants were not locked up and continued to perform their normal work duties, remaining “more or less, within the ordinary framework of their army life.” The *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, UNHCR, 26 February 1999 (“UNHCR Revised Guidelines on Detention”), also acknowledge that the cumulative impact of restrictions on freedom of movement may amount to detention.

590. *Amuur v. France*, ECtHR, *op. cit.*, fn. 45, para. 43.

was held by the European Court of Human Rights, in *Amuur v. France*, that enforced confinement to an international zone of an airport, involving restrictions on movement and close police surveillance, for 20 days, did amount to deprivation of liberty. It was also relevant to this finding that the applicants were not provided with legal or social assistance by public authorities, and that they had no access to judicial review of the restrictions imposed on them.<sup>591</sup>

The mere fact that a detained migrant is free to leave a place of detention by agreeing to depart from the country does not mean that the detention is not a deprivation of liberty. This was affirmed by the European Court of Human Rights in *Amuur v. France*,<sup>592</sup> the Court noting that the possibility to leave the country would in many cases be theoretical if no other country could be relied on to receive the individual or to provide protection if the individual is under threat. The *UNHCR Revised Guidelines on the detention of asylum seekers* take the same approach.<sup>593</sup>

Less severe restrictions, that do not amount to deprivation of liberty, should be considered in relation to rights to freedom of movement, protected under Article 12 ICCPR, Article 2 of Protocol 4 ECHR, Article 22 ACHR, Article 12 ACHPR and Article 26 ArCHR. In *Celepli v. Sweden*,<sup>594</sup> for example, the Human Rights Committee held that the confinement to a single municipality of a non-national subject to a deportation order, with a requirement to report three times weekly, did not amount to deprivation of liberty, but did raise issues under Article 12 ICCPR. Restrictions on residence may also raise issues in regard to the right to respect for family life, where they serve to separate members of a family.<sup>595</sup>

## II. Justification of detention

### 1. Different approaches to justification of immigration detention

The right to liberty and security of the person under international human rights law requires that deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.<sup>596</sup> Deprivation of liberty may be “arbitrary” either because it is not based on a legitimate basis for detention or because it does not follow

591. *Ibid.*, para. 43.

592. *Ibid.*, para. 48.

593. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 1.

594. *Celepli v. Sweden*, CCPR, Communication No. 456/1991, Views of 26 July 1994.

595. *Agraw v. Switzerland*, ECtHR, Application No. 3295/06, Judgment of 29 July 2010.

596. Adequate prescription by law and freedom from arbitrary deprivation of liberty are requirements of the right to security of the person as well as the right to liberty. See, *Zamir v. France*, ECommHR, Plenary, Application No.9174/80, Admissibility Decision, 13 July 1982, holding that “it is implicit in the said right [to security of the person] that an individual ought to be able to foresee with a reasonable degree of certainty the circumstances in which he is liable to be arrested and detained. It is further implicit in the right to security of person that there shall be adequate judicial control of arrest and detention.”

procedural requirements. In this Section, it is the first dimension of “arbitrariness” of deprivation of liberty which is addressed.

Neither the ICCPR nor the ACHR, the ACHPR or the ArCHR make further express provision for the circumstances in which deprivation of liberty is permitted. They generally prohibit detention that is “arbitrary”. The ECHR, by contrast, provides for the lawfulness of detention on a series of specified grounds. In relation to immigration detention, it permits detention in two specific situations: to prevent unauthorised entry to the country, and pending deportation or extradition (Article 5.1(f)). The scheme of Article 5 ECHR differs from that of the ICCPR, ACHR, ArCHR and ACHPR in that detention that cannot be justified on one of the specified grounds will always be considered arbitrary. Conversely, however, if detention can be shown to be necessary for a listed purpose, such as prevention of unauthorised entry, it will not be considered to be arbitrary, without the need for further justification related to the circumstances of the individual case. The protection offered by the ECHR is therefore potentially narrower than that of instruments such as the ICCPR, as will be considered further below.

Detention of asylum seekers and refugees is also regulated by Article 31 of the *Geneva Refugee Convention* and associated standards and guidance (considered further below), which establish a presumption against detention, and the principle that detention must be justified as necessary in a particular case.

## **2. Detention must have a clear legal basis in national law and procedures**

An essential safeguard against arbitrary detention is that all detentions must be adequately prescribed by law. This reflects the general human rights law principle of legal certainty, by which individuals should be able to foresee, to the greatest extent possible, the consequences which the law may have for them. The need for legal certainty is regarded as particularly vital in cases where individual liberty is at stake.<sup>597</sup> The principle of prescription by law has two essential aspects:

- that detention be in accordance with national law and procedures;
- that national law and procedures should be of sufficient quality to protect the individual from arbitrariness.<sup>598</sup>

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597. *Medvedyev v. France*, ECtHR, *op. cit.*, fn. 51, para. 80.

598. *Conka v. Belgium*, ECtHR, *op. cit.*, fn. 536, para. 39; *Amuur v. France*, *op. cit.*, fn. 45, para. 51. See also, *Servellón-García et al. v. Honduras*, IACtHR, Series C No. 152, Judgment of 21 September 2006, paras. 88-89; *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, fn. 580, para. 98. See also, UN Working Group on Arbitrary Detention (WGAD), *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 “Situations regarding immigrants and asylum-seekers”, Principle 6; WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras. 67 and 82.

For detention to have a sufficient basis in national law, the national law must clearly provide for deprivation of liberty. In *Abdolkhani and Karimnia v. Turkey*,<sup>599</sup> the European Court of Human Rights held that a law that required non-nationals without valid travel documents to reside at designated places did not provide sufficient legal basis for their detention pending deportation. Laws imposing deprivation of liberty must be accessible and precise.<sup>600</sup> Its consequences must be foreseeable to the individuals it affects. The law must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending detention.<sup>601</sup> Furthermore, there must be a clear record regarding the arrest or bringing into custody of the individual.<sup>602</sup> Legislation which allows wide executive discretion in authorising or reviewing detention is likely to be considered an insufficiently precise basis for deprivation of liberty.<sup>603</sup> The Inter-American Commission on Human Rights has stressed that “[t]he grounds and procedures by which non-nationals may be deprived of their liberty should define with sufficient detail the basis for such action, and the State should always bear the burden of justifying a detention. Moreover, authorities have a very narrow and limited margin of discretion, and guarantees for the revision of the detention should be available at a minimum in reasonable intervals.”<sup>604</sup>

The requirement that the law governing detention must be accessible, precise and foreseeable has particular implications in the case of migrants, faced with an unfamiliar legal system, often in an unfamiliar language. The authorities are required to take steps to ensure that sufficient information is available to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain. For the information to be accessible, it must also be presented in a form that takes account of the individual’s level of education, and legal advice may be required for the individual to fully understand his or her circumstances.<sup>605</sup>

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599. *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, para.133.

600. *Amuur v. France*, ECtHR, *op. cit.*, fn. 45, para 51

601. *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 117.

602. *Tehrani and Others v. Turkey*, ECtHR, Applications Nos. 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010.

603. *Rafael Ferrer-Mazorra et al. v. USA*, IACHR, *op. cit.*, fn. 380, paras. 222 and 226.

604. IACHR, *Report on Terrorism and Human Rights*, *op. cit.*, fn. 502, para. 379.

605. *Nasrullojev v. Russia*, ECtHR, Application No. 656/06, Judgment of 11 October 2007, para. 77; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 43, para. 118; *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, para. 74; *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, paras.131-135; *Amuur v. France*, ECtHR, *op. cit.*, fn. 45; *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, fn. 358. See also, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 116, 180; WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principles 1 and 8; WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras. 67 and 82.

### 3. Detention must not be arbitrary, unnecessary or disproportionate

The European Court of Human Rights has held that, in order to avoid arbitrariness, detention must, in addition to complying with national law:

- be carried out in good faith and not involve deception on the part of the authorities;
- be closely connected to the purpose of preventing unauthorised entry of the person to the country or deportation;
- the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear for their lives;
- the length of the detention must not exceed that reasonably required for the purpose pursued.<sup>606</sup>

The European Court of Human Rights, applying Article 5.1(f) ECHR, has found that, provided that these tests are met and that the detention can be shown to be for the purposes of preventing unauthorised entry or with a view to deportation, it is not necessary to show further that the detention of the individual is reasonable, necessary or proportionate, for example to prevent the person concerned from committing an offence or fleeing.<sup>607</sup> In *Saadi v. United Kingdom*, the Court therefore held that short-term detention, in appropriate conditions, for the purposes of efficient processing of cases under accelerated asylum procedures, was permissible in circumstances where the respondent State faced an escalating flow of asylum seekers.<sup>608</sup> The approach of the Court to Article 5.1(f) is in contrast to justification of detention on certain other grounds under Article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort.<sup>609</sup>

By contrast, under Article 9 of the ICCPR, as well as in international refugee law in regard to asylum seekers, the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in

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606. *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, para.74.

607. *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 43, para.112; *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, para. 72. This is in contrast to justification of detention under Article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort: *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, para. 70.

608. *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, paras.75-80

609. *Ibid.*, para. 70.



order to establish that detention is not arbitrary.<sup>610</sup> To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C v. Australia*,<sup>611</sup> the Human Rights Committee found a violation of Article 9.1 on the basis that the State did not consider less intrusive means, such as “the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was [...] arbitrary and constituted a violation of Article 9.1”.

Both the ICCPR and the ECHR require that the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.<sup>612</sup> Excessive length of detention, or uncertainty as to its duration, may also raise issues of cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.<sup>613</sup> Prolonged detention of minors calls for particularly strict scrutiny and may violate obligations under the CRC (Articles 3 and 37) as well as Article 24 ICCPR.<sup>614</sup>

Where a national court orders the release of a detainee, delay in implementing the Court’s order may lead to arbitrary detention. The European Court has held that although “some delay in implementing a decision to release a detainee is understandable and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities [...] the national authorities must attempt to keep it to a minimum [...] formalities connected with

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610. *A v. Australia*, CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3: “The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author’s particular circumstances, there were no less invasive means of achieving the same ends.” *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002: “arbitrariness” must be interpreted more broadly than “against the law” to include elements of unreasonableness. In that case, it was not unreasonable to detain considering the risk of escape, as the person had previously fled from open facility. See, *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, fn. 580, para. 98, containing a restatement of the Inter-American Court jurisprudence on necessity and proportionality.

611. *C v. Australia*, CCPR, *op. cit.*, fn. 344.

612. See, WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantee 10; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principle 7; WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras 67 and 82.

613. *Concluding Observations on Sweden*, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12: detention should be for the shortest possible time; *Concluding Observations on Costa Rica*, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 expressed concern at failure to limit the length of administrative detention of non-nationals. CAT recommended: “the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite.”

614. *Concluding Observations on Czech Republic*, CCPR, UN Doc. CCPR/C/CZE/CO/2, 9 August 2007, para. 15: the committee expressed concern at legislation permitting the detention of those under the age of 18 for up to 90 days, in light of obligations under Articles 10 and 24 ICCPR, and recommended that this period should be reduced.

release cannot justify a delay of more than a few hours.”<sup>615</sup> In *Eminbeyli v. Russia*,<sup>616</sup> three days to communicate a decision and to release the applicant was found to lead to a violation of Article 5.1(f).

The Inter-American Court of Human Rights also makes an assessment as to the legitimate aim of the detention, and its adequacy, necessity and proportionality to the legitimate aim.<sup>617</sup> The Court has held in *Vélez Loor v. Panama* that automatic detention following irregular presence is arbitrary as any decision on detention must assess the individual circumstances of the case.<sup>618</sup> Preventive detention may be a legitimate means to assure the implementation of a deportation,<sup>619</sup> however “the aim of imposing a punitive measure on the migrant who re-enters irregularly the country after a previous deportation order does not constitute a legitimate aim under the [American] Convention”.<sup>620</sup> Finally, the Court held that “it is essential that States have at their disposal a catalogue of alternative measures [to detention] that may be effective to reach the pursued aims. Accordingly, migration policies whose central axis is the mandatory detention of irregular migrants will be arbitrary, if the competent authorities do not verify case-by-case, and individually, the possibility of using less restrictive measures that are effective to reach those aims”.<sup>621</sup>

The Inter-American Commission on Human Rights has highlighted four instances in which detention of migrants or asylum-seekers may be arbitrary:

- when they fail to define with sufficient particularity the grounds upon which the concerned persons have been deprived of their liberty;
- when the procedures place the onus upon the detainee to justify his or her release;
- when they are subjected to a degree of discretion on the part of officials that exceeds reasonable limits;
- and when they fail to provide for detention review at reasonable intervals.<sup>622</sup>

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615. *Eminbeyli v. Russia*, ECtHR, Application No. 42443/02, Judgment of 26 February 2009, para. 49.

616. *Ibid.*, para.49.

617. *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 166.

618. *Ibid.*, para. 118.

619. *Ibid.*, para. 169.

620. *Ibid.*, para. 169 (our translation).

621. *Ibid.*, para. 171 (our translation).

622. *Rafael Ferrer-Mazorra et al. v. USA*, IACtHR, *op. cit.*, fn. 380, para. 221.

#### 4. Particular considerations in the detention of asylum seekers and refugees

Under international refugee law, detention of asylum seekers is permitted, but is constrained by Article 31 of the *Geneva Refugee Convention* which prohibits States from imposing penalties on those entering the State without authorisation, where they come directly from a State fleeing persecution, “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” More specifically, Article 31.2 prohibits restrictions on the movement of such persons other than those which are necessary, and requires that they be imposed only until the individual’s status is regularised or they obtain admission into another country. Based on these provisions, *UNHCR Guidelines on Applicable Criteria and Standards on the Detention of Asylum Seekers*,<sup>623</sup> and the Conclusions adopted by the UNHCR Executive Committee,<sup>624</sup> establish a presumption against detention, and the need to justify individual detentions as necessary for specified purposes.<sup>625</sup> Detention must therefore never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be seen as an exceptional measure, and must last for the shortest possible period.<sup>626</sup> The Executive Committee Conclusions (endorsed by the Guidelines, Guideline 3) stipulate that detention may only be resorted to where necessary on grounds prescribed by law:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum-seekers have destroyed their travel and / or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security or public order.<sup>627</sup>

The Guidelines stipulate that detention of asylum-seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum-seekers from pursuing

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623. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guidelines 2, 3.

624. *Conclusion No. 44*, UNHCR, *op. cit.*, fn. 580.

625. *Ibid.*

626. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, para. 3.

627. *Conclusion No. 44*, UNHCR, *op. cit.*, fn. 580. Reaffirmed in *Conclusion No. 85*, UNHCR, *op. cit.*, fn. 182. See also *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 3.

their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law.<sup>628</sup>

## 5. Particular factors in detention on entry or pending removal

### a) Detention to prevent unauthorised entry

The European Court of Human Rights has determined that Article 5.1(f) ECHR permits relatively wide powers to detain for the purposes of preventing unauthorised entry. In *Saadi v. United Kingdom* it held that Article 5.1(f) could not be interpreted as permitting detention only of persons attempting to evade entry restrictions, but also applied to other entrants, since until a State has authorised entry, any entry is unauthorised.<sup>629</sup> Nevertheless, the State must show that detention of those seeking entry to the country is reasonably justified. Factors such as the numbers of asylum seekers seeking entry to the country, and administrative difficulties, may contribute to the reasonableness of detention. In *Saadi v. United Kingdom*, these factors, and the fact that the UK authorities were using detention in good faith as a way of speedily processing asylum seekers through accelerated procedures, helped to justify seven days' detention in suitable conditions.<sup>630</sup>

Nevertheless, laws and procedures must ensure that detention on entry does not adversely affect rights under international refugee law to gain effective access to procedures for claiming refugee status.<sup>631</sup>

The UN Human Rights Committee conducts a more individualised assessment of the necessity and proportionality of detention of those seeking entry to the country. Although it accepts in principle that detention on the basis of illegal entry to the country may be permissible and not necessarily arbitrary,<sup>632</sup> it requires that such detention be shown to be necessary in the circumstances of the particular case.<sup>633</sup> In *A v. Australia*<sup>634</sup> the Committee stressed that there must be reasonable justification for a particular detention, and that the detention must not last beyond the period for which this justification applies. The Committee has also found that detention on entry may be justified for the purposes of verification of identity, although such detention may become arbitrary if it is unduly prolonged.<sup>635</sup>

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628. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 3.

629. *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, paras. 64-66.

630. *Ibid.*, paras. 76-80.

631. *Amuur v. France*, ECtHR, *op. cit.*, fn. 45, para. 43.

632. *A v. Australia*, CCPR, *op. cit.*, fn. 610, para. 9.3.

633. *Madaffer and Madaffer v. Australia*, CCPR, *op. cit.*, fn. 433, para. 9.2: "although the detention of unauthorised arrivals is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant."

634. *A v. Australia*, CCPR, *op. cit.*, fn. 610, paras. 9.3-9.4.

635. *Bakhtiyari v. Australia*, CCPR, Communication No.1069/2002, Views of 6 November 2003, paras. 9.2 – 9.3.

## b) Detention pending deportation

Under the ECHR, unlike the ICCPR, the specific terms of Article 5.1(f) narrow the scrutiny which will be applied to detentions pending deportation. In such cases, it is sufficient for the State to show that action is being taken with a view to deportation. It is not necessary to show that the substance of the decision to deport is justified under national law; nor is it necessary to show that other factors, such as the propensity to escape, or the risk of commission of a criminal offence, warrant detention.<sup>636</sup> This is in contrast to the jurisprudence of the Human Rights Committee applying the ICCPR, by which, if the decision is not to be arbitrary, individual circumstances that justify detention must be established in each case.<sup>637</sup>

In order for detention to be justified, the State must establish that deportation is being pursued with due diligence.<sup>638</sup> Longer periods of detention may be justified by the complexity of a case or where the actions of the applicant have led to delays.<sup>639</sup>

However, where proceedings have been suspended for a significant period,<sup>640</sup> or where deportation is no longer being actively pursued or is excessively delayed, then detention will no longer be justified.<sup>641</sup> Equally, if the authorities are unable to pursue a deportation because sending the person to the country of origin would be in breach of the principle of *non-refoulement* (see, Chapter 2), detention pending deportation can no longer be justified.<sup>642</sup> The same applies when other legal or practical obstacles impede the deportation, such as the fact that the concerned person is stateless and there is no other State willing to accept him or her.<sup>643</sup> One consequence of this is that, where the Court has ordered interim measures (see, Annex 2) to prevent a deportation pending full consideration of the case by the

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636. *Conka v. Belgium*, ECtHR *op. cit.*, fn. 536, para. 38: “Article 5.1(f) does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing ...all that is required under sub-paragraph (f) is that “action is being taken with a view to deportation”. *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, fn. 358, para.109.

637. *Samba Jalloh v. the Netherlands*, CCPR, *op. cit.*, fn. 610, para. 8; *Danyal Shafiq v. Australia*, CCPR, Communication No. 1324/2004, Views of 13 November 2006, paras. 7.2-7.3.

638. *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 43, para.113: “any deprivation of liberty under Article 5.1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”

639. *Kolompar v. Belgium*, ECtHR, Application No. 11613/85, Judgment of 24 September 1992, paras. 40-43.

640. *Ryabikin v. Russia*, ECtHR, *op. cit.*, fn. 349, para. 131, in the context of extradition proceedings, which were suspended for more than a year.

641. *Quinn v. France*, ECtHR, Application No. 18580/91, Judgment of 22 March 1995; *A. and Others v. United Kingdom*, ECtHR, GC, Application No. 3455/05, Judgment of 19 February 2009, para. 164. See also, WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras 67 and 82.

642. *Mikolenko v. Estonia*, ECtHR, Application No.10664.05, Judgment of 8 October 2009, para. 65. See also, WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras 67 and 82.

643. *A. and others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para.167.

Court, and deportation proceedings are therefore suspended, detention may no longer be justified.<sup>644</sup>

A further requirement is that detention must be genuinely for the purposes of expulsion. The European Court of Human Rights has held that where the real purpose of the detention is transfer for prosecution and trial in another State, then the detention will amount to a “disguised extradition” and will be arbitrary and contrary to Article 5.1(f) as well as to the right to security of the person protected by Article 5.1.<sup>645</sup>

## 6. Particular considerations in the detention of certain groups

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment. This principle can be particularly significant in relation to detention of asylum seekers, who may have suffered torture or ill-treatment or other traumatic experiences, sometimes with physical or mental health implications. In regard to all detained persons, particular concerns arise in relation to survivors of torture or trafficking; children and elderly persons; or persons suffering from serious illness or disability. For example, in *Farbtuhs v. Latvia*,<sup>646</sup> the European Court held that detention of a 79 year old disabled man violated Article 3 ECHR.

The *UNHCR Revised Guidelines on the Detention of Asylum Seekers*, Guideline 7, recommend that especially active consideration should be given to alternatives to detention, for persons for whom detention is likely to have a particularly serious effect on psychological well-being. Such persons may include unaccompanied elderly persons, survivors of torture or other trauma, and persons with a mental or physical disability. The UNHCR Guidelines recommend that such persons only be detained following medical certification that detention will not adversely affect their health or well-being. Where such persons are detained, then in order to ensure compliance with freedom from cruel, inhuman and degrading treatment, particular care will need to be taken in relation to conditions of detention, provision of health-care, etc (considered further below in Section III.2).

In *C v. Australia*,<sup>647</sup> the Human Rights Committee found a violation of Article 9.1 ICCPR on the basis that “the State Party has not demonstrated that, in the light of the author’s particular circumstances [a psychiatric illness], there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party’s immigration policies”.

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644. *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, para.134.

645. *Bozano v. France*, ECtHR, Application No. 9990/82, Judgment of 18 December 1986, para. 60.

646. *Farbtuhs v. Latvia*, ECtHR, Application No. 4672/02, Judgment of 2 December 2004.

647. *C. v. Australia*, CCPR, *op. cit.*, fn. 344.

### a) Justification of detention of children

Detention of children raises particular considerations under the CRC, as well as under international refugee law and international human rights law generally.

The CRC provides in Article 37(b) that detention of a child should be only as a last resort and for the shortest appropriate period of time. Article 37 should be read in light of other provisions of the CRC which affect decision-making regarding migrant children. Of significance in all cases where detention of child migrants is considered is Article 3.1 CRC which requires that the best interests of the child should be a primary consideration in all actions concerning children. Under Article 22.1 CRC, States must take all appropriate measures to ensure that a child refugee or asylum seeker shall receive appropriate protection and humanitarian assistance, a provision which could have consequences for decisions on whether to detain a child. For child migrants who accompany their parents or other adults, and who may risk imprisonment as a result, Article 2.2 CRC is relevant. It provides: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.” Similar provision is made in Article 24 ICCPR, and Article 19 ACHR. Also of potential significance is Article 39 CRC, which requires States to take measures to ensure the physical and psychological recovery and social reintegration of child victims of armed conflict, torture or inhuman or degrading treatment, neglect, exploitation or abuse.

The Committee on the Rights of the Child, in General Comment No.6 (2005)<sup>648</sup> has provided guidance on the application of Article 37(b) CRC to migrant children.

The Committee has stated that “unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall [...] only be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.”<sup>649</sup>

Where children are held in immigration detention contrary to their best interests, the Human Rights Committee has considered that such detention may be arbitrary in

648. CRC, *General Comment No. 6, op. cit.*, fn. 136, para. 61.

649. *Ibid.*, para.61. See also, *Concluding Observations on Australia*, CRC, UN Doc. CRC/C/15/Add.268, 20 October 2005: “the Committee remains concerned that children who are unlawfully in Australian territory are still automatically placed in administrative detention – of whatever form – until their situation is assessed. [...] the Committee is seriously concerned that [...] administrative detention is not always used as a measure of last resort and for the shortest appropriate period of time.”

violation of Article 9.1 ICCPR. It may also violate Article 24 ICCPR, which guarantees the rights of the child to measures of protection required by his or her status as a minor, without discrimination. In *Bakhtiyari v. Australia*, the Committee held that mandatory immigration detention of an Afghan refugee with five children for two years and eight months constituted arbitrary detention<sup>650</sup> as well as a violation of Article 24.1 ICCPR since the measures had not been guided by the best interests of the children.<sup>651</sup> However, detention of a minor does not necessarily violate Article 24 of the Covenant, and may be justified in exceptional circumstances. In *Samba Jalloh v. the Netherlands*, the Committee held that detention of a minor was justified “where there were doubts as to the author’s identity, where he had attempted to evade expulsion before, where there were reasonable prospects for his expulsion, and where an identity investigation was still ongoing”.<sup>652</sup>

In regard to the detention of asylum seekers or refugees, the *UNHCR Revised Guidelines on detention of asylum seekers*,<sup>653</sup> as well as the *UNHCR Guidelines on refugee children*, state that child asylum seekers should not be detained. They reaffirm the principle in Article 37 CRC that detention of children should be a measure of last resort, and for the shortest possible period of time; and specify that where children accompany their parents, they should be detained only where detention is the only means of maintaining family unity.<sup>654</sup> Similarly, the *Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings* state that “children, including unaccompanied minors should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance”.<sup>655</sup>

Where children are in fact detained, then the UNHCR guidelines as well as other international standards require that it should be in places and conditions appropriate to their age (see, further below, Sections III.1.a and III.3.d).

## **b) Detention of stateless persons**

Particular issues arise in regard to the detention of persons who are stateless (see, Chapter 1). In the case of stateless persons, it will be particularly difficult to return them to their “country of origin” or to find alternative places of resettlement. This can mean that stateless persons are held for unusually long periods in detention, ostensibly awaiting deportation. The general principle described above concerning the need to establish that deportation is being actively pursued, in order for detention to be justified, is therefore of particular relevance to stateless persons. Their

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650. *Bakhtiyari v. Australia*, CCPR, *op. cit.*, fn. 635, para. 9.3.

651. *Ibid.*, para.9.6.

652. *Samba Jalloh v. the Netherlands*, CCPR, *op. cit.*, fn. 610, para. 8.2.

653. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 6.

654. *UNHCR Guidelines on Unaccompanied Children*, *op. cit.*, fn. 213, paras. 7.6-7.8.

655. *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, principle XI.2.



detention will not be justified if there is no active or realistic progress towards transfer to another State. The *UNHCR Guidelines on Detention* note:

*“The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.”*<sup>656</sup>

Guideline 9 of the *UNHCR Guidelines* states that: “[...] being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual’s nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.”

## **7. Detention of migrants for purposes other than immigration control**

Although the focus of this Chapter is on detention for the purposes of immigration control, it should be noted that migrants, like others, may also be detained on other legitimate or illegitimate grounds. While the majority of human rights treaties do not expressly specify the grounds on which detention is permitted, under the ECHR, in addition to detention for the purposes of immigration control, permissible detention is limited to:

- detention following conviction by a criminal court;
- detention for failure to comply with an order of a court or to secure the fulfilment of an obligation prescribed by law;
- detention following arrest on suspicion of committing an offence or in order to prevent an offence being committed;
- detention of minors for educational purposes;
- detention where strictly necessary for the prevention of the spread of infectious diseases;

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656. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Introduction, para. 6.

- detention of persons of unsound mind, alcoholics, drug addicts or vagrants, where necessary for their own protection or the protection of the public.

All such detentions are subject to safeguards against arbitrariness similar to those that apply to immigration detention. It should also be noted that such powers of detention are subject to the principle of non-discrimination, including on grounds of nationality, and must therefore not be exclusively or disproportionately imposed on non-nationals except where the difference in treatment can be objectively and reasonably justified in the circumstances.<sup>657</sup>

### a) Administrative detention on grounds of national security

Administrative detention for reasons of national security, although distinct from detention for the purposes of immigration control, may nevertheless disproportionately affect non-nationals. Although, under the ICCPR, administrative detention without trial is permitted in exceptional circumstances, to the extent that it can be shown not to be arbitrary, and to be in accordance with principles of necessity, proportionality and non-discrimination and based on grounds and procedures established by law,<sup>658</sup> in practice such detention is unlikely to be permissible where there is not a derogation from Article 9 ICCPR in a declared state of emergency.<sup>659</sup> The UN Working Group on Arbitrary Detention has held the practice of preventive detention to be generally incompatible with international human rights law. In 2009, the Working Group declared administrative detention to be inadmissible in relation to persons suspected of terrorism-related conduct.<sup>660</sup> Previously, in 1993, the Working Group examined the use of administrative detention and concluded that it is arbitrary on procedural grounds if fair trial standards are violated. The Working Group also found that administrative detention was “inherently arbitrary” where it was, *de jure* or *de facto*, of an indefinite nature.<sup>661</sup>

657. *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641.

658. *General Comment No. 8, Right to Liberty and Security of the Person*, CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 30 June 1982, para. 4. See also, *Concluding Observations on Jordan*, CCPR, UN Doc. CCPR/C/79/Add.35, 10 August 1994, paras. 226-244; *Concluding Observations on Morocco*, CCPR, UN Doc. CCPR/C/79/Add.44, 23 November 1994, para. 21; and, *Concluding Observations on Zambia*, CCPR, UN Doc. CCPR/C/79/Add.62, 3 April 1996, para. 14. See, generally, International Commission of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism*, March 2006.

659. The Committee has also emphasised that the totality of ICCPR Article 9 safeguards apply even when there is a “clear and serious threat to society which cannot be contained in any other manner” except through preventive detention. See, *Cámpora Schweizer v. Uruguay*, CCPR, Communication No. 66/1980, Views of 12 October 1982, para. 18.1.

660. WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, para.54. The Working Group states that: “(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems; (b) resort to administrative detention against suspects of such criminal activities is inadmissible; (c) the detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges [...]”.

661. WGAD, *Annual Report 1992*, UN Doc. E/CN.4/1993/24, 12 January 1993, Deliberation No. 4, Conclusions at III.B. See also, WGAD, *Report on the visit to the People’s Republic of China*, UN Doc. E/CN.4/1998/44/Add.2, 22 December 1997, paras. 80-99 and 109.

The European Convention system imposes strict limitations on the use of administrative detention. Under the ECHR, administrative detention without trial is not a specified ground for which detention is permitted under Article 5 ECHR and therefore can only be legitimately imposed where the State derogates from its Article 5 obligations in a time of public emergency threatening the life of the nation (under Article 15 ECHR) and where the use of administrative detention can be shown to be “strictly required by the exigencies of the situation” and necessary, proportionate and non-discriminatory in the context of the particular emergency situation that prevails.<sup>662</sup> Measures which impose security-related administrative detention exclusively on those subject to immigration control, in circumstances where others may also pose similar security risks, have been found to discriminate unjustifiably between nationals and non-nationals and therefore to amount to disproportionate measures of derogation in violation of Article 5 ECHR.<sup>663</sup> Issues of judicial review of security-related detentions, whether characterised as immigration law measures or as administrative detention, are considered further at Section IV.3.b.

### **b) Detention by private actors**

As a general principle, international law requires States to take steps to ensure that the conduct of non-State actors does not impair the enjoyment of human rights. The right to liberty under international human rights law also prohibits arbitrary detention by private, non-State actors. In regard to such detention, it imposes positive obligations on the State to take measures to prevent and punish such detentions. This will often be relevant in the immigration context in cases of trafficking and exploitative labour practices. Such private sphere restrictions on liberty will often involve imprisonment in the workplace or home alongside confiscation of passports and other travel documents, as well as other substantial restrictions on liberty amounting to detention. Such situations are also likely to raise issues of the right to freedom from slavery, servitude or forced labour (see, further, Chapter 6). As noted above (Section I), even where they do not involve situations of private-sphere detention, they may nonetheless raise issues in relation to freedom of movement.

In accordance with the right to liberty, the State has a duty to provide an adequate legal framework which criminalises unauthorised detention by private actors, to take all appropriate measures to enforce the criminal law effectively, to establish prompt, thorough and independent investigations into credible allegations of detention by private actors; and to provide other appropriate reparations to victims. Where the authorities are aware of concerns that a particular individual is being held in

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662. *Lawless v. Ireland (No. 3)*, ECtHR, Application No. 332/57, Judgment of 1 July 1961, paras. 13 and 14; *Ireland v. United Kingdom*, ECtHR, Plenary, Application No. 5310/71, 18 January 1978, paras. 194-196 and 212-213; *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 172.

663. *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 190. In light of this finding the Grand Chamber found it unnecessary to consider whether the measure also violated Article 14 ECHR in conjunction with Article 5.

violation of the right to liberty, they must take all reasonable measures to prevent and end the violation.<sup>664</sup>

A different situation arises when non-State actors, including private actors, exercise elements of governmental authority in place of State organs, as it is the case for privately-run detention centres for migrants or asylum-seekers. In this situation, the State is directly internationally responsible for international wrongful acts, including breaches of international human rights law, caused by acts or omissions of private or non-State actors.<sup>665</sup> International human rights law obligations and standards on treatment of detainees and conditions of detention apply irrespective of whether detention facilities are operated by State authorities, or by private companies on behalf of the State. This derives from the principle that a State cannot absolve itself from responsibility for its human rights obligations by delegating its responsibilities to a private entity.<sup>666</sup>

### III. Treatment of detainees

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Even where detention of migrants can be justified on the basis of the standards discussed above, international human rights law imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention. The most relevant standard for the treatment of detainees is the prohibition of cruel, inhuman and degrading treatment (Article 16 CAT, Article 7 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR, Article 8 ArCHR). The *Convention against Torture* establishes that States have obligations to take effective measures to prevent acts of torture<sup>667</sup> and of cruel, inhuman or degrading treatment or punishment<sup>668</sup> including to keep under systematic review arrangements for the custody and treatment of persons subjected to any form of detention with a view to preventing torture and ill-treatment.<sup>669</sup>

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664. CCPR, *General Comment No. 31, op. cit.*, fn. 46, paras. 8, 15, and 18; Article 2 CPED; *Storck v. Germany*, ECtHR, Application No. 61603/00, Judgment of 16 June 2005; *Kurt v. Turkey*, ECtHR, Case No. 15/1997/799/1002, Judgment of 25 May 1998, para. 124; Venice Commission, *Opinion 363/2005, op. cit.*, fn. 352, para. 53: “Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantial claim that a person has been taken into custody and has not been seen since.”

665. Article 5, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd session in 2001, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two (ILC Draft Articles on State Responsibility). See also, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd session in 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, on Article 5, pp. 42-43 (ILC State Responsibility Commentary).

666. *Costello-Roberts v. United Kingdom*, ECtHR, *op. cit.*, fn. 386, para.27; *Ximenes-Lopes v. Brazil*, IACtHR, *op. cit.*, fn. 548.

667. Article 2.1 CAT.

668. Article 16.1 CAT.

669. Article 11 read together with Article 16.1 CAT.

Article 10.1 ICCPR makes specific provision for the right of detained persons to be treated with humanity and respect for their dignity, a more specific application of the general right under Article 7 ICCPR to freedom from torture or other cruel, inhuman or degrading treatment or punishment. Article 5.2 ACHR, Article 5 ACHPR and Article 20 ArCHR also make similar specific provision for the treatment of persons deprived of their liberty. It has been suggested that Article 10 ICCPR may extend to treatment less harsh than that covered by Article 7 ICCPR, since the Human Rights Committee has found violations of Article 10 in many cases where it has found no violation of Article 7.<sup>670</sup> In addition, provisions of other international instruments may be relevant in terms of protecting the human rights of certain categories of detained migrants (CEDAW, CRPD, and Article 37 CRC).

Detailed standards on conditions of detention are set out in the *UN Standard Minimum Rules on the Treatment of Prisoners*;<sup>671</sup> the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*;<sup>672</sup> the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*;<sup>673</sup> and the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, as well as, at a European level, the CPT standards. These standards provide comprehensive recommendations on conditions and facilities to be provided in all forms of detention, including immigration detention. As regards asylum seekers, the *UNHCR Revised Guidelines on Detention of Asylum Seekers* provide that “[c]onditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person.” They emphasise in particular that detained asylum seekers should have the opportunity to have contact with the outside world and to receive visits; the opportunity for exercise and indoor and outdoor recreation; the opportunity to continue their education; the opportunity to exercise their religion; and access to basic necessities i.e. beds, shower facilities, basic toiletries etc.<sup>674</sup>

The *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and, in the European system, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) have established independent committees of experts – respectively the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT) – with mandates to visit detention facilities of State Parties without limitations and to issue

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670. Manfred Nowak, *UN Covenant on Civil and Political Rights Commentary*, 2nd Revised Edition, N.P. Engel Publisher, 2005 (Nowak, *ICCPR Commentary*), pp.245-250.

671. *UN Standard Minimum Rules on the Treatment of Prisoners*, adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

672. Adopted by General Assembly resolution 43/173 of 9 December 1988.

673. Adopted by General Assembly resolution 45/113 of 14 December 1990.

674. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 9.

recommendations.<sup>675</sup> The OPCAT also requires State Parties to establish one or more independent national mechanisms for the prevention of torture and cruel, inhuman or degrading treatment or punishment with powers of access to detention centres.<sup>676</sup>

## 1. Appropriateness of place of detention

International guidance stipulates that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.<sup>677</sup> Under the particular scheme of Article 5 ECHR, holding a detainee in a facility which is inappropriate in light of the grounds on which he or she is held (for example for the prevention of unlawful entry or pending deportation under Article 5.1(f)) may also violate the right to liberty.<sup>678</sup> So for example, it has been held that holding a child asylum seeker with adults in a facility not adapted to her needs violated the right to liberty.<sup>679</sup> A similar rationale would be likely to apply to the long-term use of prisons or police cells for immigration detention.

In general, under international human rights law, the detention of migrants in unsuitable locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.<sup>680</sup> In relation to particular classes of migrants, it may also violate other international standards, including, in the case of minors, requirements to act in the best interests of the child under the CRC. International and regional standards as well as conclusions of UN treaty bodies and the UNHCR consistently recommend that asylum seekers or other migrants should not be detained in police or prison custody. The length of time for which someone is held in a detention facility is often relevant to whether the detention amounts to ill-treatment. For example, while detention of a migrant at an airport may be acceptable for a short period of a few hours on arrival, more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment.<sup>681</sup> This has been recognised by the European

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675. The mandate and powers of visit of the SPT are to be found in Articles 4, 11.1, 12, and 14 of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT); and of the CPT in Articles 2 and 7 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT).

676. See, Articles 3, 17-22, OPCAT.

677. *CPT Standards, op. cit.*, fn. 585, page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; *European Guidelines on accelerated asylum procedures, CMCE, op. cit.*, fn. 117, Principle XI.7: “detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.” See also, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 209.

678. *Aerts v. Belgium*, ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46.

679. *Mayeka and Mitunga v. Belgium*, ECtHR, Application no 13178/03, Judgment of 12 October 2006.

680. Under Article 7 and 10.1 ICCPR; Article 3 ECHR; Article 5 ACHR; Article 5 ACHPR.

681. *CPT Standards, op. cit.*, fn. 585, page 54.

Committee for the Prevention of Torture, which has emphasised that, although immigration detainees may have to spend some time in ordinary police detention facilities, given that the conditions in such places may generally be inadequate for prolonged periods of detention, the time they spend there should be kept to the absolute minimum.<sup>682</sup> In *Charahili v. Turkey*, the European Court of Human Rights found that prolonged detention of the applicant in the basement of a police station, in poor conditions, violated Article 3 ECHR.<sup>683</sup> The UN Human Rights Committee has also expressed concern at detention of those awaiting deportation in police custody for lengthy periods.<sup>684</sup>

International standards also consistently reject detention of asylum seekers or other migrants in prisons, requiring that other facilities should be put in place or, at a minimum, that in any case asylum seekers and migrants should be kept separate from convicted persons or persons detained pending trial.<sup>685</sup>

#### a) Place of detention of children and families

International standards require that, in those exceptional cases where children are detained, they should be held in facilities and conditions appropriate to their age. This general principle is established by Article 37.c CRC, which states that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances [...]”. Detailed rules for the exceptional situation of detention of children are provided by the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.<sup>686</sup>

Other international tribunals have found that detention of children in inappropriate facilities may in certain circumstances lead to violations of the freedom from cruel, inhuman and degrading treatment. In *Mubilanzila Mayeka and Kaniki Mitunga v.*

682. *Ibid.*, page 54.

683. *Charahili v. Turkey*, ECtHR, Application No. 46605/07, Judgment of 13 April 2010.

684. *Concluding Observations on Austria*, CCPR, *op. cit.*, fn. 187, para. 17. The Committee expressed concern that asylum seekers awaiting deportation were frequently detained for up to several months in police detention facilities and recommended that the State Party “review its detention policy with regard to asylum seekers [...] and take immediate and effective measures to ensure that all asylum seekers who are detained pending deportation are held in centres specifically designed for that purpose [...]”.

685. *Concluding Observations on Ireland*, CCPR, *op. cit.*, fn. 486, para. 21; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 207-208. See also, *Concluding Observations on Sweden*, CCPR, UN Doc. CCPR/C/SWE/CO/6, 2 April 2009, para. 17; *Concluding Observations on New Zealand*, CAT, UN Doc. CAT/C/NZL/CO/5, 14 May 2009, para. 6: “The Committee notes with concern that asylum-seekers and undocumented migrants continue to be detained in low security and correctional facilities.”; *Conclusion No.44*, UNHCR, *op. cit.*, fn. 580, para. 10.

686. *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted on December 14, 1990 by General Assembly resolution 45/113.

*Belgium*,<sup>687</sup> for example, the European Court found that detention of a five year old unaccompanied asylum seeker in an adult detention centre without proper arrangements for her care violated Article 3 ECHR, since the conditions of detention were not adapted to her position of extreme vulnerability. The Court also found a violation of her mother's Article 3 rights because of anxiety and uncertainty in relation to her daughter's detention. The Inter-American Court established that Article 19 ACHR requires higher standards of care and responsibility on the State when detention of a child is involved.<sup>688</sup>

## 2. Conditions of detention

Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or other cruel, inhuman or degrading treatment ("ill-treatment") and the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR, Article 5.2 ACHR, Article 5 ACHPR and Article 20 ArCHR). In the context of increasing use of immigration detention and the holding of ever-larger numbers of migrants, often in overcrowded facilities,<sup>689</sup> poor or overcrowded conditions of detention for migrants have regularly been found by international courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment. Although detention by its nature imposes a certain level of hardship, the general principle to be applied is that conditions of detention should be compatible with human dignity and not subject detainees to a level of suffering beyond that inherent in detention.<sup>690</sup> Furthermore, economic pressures or difficulties caused by an increased influx of migrants cannot justify a failure to comply with the prohibition of torture or other ill-treatment, given its absolute nature.<sup>691</sup>

### a) Cumulative effect of poor conditions

The cumulative effect of a number of poor conditions may lead to violation of the prohibition of ill-treatment.<sup>692</sup> Furthermore, the longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment. The test is an objective one, and can be met irrespective of whether there had been any intent

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687. *Mayeka and Mitunga v. Belgium*, ECtHR, *op. cit.*, fn. 679.

688. "*Juvenile Reeducation Institute v. Paraguay*", IACtHR, Series C No. 112, Judgment of 2 September 2004, paras. 143, 160-162.

689. *CPT Standards*, *op. cit.*, fn. 585, Safeguards for Irregular Migrants Deprived of their Liberty, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85-89.

690. *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para. 45; *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 323, para.221. See also, "*Juvenile Reeducation Institute v. Paraguay*", IACtHR, *op. cit.*, fn. 688, paras. 151-155.

691. *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 323, paras. 223-224.

692. *Dougoz v. Greece*, ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Z.N.S. v. Turkey*, ECtHR, Application No. 21896/08, Judgment of 19 January 2010; *Charahili v. Turkey*, ECtHR, *op. cit.*, fn. 683; *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 323, paras. 230-233.



on the part of the authorities to humiliate or degrade.<sup>693</sup> The prohibition of cruel, inhuman or degrading treatment places an obligation on State authorities to ensure that those whom they deprive of liberty are held in humane conditions. The onus cannot be placed on detainees themselves to take the initiative to seek access to adequate conditions.<sup>694</sup> Whether conditions are cruel, inhuman or degrading must also be seen in the context of the individual – it may depend on the sex, age or health of the individual detainee. For those held in immigration detention, it is also relevant that they are not charged with or convicted of any crime, which should be reflected in the conditions of detention and facilities at the detention centre.<sup>695</sup>

For example, detention of asylum seekers for two months in a prefabricated building with poor conditions of hygiene, restricted access to the open air and no access to phones, was found in one case to violate Article 3 ECHR, in particular given that the applicants suffered from health and psychological problems following torture in their country of origin.<sup>696</sup> The Inter-American Court equally ruled that “poor physical and sanitary conditions existing in detention centers, as well as the lack of adequate lightning and ventilation, are *per se* violations to Article 5 of the American Convention, depending on their intensity, length of detention and personal features of the inmate, since they can cause hardship that exceeds the unavoidable level of suffering inherent in detention, and because they involve humiliation and a feeling of inferiority.”<sup>697</sup>

Inadequate provision for migrants held at entry points can also lead to violations. In *Riad and Idiab v. Belgium*, for example, the European Court found a violation of Article 3 ECHR where the applicants had been held for more than 10 days in an airport transit zone without any legal or social assistance, no means of subsistence, shelter, sleeping or washing facilities and no means of communication with the outside world. Although there was a reception centre at the airport, the applicants were not informed about it for some time. The Court found that this failure to ensure the essential needs of persons deprived of their liberty amounted to a violation of Article 3.<sup>698</sup>

The African Commission on Human and Peoples’ Rights has held that cruel, inhuman or degrading treatment or punishment under Article 5 ACHPR extends “to the widest possible protection against abuses, whether physical or mental, [...] referring to any

693. *Riad and Idiab v. Belgium*, ECtHR, Applications Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para.107.

694. *Ibid.*, para.103.

695. See *CPT Standards*, *op. cit.*, fn. 585, Safeguards for Irregular Migrants Deprived of their Liberty, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85-89; *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 323, paras. 231-233.

696. *S.D. v. Greece*, ECtHR, *op. cit.*, fn. 690, paras. 52-53.

697. *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, IACtHR, Series C No. 150, Judgment of 5 July 2006, para. 97; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 215-216 (on access to water in detention).

698. *Riad and Idiab v. Belgium*, ECtHR, *op. cit.*, fn. 693, paras.103-106.

act ranging from denial of contact with one's family and refusing to inform the family of where the individual is being held, to conditions of overcrowded prisons and beatings and other forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine or medical care".<sup>699</sup>

## b) Overcrowding

Severe overcrowding has regularly been determined by international tribunals to amount to a violation of freedom from cruel, inhuman or degrading treatment. The European Court of Human Rights has found that less than three square metres of personal space per detainee is a strong indication that conditions are degrading so as to violate Article 3 ECHR.<sup>700</sup> Where overcrowding is less severe, it may nevertheless lead to violations of freedom from cruel, inhuman or degrading treatment when considered in conjunction with other conditions of detention, including poor ventilation or access to natural light or air, poor heating, inadequate food, poor sanitation or lack of a minimum of privacy.<sup>701</sup> The Inter-American Court has also held that severe overcrowding amounts *per se* to "cruel, inhuman and degrading treatment, contrary to the dignity inherent to human beings and, therefore, a violation to Article 5.2 of the American Convention."<sup>702</sup>

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has held that "one of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of detention is overcrowding [and that] [t]his is particularly applicable in cases of pre-trial detention and detention of children, asylum-seekers and refugees."<sup>703</sup>

## c) Access to healthcare

Inadequate healthcare or access to essential medicines for detainees may also violate the freedom from cruel, inhuman or degrading treatment, either on its own or in conjunction with other factors. Although there is no general obligation to release detainees on health grounds, there is an obligation to protect their physical and mental wellbeing while in detention, by providing medical care and medicines

699. *IHRDA and others v. Republic of Angola*, ACommHPR, *op. cit.*, fn. 380, para. 52; *Media Rights Agenda v. Nigeria*, ACommHPR, Communication No. 224/1998, 28th Ordinary Session, 23 October-6 November 2000, para. 71; *Amnesty International and Others v. Sudan*, ACommHPR, Communications Nos. 48/1990, 50/1991, 52/1991 and 89/1993, para. 54.

700. *Kantjrev v. Russia*, ECtHR, Application No. 37213/02, Judgment of 21 June 2007, paras. 50-51; *Labzov v. Russia*, ECtHR, Application No. 62208/00, Judgment of 16 June 2005, para. 44; *Orchowski v. Poland*, ECtHR, Application No. 17885/04, Judgment of 22 October 2009, para 122.

701. *Orchowski v. Poland*, ECtHR, *op. cit.*, fn. 700, para 122-123; *Peers v. Greece*, ECtHR, *op. cit.*, fn. 392, paras. 70-72; *Belevitskiy v. Russia*, ECtHR, Application No. 72967/01, Judgment of 1 March 2007, paras. 73-79.

702. *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, IACtHR, *op. cit.*, fn. 697, para. 91.

703. Theo Van Boven, UN Special Rapporteur on Torture, *Annual Report to the Commission on Human Rights*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 49.

appropriate to the health condition of a detainee.<sup>704</sup> For example, failure to provide medical supervision and drugs necessary to detainees with HIV, or with severe epilepsy, leading to exacerbation of their conditions, can undermine the dignity of the detainee, and cause anguish and hardship beyond that normally inherent in detention, in violation of Article 3 ECHR.<sup>705</sup> Such a violation may occur even in the absence of demonstrated deterioration of the health condition of a detainee.<sup>706</sup> The Inter-American Court has found that lack of adequate medical assistance in detention could constitute a violation of Article 5 ACHR “depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention and its cumulative effects.”<sup>707</sup>

CPT standards set out the principle that medical care available in detention should be of an equivalent standard to that available to the general public.<sup>708</sup> Guideline 10 (v) of the *UNHCR Revised Guidelines on detention of asylum seekers* provides that detained asylum seekers should have the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate. Other international standards, including the *Standard Minimum Rules for the Treatment of Prisoners* (Rules 22 to 25), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 22 to 26), the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Section H), and the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* set out detailed guidelines regarding appropriate medical care in detention.

Security measures applied during medical treatment must also be designed so far as possible to respect the dignity of the detainee. Issues in this regard may be raised by the use of handcuffs or the imposition of other restraints during treatment.<sup>709</sup>

It should also be borne in mind that, as will be discussed in more detail in Chapter 5, under international law and standards enshrining the right to health, all persons, irrespective of their nationality, residency or immigration status, are entitled to

704. *Hurtado v. Switzerland*, ECtHR, Application No. 17549/90, Judgment of 28 January 1994; *Mouisel v. France*, ECtHR, Application No. 67263/01, Judgment of 14 November 2002, para. 40; *Keenan v. United Kingdom*, ECtHR, Application No. 27229/95, Judgment of 3 April 2001, para. 111; *Aleksanyan v. Russia*, ECtHR, Application No. 46468/06, Judgment of 22 December 2008, para. 137.

705. *Kaprykowski v. Poland*, ECtHR, Application No. 23052/05, Judgment of 3 February 2009; *Kotsaftis v. Greece*, ECtHR, Application No. 39780/06, Judgment of 12 June 2008. See also, *Mouisel v. France*, ECtHR, *op. cit.*, fn. 704, paras. 40-42.

706. *Kotsaftis v. Greece*, ECtHR, *op. cit.*, fn. 705.

707. *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, IACtHR, *op. cit.*, fn. 697, para. 103. See also, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 220, 225, 227.

708. *CPT Standards*, *op. cit.*, fn. 585, Extract from the 3rd General Report [CPT/Inf (93) 12], page 27, para. 31. Although the European Court of Human Rights has sometimes accepted a lower standard of healthcare for prisoners than that available in the community, this has been in regard to convicted prisoners only, and the Court has expressly drawn a distinction between convicted prisoners and other detainees in this regard: *Aleksanyan v. Russia*, ECtHR, *op. cit.*, fn. 704, para. 139.

709. *Henaf v. France*, ECtHR, Application No. 65436/01, Judgment of 27 November 2003, paras. 49-60.

primary and emergency health care, a right which also applies in the context of detention.<sup>710</sup>

### 3. Conditions of detention of particular groups

#### a) Mentally ill detainees

Detainees who are mentally ill or who are disturbed as a result of traumatic experiences require particular consideration where they are held in immigration detention. Their detention raises questions as to (a) whether the person should be detained at all or whether more suitable alternatives can be found (see, Section II.6); and, if detention is warranted, (b) the appropriate form of detention, conditions of detention, and provision of medical care.

Where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions, continued detention may amount to cruel, inhuman or degrading treatment. In *C v. Australia*, the Human Rights Committee found a violation of Article 7 ICCPR as a result of the prolonged detention of a person with serious psychiatric illness which the authorities knew had come about as the result of his detention and which, by the time of his eventual release, was so serious as to be irreversible.<sup>711</sup>

Even where the detention of a mentally ill person is justifiable, consideration should be given to the appropriate place of detention: whether the person should be held in a specialist psychiatric facility; or whether the person should be accommodated in a specialist psychiatric ward in a detention centre.<sup>712</sup>

Irrespective of the place of detention, inadequate mental healthcare, alone or in combination with other inappropriate conditions of detention, can constitute or lead to cruel, inhuman or degrading treatment.<sup>713</sup> In assessing whether detention or conditions of detention of a mentally ill person amount to cruel, inhuman or degrading treatment, account must be taken of such persons' vulnerability, and

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710. CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 34: "In particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."

711. *C. v. Australia*, CCPR, *op. cit.*, fn. 344, para. 8.4.

712. *Recommendation R(1998)7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison*, adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers' Deputies: prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff.

713. *Musial v. Poland*, ECtHR, Application No.28300/06, Judgment of 20 January 2009, para. 96; *Madafferi and Madafferi v. Australia*, CCPR, *op. cit.*, fn. 433, where the applicant was returned to immigration detention against the advice of doctors and psychiatrists, found that the decision was not based on a proper assessment of the circumstances of the case and was in violation of Article 10.1 ICCPR.

their inability, in some cases, to complain coherently or effectively about how they are affected.<sup>714</sup>

### **b) People with disabilities**

Both Article 10 ICCPR and Article 3 ECHR have been found to require that, where disabled people are detained, measures are taken to ensure that conditions of detention are appropriate to their level of disability.<sup>715</sup> Under Article 14 CRPD, States parties must “ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.” Article 2 of that Convention defines reasonable accommodation as “all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

### **c) Survivors of torture**

Given that detained asylum seekers include those who have been victims of torture, international standards recommend that the authorities should screen detainees at the outset of their detention to identify victims of torture or other trauma, whose situation may warrant accommodation outside of detention (see, above, Section II.6), or where they are detained, may require a different type of detention facility, or particular services or healthcare.<sup>716</sup> Such screening will assist in ensuring that the authorities meet international human rights law obligations to provide appropriate conditions of detention or accommodation, and physical and mental healthcare for such persons.

### **d) Children**

In any exceptional cases where children are detained (see, Section II.6.a, above, in relation to appropriateness of detention), whether they are unaccompanied or with their families, the conditions of detention must be appropriate and the best interests of the child must guide all decisions concerning the detention.<sup>717</sup> The Committee on

714. *Ibid.*, para.87.

715. *Price v. United Kingdom*, ECtHR, Application No.33394/96, Judgment of 10 July 2001, paras. 25-30; *Farbtuhs v. Latvia*, ECtHR, *op. cit.*, fn. 646, para. 56; *Hamilton v. Jamaica*, CCPR, Communication No. 616/1995, Views of 23 July 1999.

716. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 10(i); *Recommendation R(1998)7*, CMCE, *op. cit.*, fn. 712, para. 12: “asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them”. See also, *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, Guideline XI.3 “in those cases where other vulnerable persons are detained, they should be provided with adequate assistance and support.”

717. Article 3(a) CRC.

the Rights of the Child's *General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin*<sup>718</sup> states that, "in the exceptional case of detention, conditions of detention must be governed by the best interests of the child [...] Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. [...] Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. [...] In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."<sup>719</sup>

### **i) Education in immigration detention**

Children detained for immigration purposes continue to enjoy a right to education, which must be provided to them on an equal basis with children who are at liberty, and without discrimination on grounds of race, nationality or religion.<sup>720</sup> The *UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* and the Committee on the Rights of the Child's *General Comment No. 6* recognise that children have a right to education while in detention, that education should take place outside of detention premises and that provision should be made for the children's recreation and play.<sup>721</sup>

The *UN Rules for the Protection of Juveniles Deprived of their Liberty* further add that such education should be provided "in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty [and that] [s]pecial attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. [Furthermore] Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special

718. CRC, *General Comment No.6, op. cit.*, fn. 136, para. 63.

719. See also, *Concluding Observations on Cyprus*, CESCR, UN Doc. E/C.12/CYP/CO/5, 12 June 2009, para. 22, expressing concern at inadequate conditions for children in immigration detention; *Concluding Observations on Australia*, CRC, *op. cit.*, fn. 649, paras. 62(b) and 64(c).

720. Article 2 Protocol 1 ECHR; Article 28 CRC; Article 5(e)(v) ICERD; Article 13 ICESCR; *General Comment No. 13, The right to education*, CESCR, UN Doc. E/C.12/1999/10, 8 December 1999, para. 34: "confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status."

721. *UNHCR Revised Guidelines on Detention, op. cit.*, fn. 589, Guideline 6; and CRC, *General Comment No. 6, op. cit.*, fn. 136, para. 63.

education.”<sup>722</sup> Finally the UN Rules specify that “[j]uveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.”<sup>723</sup>

### e) Women detainees

Women held in immigration detention often face particular difficulties. These may include instances of gender-based violence or harassment, including sexual violence and abuse, perpetrated by both State actors and detainees (see, Section 4, below); absence of childcare; inadequate and inappropriate provision of healthcare, goods and services needed by women; as well as other forms of gender discrimination.

International law and standards require States to take certain specific measures to address these problems. They emphasise the need to provide separate accommodation for women in detention, to ensure women are attended and supervised by women officials and to ensure body searches on women are only conducted by women.<sup>724</sup> For example, the Human Rights Committee has highlighted that, in respect of compliance with Articles 3, 7 and 10 of the ICCPR, an important consideration will be “whether men and women are separated in prisons and whether women are guarded only by female guards.”<sup>725</sup> It has also specified that, “persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.”<sup>726</sup>

International law and standards on ill-treatment, the right to health, and non-discrimination, require that migrants in detention be ensured appropriate and adequate access to healthcare, goods and services (see, Section 2.c, above). These standards require that women detainees have access to the healthcare and hygiene facilities they may need as women, including sexual and reproductive healthcare, goods and services. In addition they require that treatment be provided to detained women in an acceptable and appropriate manner. For example, the European Committee for the Prevention of Torture considers that shackling and restraining pregnant women during delivery or examination amounts to inhuman and degrading treatment,<sup>727</sup> and the European Court of Human Rights has held that it was inhuman and degrading

722. *UN Rules for the Protection of Juveniles Deprived of their Liberty*, Rule 38.

723. *Ibid.*, Rule 39.

724. Rules 8 and 53, *Standard Rules for the Treatment of Prisoners*; Principles XIX, XX, XXI, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*; Rule 19, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*.

725. CCPR, *General Comment No. 28*, *op. cit.*, fn. 22, para. 15 (Article 3).

726. *General Comment No. 16*, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, CCPR, UN Doc. UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 8 April 1988, para. 8.

727. *CPT Standards*, *op. cit.*, fn. 585, Extract from the 10th General Report [CPT/Inf (2000) 13], page 81, para. 27.

to require a woman detainee to undergo a gynaecological examination whilst handcuffed and in the presence of male staff.<sup>728</sup>

These international legal requirements apply to all female detainees, including women migrants. In addition, certain bodies have explicitly addressed the situation of women migrants in detention. For example, CEDAW has provided that: “States parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women in ill health have access to appropriate services.”<sup>729</sup>

The *UNHCR Guidelines* also emphasise that where women asylum-seekers are detained, they should be held separately from men, except where they are close family relatives. The guidelines recommend the use of female staff in detention facilities for women, and note the need for additional healthcare facilities, including gynaecological and obstetrical services.<sup>730</sup>

#### 4. Protection from ill-treatment, including violence in detention

Physical or sexual assaults, or excessive or inappropriate use of physical restraint techniques may violate rights, including the right to life and freedom from torture or cruel, inhuman or degrading treatment and rights to physical integrity. Where a person is unlawfully killed or subjected to cruel, inhuman or degrading treatment while in detention, there is a presumption that State agents are responsible, and the onus is on the State to provide a satisfactory and convincing explanation to the contrary.<sup>731</sup>

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation.<sup>732</sup> This arises as part of the general positive obligations on States to exercise due diligence and take reasonable measures to prevent, protect against and investigate acts of private persons in violation of these rights.<sup>733</sup> Obligations to protect

728. *Filiz Uyan v. Turkey*, ECtHR, Application No.7496/03, Judgment of 8 January 2009.

729. CEDAW, *General recommendation No. 26*, *op. cit.*, fn. 8, para. 26(j).

730. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 8.

731. *Anguelova v. Bulgaria*, ECtHR, Application No. 38361/97, Judgment of 13 June 2002, paras. 110-111; *Salman v. Turkey*, ECtHR, GC, Application No. 21986/93, Judgment of 27 June 2000, para. 100; *Demiray v. Turkey*, ECtHR, Application No. 27308/95, Judgment of 21 November 2000.

732. See, *Osman v. United Kingdom*, ECtHR, GC, Application No. 23452/94, Judgment of 28 October 1998; *Anguelova v. Bulgaria*, ECtHR, *op. cit.*, fn. 731; *Pueblo Bello Massacre v. Colombia*, IACtHR, Series C No. 140, Judgment of 31 January 2006, para. 123. On obligations to protect against inter-prisoner violence in detention: *Edwards v. United Kingdom*, ECtHR, Application No. 46477/99, Judgment of 14 March 2002.

733. CCPR, *General Comment No. 31*, *op. cit.*, fn. 46, para. 8; *Osman v. United Kingdom*, ECtHR, *op. cit.*, fn. 732; CAT, *General Comment No. 2*, *op. cit.*, fn. 31, para. 18; CEDAW, *General Recommendation No. 19*, *op. cit.*, fn. 136, para. 9; *Velasquez Rodriguez v. Honduras*, IACtHR, Series C No. 1, Judgment of 29 July 1988, para.172; *Pueblo Bello Massacre v. Colombia*, IACtHR, *op. cit.*, fn. 732, para. 120.



are heightened for persons held in detention, in respect of whom the State has a special duty of care.<sup>734</sup>

In situations where there is clear potential for gender or ethnic violence in detention, for example, appropriate preventive and security measures must be put in place. In *Rodic v. Bosnia-Herzegovina*, the ECtHR held that two Serb prisoners held in open, crowded conditions in an ethnic Bosnian dominated prison, and subjected to violence by fellow prisoners, without any adequate security measures being taken by the authorities, suffered mental anxiety as a result of the threat and anticipation of violence that amounted to a violation of Article 3 ECHR.<sup>735</sup> The Inter-American Court has also held that “the State has an obligation to guarantee the right to life and the right to humane treatment of the inmates interned in its penal institutions [and within it] a duty to create the conditions necessary to avoid, to the maximum extent possible, fighting among inmates”.<sup>736</sup>

In addition to protection from the acts of officials or fellow detainees, the State also has an obligation to take reasonable measures within its power to protect detained persons from acts of self-harm or suicide.<sup>737</sup>

Women in detention may face particular risks of sexual or gender-based violence, either from officials or from private actors. States are required to take measures to prevent and protect detainees from all sexual violence in detention, including by making it a criminal offence, and enforcing the criminal law. Certain forms of sexual violence in detention, such as rape, amount to torture.<sup>738</sup> The Inter-American Court of Human Rights has held that arbitrary vaginal searches of female detainees by State officials amount to rape and therefore to torture,<sup>739</sup> and that a situation where women detainees were held naked and guarded by armed men also amounted to sexual violence and violated the right to humane treatment in Article 5.2 ACHR.<sup>740</sup>

### **a) Violence or ill-treatment during deportation**

Forced expulsions, during which migrants remain in detention, may also involve the use of physical force or ill-treatment. As long as an individual being deported remains within the authority or control of agents of the State – for example while being escorted on an aircraft that has left the territory of the State – he or she

734. *Salman v. Turkey*, ECtHR, *op. cit.*, fn. 731.

735. *Rodic and Others v. Bosnia and Herzegovina*, ECtHR, Application No. 22893/05, Judgment of 27 May 2008, para. 73.

736. “*Juvenile Reeducation Institute*” v. *Paraguay*, IACtHR, *op. cit.*, fn. 688, paras. 184.

737. *Keenan v. United Kingdom*, ECtHR, *op. cit.*, fn. 704, paras. 92-101; *Barbato v. Uruguay*, CCPR, Communication No. 84/1981, Views of 21 October 1982, para. 9.2.

738. *Aydin v. Turkey*, ECtHR, *op. cit.*, fn. 388, paras. 83-86; *C. T. and K. M. v. Sweden*, CAT, *op. cit.*, fn. 322, para. 7.5.

739. *Miguel Castro-Castro Prison v. Peru*, IACtHR, Series C No. 160, Judgment of 25 November 2006, paras. 306-313.

740. *Ibid.*

remains within the jurisdiction of the State for the purposes of international human rights law (see, Chapter 1, Section I.2). Unjustifiable use of force or violence by State officials or private agents involved in a deportation, including excessive or inappropriate use of physical restraints, may violate the right to life, freedom from torture and other cruel, inhuman or degrading treatment, or rights to respect for physical integrity.<sup>741</sup> Since persons undergoing forced expulsion are deprived of their liberty, the heightened responsibility of the State to respect and protect the rights of those in detention applies. Standards of the European Committee for the Prevention of Torture on the deportation of foreign nationals by air<sup>742</sup> note the high risk of inhuman and degrading treatment involved in such deportations and provide guidelines to ensure that use of force during deportation is no more than reasonably necessary and that the risk involved in particular restraint techniques is adequately assessed and taken into account.<sup>743</sup>

## IV. Procedural protection

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### 1. Reasons for detention

A person detained for any reason, including for purposes of immigration control, has the right to be informed promptly of the reasons for detention. This right is protected by Article 5.2 ECHR, Article 9.2 ICCPR, Article 7 and 8 ACHR, and Article 14.3 ArCHR. Although Article 5.2 ECHR refers expressly only to the provision of reasons for “arrest”, the European Court of Human Rights has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty.<sup>744</sup> The Inter-American Court has held that information on the reasons for detention must be provided “when the detention takes place, [which] constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained.”<sup>745</sup>

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741. See, *Raninen v. Finland*, ECtHR, *op. cit.*, fn. 383, para. 56; *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgment of 12 March 2003, paras. 182-184, both finding that handcuffing during transportation of prisoners did not normally violate Article 3 where it did not entail the use of force or public exposure beyond what was reasonably necessary, including to prevent absconding.

742. *CPT Standards*, *op. cit.*, fn. 585, Deportation of foreign nationals by air, Extract from the 13th General Report [CPT/Inf (2003) 35], p. 66.

743. On the use of restraints, see also, *Standard Minimum Rules on the Treatment of Prisoners*, principles 33 and 34; *UN Rules for the Protection of Juveniles Deprived of their Liberty*, paras. 63-64.

744. *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, paras. 136-137. *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, paras. 413-414. The Court reasoned that since Article 5.4 and Article 5.2 are closely linked, with knowledge of the reasons for deprivation of liberty being essential to challenge that detention under Article 5.4, and since Article 5.4 makes no distinction between deprivation of liberty for the purposes of arrest or for other purposes, the right to reasons for detention applies in all cases of detention.

745. *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, fn. 580, para. 105; *Humberto Sánchez v. Honduras*, IACtHR, Series C No. 99, Judgment of 7 June 2003, para. 82.; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 116, 180.

The right to be informed of reasons for detention is also affirmed by international standards and guidelines relating to the detention of migrants and asylum seekers. The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides in Principle 11.2 that: “a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.” Principle 13 provides that at the commencement of detention, or promptly thereafter, a detained person should be provided with information on and an explanation of his or her rights and how to avail himself of such rights.<sup>746</sup>

The *UNHCR Guidelines on Detention of Asylum Seekers* and the *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* provide that, if detained, asylum-seekers are entitled to receive prompt and full communication of the legal and factual reasons of detention, including detention orders, and of their rights and available remedies, in a language and in terms that they understand.<sup>747</sup>

Information provided on the reasons for detention must be in simple, non-technical language that can be easily understood, and must include the essential legal and factual grounds for the detention – including the detention order – and information concerning the remedies available to the detainee. The information provided must be sufficiently comprehensive and precise to allow the detainee to challenge his or her detention judicially.<sup>748</sup> The principle that the information must be provided in a form that is accessible, may require, in the case of migrants, that it be translated.<sup>749</sup>

Reasons for detention must be provided promptly. Although whether information is conveyed sufficiently promptly will depend on the individual circumstances of each case, they should in general be provided within hours of detention.<sup>750</sup> The right to be provided with reasons for detention has been found to have been violated, for example, where reasons were provided only after 76 hours.<sup>751</sup> It is not essential

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746. See also, WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principles 1 and 8.

747. See, *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589; *Twenty Guidelines on Forced Return*, CMCE, *op. cit.*, fn. 480, Guideline 6; and, *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, Principle XI.5.

748. *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, paras. 136-137; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, paras. 413-414. See, *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, fn. 580, paras. 106-107; *Vélez Lóor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 116.

749. *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 14: a person who does not adequately speak the language used by the authorities, is entitled to receive this information in a language he understands.

750. *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, paras. 413- 416; *Fox, Campbell and Hartely v. United Kingdom*, ECtHR, Applications Nos. 12244/86; 12245/86; 12383/86, Judgment of 30 August 1990, para. 42; *Kerr v. United Kingdom*, ECtHR, Application No. 40451/98, Admissibility Decision, 7 December 1999.

751. *Saadi v. United Kingdom*, ECtHR, *op. cit.*, fn. 581, paras. 81-85.

however that the information be provided at the very moment in which someone is taken into detention.<sup>752</sup>

A “bare indication of the legal basis” for the detention is not sufficient. In addition, there must also be some indication of the factual basis for the detention.<sup>753</sup> The responsibility of the State to inform the detainee of the grounds for detention is not discharged where the detainee has managed to infer from the circumstances or various sources the basis for the detention. In such circumstances, there remains an obligation on the State to provide the information.<sup>754</sup>

For asylum seekers who are subject to accelerated asylum procedures, and who are detained pending expulsion in accordance with those procedures, the right to reasons for detention applies without qualification. At a regional European level, this right is affirmed in the *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures*, Guideline XI.5 of which states that “[d]etained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies.”

## 2. Safeguards following detention

### a) Right of access to a lawyer

Migrants brought into detention have the right to prompt access to a lawyer, and must be promptly informed of this right.<sup>755</sup> International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided.<sup>756</sup> Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be

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752. *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, paras. 413-416.

753. *Fox, Campbell and Hartley v. United Kingdom*, ECtHR, *op. cit.*, fn. 750, para. 41; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 116.

754. *Shamayev and others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, para. 425.

755. *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.” See also, Article 17.2(d), CPED; WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. 117, Guideline XI.5 and 6.

756. *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 132-133, 146. The IACtHR has held that the provision of legal assistance is an obligation inherent to Article 7.6 (right to *habeas corpus*) and Article 8 (due process), and that in cases involving detention free legal assistance is an “imperative interest of justice” (para. 146, our translation).

provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.<sup>757</sup>

Although Article 5 ECHR does not expressly provide for the right of detainees to have access to a lawyer, the European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate Article 5.4 ECHR where they prevent the detainee from effectively challenging the lawfulness of detention.<sup>758</sup> Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under Article 5.4.<sup>759</sup>

### **b) Right of access to medical attention**

On first entering into detention, there is also a right of prompt access to a doctor of one's choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.<sup>760</sup> Standards relating to adequacy of healthcare are discussed above in regard to conditions of detention.

### **c) Right to inform family members or others of detention**

The possibility to notify a family member, friend, or other person with a legitimate interest in the information, of the fact and place of detention, and of any subsequent transfer, is an essential safeguard against arbitrary detention, consistently protected by international standards.<sup>761</sup> Article 18.1 of the *International Convention for the Protection of All Persons from Enforced Disappearance* provides that any person with a legitimate interest, such as relatives of the person deprived of liberty, their repre-

757. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 5(ii): "Where possible, they should receive free legal assistance; [...]"; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.

758. *Öcalan v. Turkey*, ECtHR, *op. cit.*, fn. 741, para. 72, endorsed by the judgment of the Grand Chamber, *op. cit.*, fn. 47, para. 70.

759. *Istratii v. Moldova*, ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87-101.

760. *Algür v. Turkey*, ECtHR, Application No. 32574/96, Judgment of 22 October 2002, para. 44; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 220, 225, 227 (the right to medical assistance is derived by the right to physical, mental and moral integrity, to human dignity and not to be subject to torture or cruel, inhuman or degrading punishment or treatment of Articles 5.1 and 5.2 ACHR); Article 14.4 ArCHR; *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 24: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." See also, *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, Guideline XI.5.

761. Article 17.2(d) CPED; Article 10.2, *UN Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty*; CPT, *2nd General Report*, *op. cit.*, fn. 760, para. 36; WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantee 6; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principle 2.

representatives or their counsel, have the right of access to at least information on the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to detention; the authority responsible for supervising the detention; the whereabouts of the person, including, in the event of a transfer, the destination and the authority responsible for the transfer; the date, time and place of release; information relating to the state of health of the person; and in the event of their death during detention, the circumstances and cause of death and the destination of the remains.

This right is of general application and applies, therefore, also to detention of migrants and asylum-seekers. The *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* also affirm the importance of this right in the immigration detention context.<sup>762</sup>

#### **d) Right of access to UNHCR**

Persons seeking asylum have the right, following detention, “to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.”<sup>763</sup> They should be informed of this right promptly following detention, as it is established by the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.<sup>764</sup> The *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* also affirm that this right must be applied in accelerated asylum procedures.<sup>765</sup>

#### **e) Right to consular access**

Article 36 of the *Vienna Convention on Consular Relations* of 1963 (VCCA) provides for the right of non-nationals to consular access while held in any form of detention. It protects:

- the right to communicate freely and have access to consular officers;<sup>766</sup>
- the right of a detainee to have the fact of his or her detention or arrest communicated to the consular officers, if he or she so requests;
- the right to have their communication forwarded to them without delay;

762. *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. 117, Principle XI.5.

763. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 5(v). See, WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, Guarantee 14; WGAD, *Annual Report 1999 op. cit.*, fn. 598, Principle 10, which include also the International Committee of the Red Cross and specialized NGOs.

764. *Body of Principles for the Protection of all Persons Deprived of their Liberty*, Principle 16.2.

765. *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 117, Principle XIV.

766. See this rights also in WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, para. 69, Guarantee 6; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principle 2.

- the right to be informed of his or her rights of communication with consular officers without delay;<sup>767</sup>
- the right to refuse action or assistance by consular officers.<sup>768</sup>

The International Court of Justice has held that, despite the fact that the Convention deals with obligations between States, the right to consular access is a right of the individual.<sup>769</sup> The Court has ruled that “the duty upon the detaining authority to give [...] information to the individual [on the right to contact and communicate with the consular authority] arises once it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”<sup>770</sup> It has recently reiterated that “[i]t is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect [...]. Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights “without delay”.”<sup>771</sup> However, the ICJ has held that the requirement to provide information without delay “cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36”.<sup>772</sup>

In international human rights law the right to consular access is reflected in Articles 16.7 and 23 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. This right applies regardless of the regular or irregular status of the migrant. The *International Convention for the Protection of All Persons from Enforced Disappearance* provides for the right to consular access in Article 17.2(d). In non-treaty sources, it is affirmed in Article 38 of the *Standard Minimum Rules of the Treatment of Prisoners*,<sup>773</sup> Article 16.2 of the *Body of Principles for the Protection of All Persons under Any Form of Detention*

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767. Article 36.1(b), *Vienna Convention on Consular Relations* (VCCR) (contains all the last three rights).

768. Article 36.1(c) VCCR.

769. *LeGrand (Germany v. United States of America)*, ICJ, Judgment, 27 June 2001, ICJ Reports 2001, p. 466, p. 494, para. 77.

770. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ, Judgment, 31 March 2004, ICJ Reports 2004, p. 12, p. 43, para. 63, and p. 49, para. 88.

771. *Diallo (Republic of Guinea v. Democratic Republic of Congo)*, ICJ, Judgment, 30 November 2010, para. 95.

772. *Avena and Other Mexican Nationals*, ICJ *op. cit.*, fn. 770, p. 43, para. 63, and p. 49, para. 87.

773. *Standard Minimum Rules of the Treatment of Prisoners*.

or Imprisonment,<sup>774</sup> and Article 10 of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*.<sup>775</sup>

In the Inter-American system, the Inter-American Court of Human Rights has directly interpreted the provisions of Article 36 of the *Vienna Convention on Consular Assistance*. The Court recognised, as did the ICJ, the individual nature of the right to consular access under the VCCA.<sup>776</sup> It found that, under this right, it is “imperative that the State advises the detainee of his rights if he is an alien, just as it advises him of the other rights accorded to every person deprived of his freedom”.<sup>777</sup> Unlike for the ICJ, “notification must be made at the time the [non-national] is deprived of his freedom, or at least before he makes his first statement before the authorities”.<sup>778</sup> Furthermore, the Court has held that the right to consular access “must be recognised and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defence and receive a fair trial”.<sup>779</sup> A violation of this right has been interpreted to entail a violation of Article 7.4 (*habeas corpus*) and Article 8 ACHR (right to a fair trial)<sup>780</sup> and Articles XVIII and XXVI ADRDM.<sup>781</sup>

At a European level, there is no legally binding right to consular access, but the right is enshrined in Article 44 of the *European Prison Rules*<sup>782</sup> and in the standards of the European Committee for the Prevention of Torture.<sup>783</sup>

### 3. Judicial review of detention

The right to challenge the lawfulness of detention judicially, protected by Article 9.4 ICCPR, Article 5.4 ECHR, Article 7.6 ACHR and Article 14.6 ArCHR,<sup>784</sup> is a fundamental

774. *Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment*.

775. *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, adopted by General Assembly resolution 40/144 of 13 December 1985, A/RES/40/144.

776. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR, Advisory Opinion OC-16/99, 1 October 1999, para. 84.

777. *Ibid.*, para. 96.

778. *Ibid.*, para. 106.

779. *Ibid.*, para. 122.

780. *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 151-160.

781. *Moreno Ramos v. United States*, IACHR, Case 12.430, Report No. 1/05, Merits, 28 January 2005, para. 59; *Martínez Villareal v. United States*, IACHR, Case 11.753, Report No. 52/02, Merits, 10 October 2002, paras. 63-77.

782. *Recommendation R(87)3 of the Committee of Ministers to member states on the European Prison Rules*, adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies.

783. *CPT Standards*, *op. cit.*, fn. 585, Extract from the 19th General Report [CPT/Inf (2009) 27], page 61, para. 83.

784. See also Article 37(d) CRC: “Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”; and Article 17.2(f) CPED. See, WGAD, *Annual Report 1998*, *op. cit.*, fn. 598, Guarantees 3 and 4; WGAD, *Annual Report 1999*, *op. cit.*, fn. 598, Principle 3; WGAD, *Annual Report 2003*, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 86; WGAD, *Annual Report 2008*, *op. cit.*, fn. 580, paras.



protection against arbitrary detention, as well as against torture or ill-treatment in detention.<sup>785</sup> This right is of vital importance to detained migrants, in particular where no clear individualised grounds for detention have been disclosed to the detainee or to his or her lawyer. Since the right to judicial review of detention must be real and effective rather than merely formal, its consequence is that systems of mandatory detention of migrants or classes of migrants are necessarily incompatible with international human rights standards.<sup>786</sup>

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, whether lawful or unlawful, and requires that they should have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative should have the opportunity to be heard before the court.<sup>787</sup> The right requires that there be prompt access to court when a person is first detained, but also that thereafter there are regular judicial reviews of the lawfulness of the detention.<sup>788</sup> Particular public interest concerns, such as national security, are not grounds to restrict the right to judicial review of detention, in the absence of derogation.<sup>789</sup> The Inter-American Court of Human Rights has stated that “writs of *habeas corpus* and of “*amparo*” are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27.2 and that serve, moreover, to preserve legality in a democratic society.”<sup>790</sup>

The right to review of the lawfulness of the detention is designed to protect against arbitrariness: it is therefore a right to review not only of the detention’s compliance with national law, but also of its compliance with principles of human rights law, including freedom from arbitrary detention.<sup>791</sup> As the European Court of Human Rights recognised in *Kurt v. Turkey*, “[w]hat is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place

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67 and 82. The African Commission on Human and Peoples’ Rights has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR): *IHRDA and others v. Republic of Angola*, ACommHPR, *op. cit.*, fn. 380, paras. 58-60; *RADDH v. Zambia*, ACommHPR, *op. cit.*, fn. 502, para. 30.

785. *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, fn. 580, para. 115; *Neira Alegría et al. v. Perú*, IACtHR, Series C No. 20, Judgment of 19 January 1995, para. 82; *La Cantuta v. Peru*, IACtHR, Series C No. 162, Judgment of 29 November 2006, para. 111; *Serrano Cruz Sisters v. El Salvador*, IACtHR, Series C No. 120, Judgment of 1 March 2005, para. 79. See also, *Habeas corpus in emergency situations*, IACtHR, *op. cit.*, fn. 523, para. 35.

786. Article 9.4 ICCPR. Nowak states that: “Mandatory detention systems seem to be incompatible with the right to habeas corpus”, referring to Australian cases: Nowak, *CCPR Commentary*, *op. cit.*, fn. 670, page 236.

787. *Al-Nashif v. Bulgaria*, ECtHR, *op. cit.*, fn. 453, para. 92; *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, Plenary, Applications Nos. 2832/66; 2835/66; 2899/66, Judgment of 18 June 1971, para. 73; *Winterwerp v. the Netherlands*, ECtHR, Application No. 6301/73, Judgment of 24 October 1979; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 124.

788. See, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 107-109.

789. *Al-Nashif v. Bulgaria*, ECtHR, *op. cit.*, fn. 453, para.94.

790. *Habeas corpus in emergency situations*, IACtHR, *op. cit.*, fn. 523, para. 42.

791. *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 202.

detainees beyond the reach of the most rudimentary forms of legal protection.”<sup>792</sup> Judicial review of detention must provide a practical, effective and accessible means of challenging detention. The principle of accessibility implies that the State must ensure that the detainee has a realistic possibility of using the remedy, in practice as well as in theory.<sup>793</sup> This may require provision of information, legal assistance or translation.

It should be noted that these international human rights standards refer only to remedies that must be made available during detention. They do not address the need for remedies to review the lawfulness of a detention which has already ended.<sup>794</sup> In the latter case, it is the right to an effective remedy which will be relevant.

The right to judicial review of detention protected by international human rights law is also reflected in international refugee law. UNHCR guidelines require both automatic review of detention and regular automatic periodic reviews thereafter, and a right to challenge detention.<sup>795</sup>

### a) Requirements of effective judicial review of detention

For a judicial review to meet international human rights law, it must fulfil a number of requirements.

- **The review must be clearly prescribed by law.** Both the law permitting detention, and the procedure for its review must be sufficiently certain, in theory and in practice, to allow a court to exercise effective judicial review of the permissibility of the detention under national law, and to ensure that the review process is accessible.<sup>796</sup> In addition to establishing when detention is permissible, the law must prescribe a specific legal process for review of the legality of detention, separate from the legal process leading to a decision to deport. In the absence of such a separate procedure, there will be no means of redress for an initially legitimate detention that becomes

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792. *Kurt v. Turkey*, ECtHR, *op. cit.*, fn. 664, para.123.

793. *Nasrulloev v. Russia*, ECtHR, *op. cit.*, fn. 605, para. 86. The need for accessibility is emphasised in the Council of Europe Guidelines on Human Rights Protection in the context of accelerated asylum procedures which state in Principle XI.6 that “detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance.” See also, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 129.

794. *Slivenko v. Latvia*, ECtHR, *op. cit.*, fn. 427, paras. 158-159.

795. *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 589, Guideline 5: “(iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend; (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain”.

796. *Z.N.S. v. Turkey*, ECtHR, *op. cit.*, fn. 692, para. 60; *S.D. v. Greece*, ECtHR, *op. cit.*, fn. 690, para.73.

illegitimate, for example where a deportation is initially being pursued but is later suspended.<sup>797</sup>

- **The review must be by an independent and impartial judicial body.** This reflects the general standard of the right to a fair hearing, which is given more specific expression in guarantees relating to judicial review of detention.<sup>798</sup>
- **The review must be of sufficient scope and have sufficient powers to be effective.** The scope of the judicial review required will differ according to the circumstances of the case and to the kind of deprivation of liberty involved.<sup>799</sup> The European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention.<sup>800</sup> The review must be by a body which is more than merely advisory, and which has power to issue legally binding judgments capable of leading, where appropriate, to release.<sup>801</sup> The Human Rights Committee has repeatedly emphasised that judicial review requires real and not merely formal review of the grounds and circumstances of detention, and judicial discretion to order release. In *A v. Australia*,<sup>802</sup> it found that allowing the court to order release of detainees only if they did not fall within a particular category of people was insufficient to provide an effective judicial review of detention. It emphasised that “[c]ourt review of the lawfulness of detention [...] must include the possibility of ordering release [and must be], in its effects, real and not merely formal.”<sup>803</sup> The Inter-American Court has held that the remedy of *habeas corpus* “is not exercised with the mere formal existence of the remedies it governs. Those remedies must be effective, since their purpose [...] is to obtain without delay a decision “on the lawfulness of [the]

797. *Ibid.*, para. 60.

798. See, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, para. 108.

799. *Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 29 February 1988.

800. *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 202; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 43, paras. 127-130.

801. *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 43, para. 128.

802. *A v. Australia*, CCPR, *op. cit.*, fn. 610.

803. *C. v. Australia*, CCPR, *op. cit.*, fn. 344, para. 8.3, finding a violation of Article 9.4 where “the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a “non-citizen” without an entry permit. There was no discretion for a court [...] to review the author’s detention in substantive terms for this continued justification.” See also, *Danyal Shafiq v. Australia*, CCPR, *op. cit.*, fn. 637: “court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere formal compliance of the detention with domestic law governing the detention”; *Bakhtiyari v. Australia*, CCPR, *op. cit.*, fn. 635: “As to the claim under article 9, paragraph 4, [...] the court review available to Mrs Bakhtiyari would be confined purely to a formal assessment of whether she was a “non-citizen” without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.” To the same effect see, *Rafale Ferrer-Mazorra et al v. United States*, IACHR, *op. cit.*, fn. 380, para. 235.

*arrest or detention,*” and, should they be unlawful, to obtain, also without delay, an “*order [for] [...] release*”.<sup>804</sup>

- **The review must meet standards of due process.** Although it is not always necessary that the review be attended by the same guarantees as those required for criminal or civil litigation,<sup>805</sup> it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.<sup>806</sup> Thus, proceedings must be adversarial and must always ensure “equality of arms” between the parties. Legal assistance must be provided to the extent necessary for an effective application for release.<sup>807</sup> Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures.<sup>808</sup>
- **The review must be prompt.** What is a reasonable time for judicial review of detention to take place will depend on the circumstances. The Human Rights Committee found in *Mansour Ahani v. Canada* that a delay of nine and a half months to determine lawfulness of detention subject to a security certificate violated Article 9.4 ICCPR.<sup>809</sup> However, in the same case a delay of 120 days before a later detention pending deportation could be challenged was permissible. In *ZNS v. Turkey*,<sup>810</sup> the European Court of Human Rights held that, where it took two months and ten days for the courts to review detention, in a case that was not complex, the right to speedy review of detention was violated. In *Embenyeli v. Russia*,<sup>811</sup> where it took five months to process a review of detention, there had also been a violation of Article 5.4 ECHR.

## b) Effective judicial review in national security cases

Special procedures for judicial review of detention in cases involving national security or counter-terrorism concerns raise particular issues in regard to Article 9.4 ICCPR and equivalent protections, where they rely on the use of “closed” evidence not available to the detainee or his or her representatives. Detention on the basis

804. *Suárez-Rosero v. Ecuador*, IACtHR, Series C No. 35, Judgment of 12 November 1997, para. 63; *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 142-143.

805. *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 203.

806. *Bouamar v. Belgium*, ECtHR, *op. cit.*, fn. 799, para. 60. See, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 502, paras. 107-109.

807. *Ibid.*, paras. 60-63; *Winterwerp v. Netherlands*, ECtHR, *op. cit.*, fn. 787, para. 60: “essential that the person concerned has access to a court and the opportunity to be heard in person or through a legal representative”; *Lebedev v. Russia*, ECtHR, Application No. 4493/04, Judgment of 25 October 2007, paras. 84-89.

808. *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, *op. cit.*, fn. 787, para. 79; *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, fn. 641, para. 217: “in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants’ fundamental rights, Article 5 para. 4 must import substantially the same fair trial guarantees as Article 6 para. 1 in its criminal aspect”.

809. *Ahani v. Canada*, CCPR, *op. cit.*, fn. 473.

810. *Z.N.S. v. Turkey*, ECtHR, *op. cit.*, fn. 692, paras. 61-62.

811. *Eminbeyli v. Russia*, ECtHR, *op. cit.*, fn. 615, para. 10.5.

of national security certificates in Canada, as well as counter-terrorism administrative detentions in the UK, illustrate these difficulties. In *A. and Others v. United Kingdom*, the European Court of Human Rights found that the system of review of administrative detention of persons subject to immigration control and suspected of terrorism, which relied on special advocates to scrutinise closed evidence and represent the interests of the detainee in regard to the allegations it raised, without the detainee being aware of them, did not provide sufficient fair procedures to satisfy Article 5.4 ECHR. The Court held that the detainee had to be provided with sufficient information to enable him to give instructions to the special advocate. Where the open material consisted only of general assertions, and the decision on detention was based mainly on the closed material, Article 5.4 would be violated. In *Mansour Ahani v. Canada*,<sup>812</sup> the Human Rights Committee held that a hearing on a security certificate which formed the basis for the detention of a non-national pending deportation was sufficient to comply with due process under Article 14 ICCPR. The Committee based its decision on the fact that the non-national had been provided by the Court with a redacted summary of the allegations against him, and that the Court had sought to ensure that despite the national security constraints in the case, the detainee could respond to the case against him, make his own case and cross-examine witnesses.

#### 4. Reparation for unlawful detention

The UN *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.<sup>813</sup>

In accordance with this general principle, persons who are found by domestic or international courts or other appropriate authorities to have been wrongly detained have a right to reparation, in particular compensation, for their wrongful detention (Article 5.5 ECHR; Article 9.5 ICCPR, Article 14.7 ArCHR). Under the ICCPR this right arises whenever there is “unlawful” detention, i.e. detention which is either in violation of domestic law, or in violation of the Covenant. Under the ECHR, it arises only where there is detention in contravention of the Convention itself (although in practice this will include cases where the detention did not have an adequate basis in domestic law).<sup>814</sup> The award of compensation must be legally binding and enforceable.<sup>815</sup> *ex gratia* payments will not be sufficient.

812. *Ahani v. Canada*, CCPR, *op. cit.*, fn. 473, para. 10.5.

813. Articles 2 and 3 of the UN *Basic Principles and Guidelines on the right to a remedy and reparation*.

814. Nowak, *CCPR Commentary*, *op. cit.*, fn. 670, pp.180-182.

815. *Brogan and Others v. United Kingdom*, ECtHR, Plenary, Applications Nos. 1209/84; 11234/84; 11266/84; 11386/85, Judgment of 29 November 1988, para. 67.