# LEGAL COMMENTARY TO THE ICJ BERLIN DECLARATION

## COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW

HUMAN RIGHTS AND RULE OF LAW SERIES: No. 1

INTERNATIONAL COMMISSION OF JURISTS

Terrorism is a serious threat to human rights. Yet global counter-terrorism measures have stretched to the limit, and broken, the most basic principles of the rule of law and international law, especially international human rights law and international humanitarian law. In the name of national security and the fight against terrorism, many governments try to justify the use of torture, enforced disappearance, secret detentions, extrajudicial executions and indiscriminate killing of civilians.

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In August 2004 the ICJ brought its network of jurists from around the world to Berlin, for the 2004 Biennial Conference. The meeting concluded with the 160 jurists adopting the ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration). The 11 succinct principles of the Berlin Declaration set out the legal norms that should guide the counter-terrorism measures of every State. This Legal Commentary to the Berlin Declaration, explains the international law, jurisprudence and expert interpretations that underlie the Berlin Declaration. It explains what the principles mean in practice and what international legal standards apply.

*"The Berlin Declaration should be displayed in every judges' chambers and law office worldwide".*

—Mary Robinson, Former President of Ireland

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**International Commission of Jurists**

The International Commission of Jurists (ICJ) is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has 85 national sections and affiliated organizations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the Organization of African Unity. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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## Counter-terrorism, Human Rights and the Rule of Law

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# Legal Commentary to the ICJ Berlin Declaration

## Counter-terrorism, Human Rights and the Rule of Law

INTERNATIONAL
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The Legal Commentary to the Berlin Declaration was researched and written by Federico Andreu-Guzmán, Veronika Bilkova, Claire Callejon, Cordula Droege, Hassiba Hadj-Sahraoui, Ian Seiderman, Gerald Staberock and José Zeitune. Federico Andreu-Guzmán provided legal review and Priyamvada Yarnell assisted in its production.

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## Introduction

Since the 11 September 2001 attacks in the United States of America ("9/11"), combating terrorism has become a priority for many countries and a dominant subject in most intergovernmental organizations. The pace of change has been breathtaking, with many new measures and decisions taken at both the national and international levels, touching all regions of the world. Long-standing laws that pre-date 9/11 have been given new life. Rarely has the international community been mobilized around one subject on such a scale and with such urgency.

Terrorism is a serious threat to human rights. The ICJ condemns terrorism and reaffirms that all States have an obligation to take effective measures against acts of terrorism. However, from long experience, the ICJ sees no conflict between the international legal duty of States to protect people threatened by terrorism and their responsibility to uphold the rule of law and human rights. On the contrary, both duties form part of a seamless web of protection incumbent upon States. Human rights law has been crafted by States and already give governments a reasonable margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.

### Counter-terrorism, the rule of law and international law

Yet global counter-terrorism measures have stretched to the limit, and broken, the most basic principles and norms of the rule of law and international law, especially international human rights law and international humanitarian law. In the name of national security and the fight against terrorism, many governments try to justify the use of torture, enforced disappearance, secret detentions, extrajudicial executions and indiscriminate killing of civilians.

While some countries face a very real and serious terrorist threat, their response has sometimes unacceptably violated human rights and undermined international law. Other countries do not face a significant threat, but rather use the anti-terrorist fight as a pretext to adopt measures aimed at restricting liberties and muzzling political and social opposition. Some governments have exploited the post-9/11 climate to justify long-standing human rights violations carried out in the name of national security.

Terrorism creates victims. Counter-terrorism is creating new victims. The world has seen people suspected of terrorist offences removed beyond the protective reach of the courts, held without judicial review, without *habeas corpus*. Incommunicado detention is now more widespread and in more countries can government ministers put terror suspects in administrative detention for long periods without charge or trial. Many detainees have been summarily taken or expelled, without due process, in violation of usual extradition procedures, to a country where they can be tortured with impunity. We have seen basic fair trial guarantees ignored, rights of defence cut down and rights of appeal removed. Indeed, in the name of defending

democracy, the separation of powers, a fundamental foundation of a democracy, is being undermined, as is freedom of information and the media. Civilian justice is being militarised: civilians are tried by military tribunals, special courts or *ad hoc* or military commissions.

The discourse surrounding the "global war on terror" or "war against terrorism" characterises this struggle as a new kind of war: one that requires essentially a military response against the global terrorist network and which seeks to escape the application of both international humanitarian law and international human rights law applicable in an armed conflict. But these new paradigms often bypass two basic and foundational elements of modern societies: the rule of law must be the first defence against arbitrary power and the political legitimacy of the fight against criminality – including terrorism – should flow from respect for the rule of law and human rights.

The odious and particularly serious nature of certain terrorist acts cannot be used as a pretext by States to sacrifice fundamental freedoms and rights in the name of eradicating terrorism. As has been emphasised by the United Nations High Commissioner for Human Rights:

> *"An effective international strategy to counter terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures."*[1]

## The ICJ Berlin Declaration and Legal Commentary

In August 2004 the ICJ brought its network of jurists from around the world – Commissioners, Honorary Members, National Sections and Affiliates – to Berlin, Germany, for the 2004 Biennial Conference. Over three days they explored and debated how terrorism could be fought within the rule of law and international law. On 29 August 2004 the 160 jurists adopted the *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration)*. The 11 succinct principles of the *Berlin Declaration* set out the legal norms that should guide the counter-terrorism measures of every State. The Berlin Declaration reflects existing international human rights law, criminal law, humanitarian law and refugee law.

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1 Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, *Human rights: a uniting framework*, UN document E/CN.4/2002/18, 27 February 2002, paragraph 5.

Since its adoption, the *Berlin Declaration* has been frequently cited by intergovernmental bodies – including United Nations human rights experts, the High Commissioner for Human Rights and his/her offices, the European Parliament – as well as bar associations, lawyers, human rights NGOs, legal academic centres and national tribunals around the world.

The ICJ has now prepared this Legal Commentary to the *Berlin Declaration*, with the aim of explaining the international law, jurisprudence and expert interpretations that underlie the *Berlin Declaration*. The Commentary explores legal controversies that have been raised before and since 9/11. It explains what the principles mean in practice and what international legal standards apply. The purpose of this Commentary is to help policy-makers, judges, lawyers and human rights defenders when they are considering or challenging counter-terrorism legislation, policies or practice.

## Leading role of judges and lawyers

Policy-makers dismiss general statements of human rights principle as unrealistic in the face of today's perceived threats. Some countries have exploited a sense of fear and insecurity to reject the usual scrutiny by legislatures and the courts. The public in many countries seem ready to accept greater restrictions on rights – principally the rights of others.

The ICJ considers that the judicial and legal communities and human rights defenders play a leading role globally in articulating how the rule of law and international human rights standards can and must be respected in addressing terrorist acts. This Legal Commentary seeks to provide a tool to help jurists and human rights defenders to play this role, to advocate how counter-terrorism measures should respect the rule of law and international law.

Nicholas Howen
Secretary-General

# THE BERLIN DECLARATION

# The Berlin Declaration

## The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism

### 6th September 2004

*On 28 August 2004, 160 lawyers from around the world, meeting at the ICJ biennial conference in Berlin, adopted a Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism. The Declaration highlights the grave challenge to the rule of law brought about by excessive counter-terrorism measures, reaffirms the most fundamental human rights violated by those measures, and delineates methods of action for the worldwide ICJ network to address the challenge.*

### Adopted 28 August 2004

160 jurists, from all regions of the world, meeting as Commissioners, Honorary Members, National Sections and Affiliated Organisations at the International Commission of Jurists (ICJ) Biennial Conference of 27-29 August 2004, in Berlin, Germany, where it was founded 52 years ago, adopt the following Declaration:

The world faces a grave challenge to the rule of law and human rights. Previously well-established and accepted legal principles are being called into question in all regions of the world through ill-conceived responses to terrorism. Many of the achievements in the legal protection of human rights are under attack.

Terrorism poses a serious threat to human rights. The ICJ condemns terrorism and affirms that all States have an obligation to take effective measures against acts of terrorism. Under international law, States have the right and the duty to protect the security of all people.

Since September 2001 many States have adopted new counter-terrorism measures that are in breach of their international obligations. In some countries, the post-September 2001 climate of insecurity has been exploited to justify long-standing human rights violations carried out in the name of national security.

In adopting measures aimed at suppressing acts of terrorism, States must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for States to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of States to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State. Both contemporary human rights and humanitarian law allow States a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.

International and national efforts aimed at the realization of civil, cultural, economic, political and social rights of all persons without discrimination, and addressing political, economic and social exclusion, are themselves essential tools in preventing and eradicating terrorism.

Motivated by the same sense of purpose and urgency that accompanied its founding, and in the face of today's challenges, the ICJ rededicates itself to working to uphold the rule of law and human rights.

In view of recent grave developments, the ICJ affirms that in the suppression of terrorism, States must give full effect to the following principles:

1. **Duty to protect:** All States have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.

2. **Independent judiciary:** In the development and implementation of counter-terrorism measures, States have an obligation to guarantee the independence of the judiciary and its role in reviewing State conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.

3. **Principles of criminal law:** States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of legality *(nullum crimen sine lege)*. States may not apply criminal law retroactively. They may not criminalize the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, 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.

4. **Derogations:** States must not suspend rights which are non-derogable under treaty or customary law. States must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.

5. **Peremptory norms:** States must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Acts in contravention of this and other peremptory norms of international human rights law, including extrajudicial execution and enforced disappearance, can never be justified. Whenever such acts occur, they must be effectively investigated without delay and those responsible for their commission must be brought promptly to justice.

6. **Deprivation of liberty:** States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to *habeas corpus* or equivalent judicial procedures, at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.

7. **Fair trial:** States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military tribunals. Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings. Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.

8. **Fundamental rights and freedoms:** In the implementation of counter-terrorism measures, States must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to

self-determination, as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate.

9. **Remedy and reparation:** States must ensure that any person adversely affected by counter-terrorism measures of a State, or of a non-State actor whose conduct is supported or condoned by the State, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.

10. ***Non-refoulement:*** States may not expel, return, transfer or extradite a person suspected or convicted of acts of terrorism to a State where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial, or be subject to the death penalty.

11. **Complementarity of humanitarian law:** During times of armed conflict and situations of occupation States must apply and respect the rules and principles of both international humanitarian law and human rights law. These legal regimes are complementary and mutually reinforcing.

**Commitment to Act**

- The ICJ, including its Commissioners, Honorary Members, National Sections and Affiliated Organisations, consistent with their professional obligations, will work singly and collectively to monitor counter-terrorism measures and assess their compatibility with the rule of law and human rights.

- The ICJ will challenge excessive counter-terrorism legislation and measures at the national level through advocacy and litigation and will work towards the promotion of policy options fully consistent with international human rights law.

- The ICJ will work to ensure that counter-terrorism measures, programs and plans of action of global and regional organizations comply with existing international human rights obligations.

- The ICJ will advocate the establishment of monitoring mechanisms by relevant intergovernmental and national institutions to help ensure that domestic counter-terrorism measures comply with international norms and human rights obligations and the rule of law, as called for in the joint NGO Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-terrorism adopted at the ICJ Conference of 23-24 October 2003 in Geneva.

- The ICJ will invite and work with jurists and human rights organizations from around the world to join in these efforts.

- The judiciary and legal profession have a particularly heavy responsibility during times of crisis to ensure that rights are protected. The ICJ calls on all jurists to act to uphold the rule of law and human rights while countering terrorism:

    - Lawyers: Members of the legal profession and bar associations should express themselves publicly and employ their full professional capacities to prevent the adoption and implementation of unacceptable counter-terrorism measures. They should vigorously pursue domestic and, where available, international legal remedies to challenge counter-terrorism laws and practices in violation of international human rights standards. Lawyers have a mandate to defend persons suspected or accused of responsibility for terrorist acts.

    - Prosecutors: In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out above. They should refuse to use evidence obtained by methods involving a serious violation of a suspect's human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice. Prosecutors have a responsibility to tackle impunity by prosecuting persons responsible for serious human rights violations committed while countering terrorism and to seek remedy and reparation for victims of such violations.

    - The Judiciary: The judiciary is the protector of fundamental rights and freedoms and the rule of law and the guarantor of human rights in the fight against terrorism. In trying those accused of acts of terrorism, judges should ensure the proper administration of justice in conformity with international standards of independence, due process and fair trial. Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards, including through judicial consideration of the constitutionality and legality of such norms and acts. In the development of jurisprudence, judges should wherever possible apply international standards relating to the administration of justice and human rights. Judges should ensure that judicial procedures aimed at human rights protection, such as *habeas corpus*, are implemented.

# THE LEGAL COMMENTARY

# Principle 1 – Duty to protect

*All States have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.*

# Commentary

## 1. Unlawful State practices

States frequently argue that international human rights and humanitarian law are not applicable in the so-called "war against terrorism". They try to create a vague and ill-defined framework in which individuals become non-persons, outside of the protection of international law. In the case of overseas counter-terrorism operations, States frequently argue that they do not have a duty to respect their obligations under international human rights treaties because such operations are extraterritorial in nature. In other cases, States hold foreigners, sometimes for up to several months, in the transit area of national airports – so-called "international zones" – without rights or judicial protection. In the current post "9/11" climate, counter-terrorism measures have frequently affected, or been targeted at, migrants, refugees, asylum-seekers, political and social dissidents, members of religious or other minorities, or simply people living on the margins of society. In some States, racial or national profiling is an integral part of such measures. Some countries have also resorted to kidnapping or enforced disappearance to remove alleged "terrorists" from territory belonging to other States. Similarly, some States have resorted to what could be called "torture by delegation", by despatching people to other countries where they are tortured to extract information from them that is then passed back to the State that sent them there for use in proceedings of various kinds.

## 2. International legal framework

### i) The State's duty to guarantee rights

Under international human rights law, individuals have rights and at the same time States have corresponding obligations. The obligations of States seek to protect the fundamental rights of individuals against transgressions by the State. The purpose of human rights treaties is to guarantee the enjoyment of those rights and freedoms

by individual human beings, rather than to establish reciprocal relations between States.[2]

Broadly speaking, international human rights law places two types of obligations on the State: firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations is both negative and positive in nature: on the one hand the State must refrain (whether by act or omission) from violating human rights; and on the other hand, the State must ensure that, through the adoption of whatever measures may be necessary, such rights can be actively enjoyed. Thus the Human Rights Committee has stressed that "States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the [International] Covenant [on Civil and Political Rights] [...,] Article 2 [which] requires that States parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations".[3]

The second obligation concerns the State's duty to prevent violations, investigate them, bring to justice and punish perpetrators and provide reparation for any damage caused.[4] The State is legally bound to refrain from violating the rights of the individual, to ensure that, by adopting the necessary measures, such rights can be actively enjoyed, and to safeguard those same rights. The State is therefore placed in the legal position of being the guarantor of human rights and, as such, has a fundamental obligation to protect and safeguard those rights. Consequently, the State is the guarantor that individuals will be able to fully enjoy those rights and, as such, must comply with its international obligations, whether they be treaty-based or customary.

This duty to guarantee rights is founded on both international customary law and international treaty law.[5] It consists of five basic obligations which the State must

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2 See, among others, the European Commission on Human Rights, "*Decision on the Admissibility of Application N° 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy*", *Yearbook of the European Convention on Human Rights*, vol. 4, p.140, and the Inter-American Court of Human Rights, Advisory Opinion OC-1/82, 24 September 1982, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*, para. 24.

3 Human Rights Committee, General Comment N° 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, paras. 6 and 7.

4 See, among others, the Human Rights Committee, General Comment N° 31; Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velázquez Rodríguez Case*, paras. 166 and 174; Inter-American Commission on Human Rights, Report N° 1/96 of 1 March 1996, Case 10,559, *Chumbivilcas v. Peru*; African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication N° 155/96 (2001); and the UN Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, UN document A/46/876 S/23580, para. 28.

5 See, among others, the *International Covenant on Civil and Political Rights* (Article 2), the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (Article 6), the *Convention on the Elimination of All Forms of Discrimination against Women* (Article 2(c)), the *International Convention for the Protection of All Persons from Enforced Disappearance,* the *Declaration on the Protection of All Persons from Enforced*

honour: the obligation to investigate, the obligation to bring to justice and punish those responsible, the obligation to provide an effective remedy for the victims of human rights violations, the obligation to provide fair and adequate compensation to the victims and their relatives, and the obligation to establish the truth about what happened. The obligations which go to make up the duty of guarantee are complementary. They are not alternative and they cannot be substituted for one another.[6]

### ii) The extraterritorial applicability of human rights law

There is today ample authority at the universal and regional level that human rights treaties apply wherever a State "exercises jurisdiction". The test is whether a State "exercises effective (not necessarily sovereign) control over a territory". Human rights treaties can therefore also apply extraterritorially. The International Court of Justice has taken the view that the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* apply when a State acts in the exercise of its jurisdiction outside its own territory.[7]

As far as the ICCPR is concerned, it would not be compatible with its object and purpose to exclude the rights set out in this treaty from applying where the State Party exercises effective control over a territory or exercises jurisdiction over people outside its territory. Indeed, the Human Rights Committee has consistently applied the ICCPR to acts carried out outside national territory.[8] Extraterritorial application of the ICCPR must also extend to all individuals who are subject to State jurisdiction when troops from that State are operating abroad, particularly in the context

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*Disappearance*, the UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, the *American Convention on Human Rights* (Article 1.1), the *Inter-American Convention on Forced Disappearance of Persons* (Article 1), the *Inter-American Convention to Prevent and Punish Torture* (Article 1), the *African Charter on Human and Peoples' Rights* (Article 1), the *Arab Charter on Human Rights* (Article 3) and *the European Convention on Human Rights* (Article 1).

6 See, among others, the Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1994/7, paras. 688 and 711; Inter-American Commission on Human Rights (Report N° 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992, para. 52; Report N° 36/96, Case 10,843 (Chile), 15 October 1996, para. 77; Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, para. 76; Report N° 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, para. 50); and Inter-American Court of Human Rights, Judgment of 27 August 1998, *Garrido and Baigorria Case (Reparations),* para. 72.

7 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, paras. 111, 112 and 113.

8 Views of 29 July 1981, *López Burgos v. Uruguay,* Communication N° 52/1979, *CCPR/C/13/D/52/1979*; Views on Case N° 56/79, *Lilian Celiberti de Casariego v. Uruguay;* Views on Case N° 106/81, *Montero v. Uruguay;* and the *Concluding Observations of the Human Rights Committee on: United States of America* (CCPR/C/79/Add.50, A/50/40, 3 November 1995, paras. 266-304, and CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10) and *Israel* (CCPR/CO/78/ISR, 21 August 2003, para. 11, and CCPR/C/79/Add.93, 18 August 1998, para. 10).

of peacekeeping, peace-restoration missions, NATO military missions or belligerent occupation.[9]

States have an international obligation to ensure and guarantee all rights protected by the ICCPR for any person under their jurisdiction or control, *de jure* or *de facto*, including outside their territory. Indeed the Human Rights Committee has stated that:

> *"States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […] [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation".*[10]

As far as extraterritorial application of the *International Covenant on Economic, Social and Cultural Rights* is concerned, the Committee on Economic, Social and Cultural Rights has adopted an identical interpretation.[11]

The Committee against Torture has similarly reiterated that the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* applies extraterritorially. It stated that "the Convention protections extend to all territories under the jurisdiction of a State party and […] this principle includes all areas under the *de facto* effective control of the State party's authorities".[12]

The extraterritorial applicability of human rights law is further underscored by jurisprudence from regional human rights systems. The Inter-American Commission on Human Rights has taken the view that the *American Declaration of the Rights and Duties of Man* applies to the acts of foreign forces, for example, during the

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9 See, among others, the *Concluding Observations of the Human Rights Committee on Poland* (CCPR/CO/82/POL, 2 December 2004, para. 3); *Belgium* (CCPR/CO/81/BEL, 12 August 2004, para. 6); *Germany* (CCPR/CO/80/DE, 4 May 2004, para. 11); and *Iraq* (CCPR A/46/40, 1991, para. 652, and CCPR/C/SR.1080-1082).

10 Human Rights Committee, General Comment N° 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

11 See the *Concluding Observations of the Committee on Economic, Social and Cultural Rights on Israel*, E/C.12/1/Add.90, 26 June 2003, para. 15, and E/C.12/1/Add.27, para. 11.

12 Committee against Torture, *Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories*, CAT/C/CR/33/3, 10 December 2004, para. 4(b).

occupation of Grenada[13] or, more recently, in the context of the detentions at Guantánamo Bay.[14]

Similarly, the European Court of Human Rights has stated that a State is responsible under the *European Convention on Human Rights* for acts committed outside its territory and, in particular, in cases of occupation.[15] According to jurisprudence of the European Court, a State has "jurisdiction" not only within its national territory but also as a consequence of military action – whether lawful or unlawful. A State has jurisdiction if it exercises effective control in an area outside its national territory, whether directly, through its armed forces, or through a subordinate local administration.[16] This responsibility extends to securing the entire range of substantive rights set out in the Conventions and Additional Protocols ratified by the State Party.[17] The European Court has reaffirmed the principle that extraterritorial application applies "[…] when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by the Government".[18]

### iii) The duty to protect people from acts of terrorism

Under international law, States have an undeniable duty to protect people from terrorist acts committed by non-State actors and to pursue, try and punish those responsible for terrorist acts because such acts impair the enjoyment of human rights.

Indeed, the Human Rights Committee has pointed out that, under Article 2 (1) of the ICCPR, States have a legal obligation "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[19] It is a long-established principle of international law that "[t]he State may become accountable […] also as a result of insufficient diligence in criminally prosecuting the offenders. […] It is generally recognized that the curbing

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13 Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case 10,951, Report N° 109/99, September 29, 1999, para. 37.

14 Inter-American Commission on Human Rights, *Request for precautionary measures in favour of detainees being held by the United States at Guantanamo Bay*, 12 March 2002, *ILM*, 2002, vol. 41, pp. 532-535. See also the *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

15 See the European Court of Human Rights, *Case of Loizidou v. Turkey (Preliminary Objections)*, Judgment of 23 March 1995, Series A N° 310, para. 60.

16 See *supra*, para. 61.

17 European Court of Human Rights, *Cyprus v. Turkey*, Judgment of 10 May 2001, para. 77. See also the earlier decision by the European Commission on Human Rights following the invasion by Turkish forces in 1974, Application 6780/74, DR 2, 125, 136 *et seq*.

18 *Bankovic and Others v. Belgium and 16 other contracting States*, 12 December 2001, para. 71.

19 Human Rights Committee, General Comment N° 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8. See also Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velázquez Rodríguez Case*.

of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty that is incumbent on the State".[20] The *International Convention for the Protection of All Persons from Enforced Disappearance* stipulates that "[e]ach State Party shall take appropriate measures to investigate acts [...] [that amount to enforced disappearance] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice".[21]

### iv) Counter-terrorism measures must comply with international law

The odious and serious nature of terrorist acts cannot be used by States as a pretext for avoiding their international obligations with regard to human rights, especially in the case of rights that are non-derogable or *jus cogens*. As Judge Antonio Cançado Trindade from the Inter-American Court of Human Rights has said, "[t]errorism cannot be fought with its own weapons".[22] That great writer on international humanitarian law, Jean Pictet, warned four decades ago that "it would be a disastrously retrograde step for humanity to try to fight terrorism with its own weapons".[23] This was further underlined in the following terms by the UN High Commissioner for Human Rights:

> *"An effective international strategy to counter terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures".*[24]

States must combat terrorism within the framework of the rule of law and in compliance with international law, in particular international human rights law and international humanitarian law. Indeed, the UN Security Council, the General Assembly and the former Commission on Human Rights, have repeatedly said that all measures to counter terrorism must strictly comply with the relevant provisions of

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20 Arbitral Decision of 1 May 1925 by Professor Max Huber concerning British claims for damages caused to British subjects in the Spanish part of Morocco, in *Recueil de sentences arbitrales*, United Nations, Vol. II, pp. 645 and 646 [French original, free translation].

21 Article 3 of the International Convention for the Protection of All Persons against Enforced Disappearance, adopted by the UN General Assembly in its resolution N° 61/177 of 20 December 2006.

22 Inter-American Court of Human Rights, Judgment of 15 September 2005, Case of the *"Mapiripán Massacre" v. Colombia*, Opinion of Judge A.A. Cançado Trindade, para. 51.

23 Jean Pictet, *The Principles of International Humanitarian Law*, 1 Edition, Geneva, ICRC, 1966, p. 36.

24 *Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, Human rights: a uniting framework*, UN document E/CN.4/2002/18, 27 February 2002, para. 5.

international law, including international human rights standards.[25] The UN Human Rights Committee has repeatedly reminded States that domestic laws and measures to combat terrorism must be compatible with the provisions of the ICCPR as well as any other obligations they may have under international law, be they treaty-based or customary.[26] The Committee against Torture has reminded States Parties that their responses to the threat of international terrorism must be compatible with the obligations they assumed on ratifying the Convention against Torture.[27] The Committee for the Elimination of Racial Discrimination has also emphasized that "measures to combat terrorism must be in accordance with the Charter of the United Nations and that they are only legitimate if they respect the fundamental principles and the universally recognized standards of international law, in particular, international human rights law and international humanitarian law".[28] Similarly, Guideline XVI of the *Guidelines on Human Rights and the Fight against Terrorism* adopted by the Committee of Ministers of the Council of Europe[29] stipulates that "[i]n their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable". The General Assembly of the Organization of American States has repeatedly stated that "all member States have the duty to ensure that all measures adopted to combat terrorism are taken in keeping with their obligations under international law, in particular international human rights law, international law on refugees, and international humanitarian law".[30] For its part, the Parliamentary Assembly of the Council of Europe resolved that "[t]he combat against terrorism must be carried out in compliance with national and international law and respecting human rights".[31]

Counter-terrorism measures must strictly comply with the principles of legality, necessity, proportionality and non-discrimination.[32] Indeed, even though international

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25 See, among others, UN Security Council Resolution 1456 (2003); UN General Assembly Resolutions 54/164 of 17 December 1999, 56/160 of 19 December 2001, 57/219 of 18 December 2002, 58/187 of December 2003, 59/191 of 20 December 2004 and 60/158 of 16 December 2005; and former UN Commission on Human Rights Resolutions 2005/80, 2004/87, 2003/68, 2002/35, 2001/37, 2000/30, 1999/27 and 1998/47.

26 See, among others, the *Concluding Observations of the Human Rights Committee on United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK;CCPR/CO/73/UKOT, 6 November 2001, para. 6; *Republic of Moldavia*, CCPR/CO/75/MDA, 26 July 2002, para. 8; *Philippines*, CCPR/CO/79/PHL, 1 December 2003, para. 6; *Sweden*, CCPR/CO/74/SWE, 24 April 2002, para. 12; *Egypt*, CCPR/CO/76/EGY, 28 November 2002, para.16; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; *Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003, para. 13; *United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 11; and *Republic of Korea*, CCPR/C/KOR/CO/3, 28 November 2006, para. 9.

27 *Statement of the Committee against Torture,* 22 November 2001, CAT/C/XXVII/Misc.7.

28 *Declaration on racial discrimination and the fight against terrorism*, Committee for the Elimination of Racial Discrimination, 8 March 2002, para. 3.

29 Endorsed by the Committee of Ministers of the Council of Europe on 15 July 2002.

30 Resolution AG/RES. 1931 (XXXIII-O/03), adopted on 10 June 2003, para. 2. In a similar vein, see Resolutions AG/RES. 1906 (XXXII-O/02) of 4 June 2002, para. 1; AG/RES. 2035 (XXXIV-O/04) of 8 June 2004, para. 2; AG/RES. 2143 (XXXV-O/05) of 7 June 2005, para. 2; and AG/RES. 2238 (XXXVI-O/06) of 6 June 2006, para. 2.

31 Resolution 1271 (2002), adopted on 24 January 2002.

32 See, among others, the Human Rights Committee, General Comment N° 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, and the Inter-American Commission on Human Rights, *Report on*

law allows certain rights or freedoms to be restricted or limited[33], in order to be legitimate any such restriction or limitation must comply with both the substantive and procedural requirements of international law. The circumstances in which a State may limit the exercise of any guaranteed right are set out either in a general clause authorizing such restrictions or in specific provisions relating to each right or freedom. Generally speaking, under international law, it is possible for freedom of movement, expression, assembly and association, political rights and the right to strike to be restricted or limited. However, international human rights law specifies the strict conditions under which such restrictions on rights are possible[34], and it is not left to States to decide if and when the exercise of rights may be limited. Indeed, generally speaking, any restrictions or limitations have to be established in law, be necessary in a democratic society to protect national security, public order, public health or morality, or the rights and freedoms of others, be necessary to protect those objectives, be proportionate to the interest to be protected and not impair the essence of the right in question, and be consistent with other international obligations, in particular *jus cogens*, non-derogable rights, and the right to an effective remedy (see Principles 4 and 5, *Berlin Declaration*). When a State imposes certain restrictions on the exercise of freedoms or rights, these may not put in jeopardy the freedom or right itself.[35]

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*Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 51.

33 See, for example, Article 29 (2) of the *Universal Declaration of Human Rights*: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". See also, among others, Articles 12, 18 (3), 19 (3) and 21 of the *International Covenant on Civil and Political Rights*; Articles 12, 13, 15, 22, and 30 of the *American Convention on Human Rights*; Articles 8, 9, 10, 11 and 18 of the *European Convention on Human Rights*; Articles 8, 11 and 12 of the *African Charter on Human and Peoples' Rights*; and Articles 24, 30, 32 and 35 of the *Arab Charter on Human Rights*.

34 See, among others, the Human Rights Committee: General Comment N° 10, *Freedom of expression* (Article 19), 29 June 1983, para. 4; General Comment N° 22, *The right to freedom of thought, conscience and religion* (Article 18), 30 July 1993, para. 8; General Comment N° 27, *Freedom of movement* (Article 12), CCPR/C/21/Rev.1/Add.9, 2 November 1999, in particular, paras. 11 to 18; General Comment N° 29, *States of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 4, 7 and 9; and General Comment N° 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 6. See also the *Concluding Observations of the Human Rights Committee on the Syrian Arab Republic*, CCPR/CO/84/SYR, 9 August 2005, para. 6, and *Yemen*, CCPR/CO/84/YEM, 9 August 2005, para. 13.

35 See, for example, the Human Rights Committee: General Comment N° 10, *Freedom of expression* (Article 19), para. 4, and General Comment N° 27, *Freedom of movement* (Article 12), CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 13.

# Principle 2 – Independence of the judiciary

*In the development and implementation of counter-terrorism measures, States have an obligation to guarantee the independence of the judiciary and its role in reviewing State conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.*

# Commentary

## 1. Unlawful State practices

In the name of fighting terrorism, many countries have taken measures that have affected and often undermined the existence of an independent and impartial justice system. Since 11 September 2001, a number of States have set up special or extraordinary jurisdictions to displace the natural jurisdiction of regular courts. In other States, jurisdiction over terrorist offences has been transferred from the regular courts to military courts. Yet others have established pseudo-courts, under the total control of the executive and made up of senior civil servants, to try terrorist suspects, thereby removing jurisdiction from the regular courts. Another common practice is to limit the power of the courts to examine and rule on the legality of anti-terrorism legislation and their ability to exercise judicial oversight over the implementation of anti-terrorism measures.

These measures and practices, implemented under the pretext of fighting terrorism, have undermined the foundations of the rule of law, including the separation of powers and the principle of legality. Another practice that affects the independence of the justice system is the granting of judicial police powers to the armed forces in the investigation of terrorist offences. This practice has not only given rise to serious human rights violations, but also creates serious confusion about balance of authority between the different branches of the State and jeopardizes the independence of the judiciary.

## 2. International legal framework

A country's judicial system is central to the protection of human rights and freedoms. In the context of counter-terrorism legislation and policies, the judiciary acts as an essential check on the other branches of the State in that it ensures that any such laws and measures comply with international human rights law and the rule of law. Independent and impartial courts have a vital role in monitoring counter-terrorism measures taken by the executive and legislature and, in some instances, constitute the last resort for upholding human rights norms that may be under attack. As well as being the guarantor of human rights and the rule of law, the judiciary plays a key role in protecting people from abuses stemming from counter-terrorist legislation

and practices and in providing judicial protection and effective remedies and redress for victims of human rights violations committed in the course of combating terrorism.[36] Indeed, as has also been pointed out by the Inter-American Commission on Human Rights, "the independence of the judiciary is an essential requisite for the practical observance of human rights".[37]

### i) The principle of separation of powers

The concept of the independence of the judiciary derives from the basic principles of the rule of law, in particular the principle of separation of powers, the cornerstone of an independent and impartial justice system. The UN Special Rapporteur on the Independence of Judges and Lawyers has underscored that "the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State".[38] In a similar vein, he has said that:

> *"the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law. [...] [T]he underlying concepts of judicial independence and impartiality [...] are 'general principles of law recognized by civilized nations' in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice".*[39]

In this connection, the Human Rights Committee has said that the principle of legality and the rule of law are inherent in the *International Covenant on Civil and Political Rights* (ICCPR).[40] The European Court of Human Rights has reaffirmed that respect for the principle of the separation of powers is an essential principle of a functioning democracy which cannot be called into question.[41] The Inter-American Court of Human Rights has also stressed that "there exists an inseparable bond

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36 See, among others, the *International Covenant on Civil and Political Rights* (Articles 2 and 18), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 18.1), the *American Convention on Human Rights* (Article 8.1 and 25), the *African Charter on Human and Peoples' Rights* (Article 7.1), the *Arab Charter on Human Rights* (Article 12), the *European Convention on Human Rights* (Articles 6.1 and 13) and the *Charter of Fundamental Rights of the European Union* (Article 47).

37 *The Situation of Human Rights in Cuba: Seventh Report*, OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, p. 67, para. 2.

38 *Report of the Special Rapporteur on the independence of judges and lawyers*, E/CN.4/1995/39, para. 55.

39 *Ibid.*, paras. 32 and 34.

40 Human Rights Committee, General Comment Nº 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

41 European Court of Human Rights, Judgment of 13 February 2003, Case of *Chevrol v. France*, Application Nº 49636/99, para. 74.

between the principle of legality, democratic institutions and the rule of law".[42] According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of the State. The different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of the State to interfere in the sphere of another.[43] The UN Secretary General said that "key elements of the rule of law include an independent judiciary [...], defined and limited powers of Government [...], a legal framework protecting human rights and guidelines governing the conduct of police and other security forces that are consistent with international standards".[44]

States have an international obligation to guarantee the independence of the judiciary.[45] The Inter-American Court of Human Rights has stated that "under the rule of law, the independence of all judges must be guaranteed".[46] The Human Rights Committee has stressed the obligation of all States parties to the ICCPR to ensure that there is an independent and impartial judiciary and to adopt legislation and measures that ensure that there is a clear distinction between the executive and judicial branches, so that the former cannot interfere in matters for which the judiciary has responsibility.[47] The Human Rights Committee considered that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with".[48] The Human Rights Committee has also considered that "a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal".[49]

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42 Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (Articles 27.2, 25.1 and 7.6, American Convention on Human Rights), paras. 24 and 26.

43 See the Inter-American Democratic Charter, adopted by the OAS General Assembly on 11 September 2001, Articles 3 and 4.

44 UN document A/57/275, para. 1.

45 See, among others, the UN *Basic Principles on the Independence of the Judiciary* (Principle 1); *Recommendation N° R (94) 12 on the Independence, Efficiency and Role of Judges*, adopted by the Committee of Ministers of the Council of Europe, 13 October 1994; the *African Charter on Human and Peoples' Rights* (Article 26); and the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, adopted by the African Union in 2003 and compiled by the African Commission on Human and Peoples' Rights.

46 Judgment of 31 January 2001, *Constitutional Court Case (Peru)*, para. 75.

47 *Concluding Observations of the Human Rights Committee on Romania*, 28 July 1999, CCPR/C/79/Add.111, para. 10. See also the *Concluding Observations of the Human Rights Committee* on *Peru*, 15 November 2000, CCPR/CO/70/PER, para. 10; *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para. 15; *Tunisia*, CCPR/C/79/Add.43, 10 November 1994, para. 14; and *Nepal*, 10 November 1994, CCPR/C/79/Add.42, para. 18.

48 Decision of 22 March 1996, Communication N° 521/1992, Case of *Vladimir Kulomin v. Hungary*, para. 11.3, UN document CCPR/C/56/D/521/1992, 1 August 1996.

49 Decision of 20 October 1993, Communication N° 468/1991, Case of *Angel N. Oló Bahamonde v. Equatorial Guinea*, para. 9.4, UN document CCPR/C/49/D/468/1991, 10 November 1993.

Several international instruments reiterate the principle of the separation of powers, particularly with regard to the judiciary.[50] Principle 1 of The UN *Basic Principles on the Independence of the Judiciary* stipulates that "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary". These *Basic Principles*, which establish the prerequisites for ensuring that the independence of judges is preserved, must be taken into account when assessing how independent are tribunals and courts of law. The Human Rights Committee and other UN treaty bodies[51], the Inter-American Court of Human Rights[52], the Inter-American Commission on Human Rights[53] and the African Commission on Human and Peoples' Rights[54] therefore refer to these principles when examining the independence and impartiality of courts.

### ii) The function of the judiciary is to dispense justice

As a corollary of the principle of the separation of powers, only the judicial organs of the State are authorized to dispense justice. This was reiterated by the Human Rights Committee when it stated that, even in time of war or in a state of emergency, "[o]nly a court of law may try and convict a person for a criminal offence".[55] The Inter-American Commission on Human Rights has also taken the view that "[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person's guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the State to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*".[56]

The European Court of Human Rights has stated that a court must be independent both of the executive branch of the State as well as of the parties to proceedings.[57]

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50 See, among others, Article 3 of the *Inter-American Democratic Charter* (adopted on 11 September 2001 by the General Assembly of the Organization of American States); *Recommendation N° R (94) of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 13 October 1994, and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

51 For example, see the following: *Concluding Observations of the Human Rights Committee on Belarus*, 19 November 1997, CCPR/C/79/Add.86, para. 14; *Concluding Observations of the Committee against Torture on Uzbekistan*, 19 November 1999, A/55/44, para. 81; *Armenia*, 17 November 2000, A/56/44, para. 39; and *Kyrgyzstan*, 18 November 2000, A/55/44, para. 75; and *Conclusions and recommendations of the Committee against Torture: Azerbaijan*, 14 May 2003, CAT/C/CR/30/1, para. 7.

52 For example, see Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castrillo Petruzzi et al v. Peru.*

53 For example, see the *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, and Report N° 78/02, Case 11,335, *Guy Malary v. Haiti*, 27 December 2002, para. 74.

54 For example, see the Decision dated 6 November 2000, Communication N° 223/98 (Sierra Leone) and Decision dated 15 November 1999, Communication N° 151/96 (Nigeria).

55 UN document CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

56 Report N° 49/00, Case 11,182, *Rodolfo Gerbert, Ascencio Lindo et al. v. Peru*, 13 April 2000, para. 86.

57 European Court of Human Rights, Judgment of 16 July 1971, *Ringeisen v. Austria*, para. 95.

It has also said that the independence of courts must be preserved and respected by the legislature.[58] The Court also ruled that the adoption of a law by the parliament concerned, declaring that certain cases could not be examined by the courts and ordering ongoing legal proceedings to be suspended, constituted a violation of the independence of the judiciary.[59] The European Court has pointed out that it is a widely recognized principle that legal decisions should not be changed by authorities that are not part of the judiciary. The Court has therefore found the independence of courts to have been violated if their decisions can be changed by officials or bodies belonging to the executive and if such decisions can only be considered *res judicata* (i.e. a judicial decision that cannot be reopened) following confirmation by such authorities.[60]

In the view of the African Commission on Human and Peoples' Rights, the creation of special tribunals, especially military ones, to try certain offences which fall within the remit of ordinary courts, undermines the independence of the judiciary.[61] It has also stated that the adoption by the executive of measures to remove jurisdiction from the ordinary courts for fundamental issues such as complaints about abuses or *habeas corpus* constitute a violation by the State of its obligation to ensure that the judiciary is independent.[62]

### iii) The independence of the judiciary

To ensure and guarantee the independence of the judiciary, the constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. The judiciary must also in reality be truly and effectively independent as well as free from influences or pressure from any quarter.[63] The concept of independence of the judiciary also refers to the autonomy of any given judge or court to decide cases by applying the law to the facts.[64] This independence belongs both to the judiciary as an institution (independence from the other branches of the State, referred to as "institutional independence") and to the particular judge (independence from other members of the judiciary, or "individual independence"). It means that neither the judiciary nor the judges of whom it is composed can be subordinate to the other branches of the State or to the parties to proceedings.[65] The concept of an independent judiciary also means that judges,

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58 European Court of Human Rights, Judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Case N° 22/1993/417/496, para. 49.

59 European Court of Human Rights, Judgment of 22 October 1997, *Papageorgiou v. Greece*, Case N° 00024628/94.

60 European Court of Human Rights, Judgment of 25 February 1997, *Findlay v. United Kingdom*, para. 77; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, para. 79.

61 Decision of 6 November 2000, Communication 224/98, *Media Rights Agenda v. Nigeria*, para. 63.

62 See the decisions relating to Communications 151/96, 143/95-150/96, 129/94, 60/91 and 87/93.

63 See the UN *Basic Principles on the Independence of the Judiciary*, Principles 1, 2, 3 and 4.

64 UN *Basic Principles on the Independence of the Judiciary*, Principle 2.

65 European Court of Human Rights, Judgment of 16 July 1971, Case of *Ringeisen v. Austria*, para. 95, and Inter-

lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment and persecution as they carry out their professional activities in the defence of human rights.[66]

Independence of the judiciary is closely linked to the universally recognized and protected right to be tried by an independent and impartial tribunal.[67] The Human Rights Committee has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception".[68] For its part, Principle 5 of the UN *Basic Principles on the Independence of the Judiciary* establishes that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".[69] This means that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, *ad hoc*, 'extraordinary', *ex post facto* and special courts are forbidden (see Principle 7, *Berlin Declaration*).

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American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

66 See, among others, the UN *Basic Principles on the Independence of the Judiciary*; the UN *Guidelines on the Role of Prosecutors*; the UN *Basic Principles on the Role of Lawyers*; the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*; *Recommendation N° R (94) 12 on the Independence, Efficiency and Role of Judges* of the Committee of Ministers of the Council of Europe; and *Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer* of the Committee of Ministers to Member States of the Council of Europe.

67 The *International Covenant on Civil and Political Rights* (Article 14), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 18.1), the *American Convention on Human Rights* (Article 8.1), the *African Charter on Human and Peoples' Rights* (Article 7.1), the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, the *Resolution on the Right to Fair Trial and Legal Aid in Africa*, adopted by the African Commission of Human and Peoples' Rights on 15 November 1999, the *Declaration and Recommendations on the Right to a Fair Trial in Africa* of the African Commission on Human and Peoples' Rights, the *European Convention on Human Rights* (Article 6.1), the Protocol I to the Geneva Conventions (Article 75.4), the *Universal Declaration on Human Rights* (Article 10), the *American Declaration of the Rights and Duties of Man* (Article XXVI), the *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism* (Guideline IX) and the *Charter of Fundamental Rights of the European Union* (Article 47).

68 Views of 28 October 1992, Communication N° 263/1987, *M. Gonzalez del Río v. Peru,* CCPR/C/46/D/263/1987, para. 5.2.

69 See also the UN *Model Treaty on Extradition*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Article 4 of the Treaty states that "[e]xtradition may be refused in any of the following circumstances: [...] (g) If the person whose extradition has been requested has been sentenced or would be liable to be tried in the requesting State by an extraordinary or *ad hoc* court or tribunal". However, it is in the Americas where this type of clause has long existed in the context of extradition.

# Principle 3 – Principles of criminal law

*States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of legality (*nullum crimen sine lege*). States may not apply criminal law retroactively. They may not criminalize the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, 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.*

# Commentary

## 1. Unlawful State practices

In many countries, legislation criminalizes the legitimate exercise of fundamental freedoms and peaceful political and/or social opposition by using vague, imprecise or ambiguous definitions of what constitutes a terrorist offence. In some countries, the legitimate exercise of certain fundamental rights and freedoms, such as the right to strike and freedom of expression, association and information, have been designated in effect as terrorist offences. It is not confined to national legislation. Over the past few years, regional anti-terrorist treaties have similarly used definitions that allow the legitimate exercise of fundamental freedoms, such as the right to strike, to be criminalized by viewing them as forms of "terrorism".[70] Some States have draw up official lists of "terrorist" groups. Membership of these "terrorist" groups becomes *ipso facto* an offence, as does any form of collaboration with them, regardless of whether the person concerned knew about, participated in or contributed towards the commission of terrorist acts. Such lists have included groups that are not engaged in terrorism but are exercising peaceful political opposition. Several countries, having removed political offences from their national criminal legislation, have then designated those same acts as terrorist offences. Anti-terrorist criminal legislation often applies retroactively.

70 See, for example, Article 1 of the *Convention on the Prevention and Combating of Terrorism of the Organization of African Unity*, Article 1 of the *Arab Convention for the Suppression of Terrorism* and Article 1 of the *Convention on Combating Terrorism, Separatism, and Extremism,* signed in Shanghai on 15 June 2001.

## 2. International legal framework

### i) The principle of legality of the offence *(nullum crimen sine lege)*

Under international law, all States undoubtedly have the right and duty to combat and suppress criminal acts that, given their nature, objectives or the methods used to commit them, amount to terrorist acts.

Nevertheless, the legal definition of offences and their enforcement, both at national and international level, must comply with certain principles of criminal law and international human rights law, *inter alia*, the principle of legality of offences (*nullum crimen sine lege*), including the non-retroactivity of criminal law and individual criminal responsibility.

The principle of legality of offences, *nullum crimen sine lege*, is a cornerstone of contemporary criminal law,[71] as well as a principle of international human rights law.[72] Its absolute and non-derogable nature has been explicitly recognized in various human rights treaties[73] and by international human rights bodies.[74] The *nullum crimen sine lege* principle is closely linked to the right of everyone "to security of person"[75], since it seeks to safeguard people's right to know which acts can result in criminal liability and which will not.[76] Indeed, "criminal law provides for norms of conduct that individuals shall respect".[77]

The *nullum crimen sine lege* principle means that, in order to be termed an offence, a specific type of conduct needs to be established in law as a crime and the definition

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71 See, for example, the *Rome Statute of the International Criminal Court* (Article 22) and the reports of the International Law Commission to the UN General Assembly, 1993 (Supplement N° 10 (A/48/10), p.81) and 1994 (Supplement N° 10 (A/49/10), p.321).

72 The *International Covenant on Civil and Political Rights* (ICCPR) (Article 15), the *European Convention on Human Rights* (Article 7), the *African Charter on Human and Peoples' Rights* (Article 7.2), the *Arab Charter on Human Rights* (Article 15) and the *American Convention on Human Rights* (Article 9).

73 The ICCPR (Article 4.2), the *European Convention on Human Rights* (Article 15), the *Arab Charter on Human Rights* (Article 4(b)) and the *American Convention on Human Rights* (Article 27).

74 Human Rights Committee, General Comment N° 29, *States of emergency (Article 4),* para. 7; *Concluding Observations of the Human Rights Committee on Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; Inter-American Court of Human Rights, Judgment of 30 May 1999, Case of *Castillo Petruzzi et al. v. Peru*, para. 119 *et seq.*; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 218.

75 Article 3 of the *Universal Declaration of Human Rights*.

76 Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, OAS document OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 80.

77 Report of the International Law Commission (1996), UN document Supplement N° 10 (A/51/10), p. 90.

of any criminal offence should be precise and free of ambiguity.[78] The Inter-American Court of Human Rights has said:

> *"that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence, thus giving full meaning to the principle of* nullum crimen nulla poena sine lege praevia *in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are most precious, such as life and liberty".*[79]

Thus, definitions which are vague, ambiguous and imprecise contravene international human rights law and the "general conditions prescribed by international law".[80]

The principle of legality of offences means that, in order to be held accountable for a crime, the alleged offender must have fully committed the criminal behaviour in question (be it an act or omission) as described precisely and unambiguously in criminal legislation, without prejudice to the rules of criminal liability concerning the attempted commission of such an offence or the issue of complicity. The Human Rights Committee has therefore stated that if a person is convicted of an offence, "the elements of which, in truth, were not all present, [...] the conviction

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78 See, among others, the Human Rights Committee: General Comment N° 29, *States of emergency (Article 4),* para. 7, UN document CCPR/C/21/Rev.1/Add.11, 31 August 2001; the *Concluding Observations of the Human Rights Committee on Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; and *Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 20; European Court of Human Rights: Judgment of 25 May 1993, *Kokkinakis v. Greece*, Series A, N° 260-A, p.22, para. 52; and Judgment of 22 June 2000, *Cöeme v. Belgium*, para. 11; Inter-American Court of Human Rights: Judgment of 30 May 1999, Case of *Castillo Petruzzi et al v. Peru*, paras. 119, 120 and 121; and Inter-American Commission on Human Rights: *Second report on the situation of human rights in Peru*, *op. cit.* 76, para. 80, and *Report on Terrorism and Human Rights*, *op. cit.* 32, "Recommendations", N° 10 (a).

79 Judgment of 30 May 1999, Case of *Castillo Petruzzi et al v. Peru*, para. 121.

80 UN Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN.4/1998/39/Add.1, para. 129. See also the *Concluding Observations of the Human Rights Committee on Portugal (Macau)*, UN document CCPR/C/79/Add.115, 4 November 1999, para. 12; the *Observations and recommendations of the Human Rights Committee on Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; and the *Concluding Observations of the Human Rights Committee on Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. See also the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1983-1984*, p.85, para. 7, and the *Second report on the situation of human rights in Peru*, *op. cit.* 76, para. 80.

[is] thus in violation of the principle of *nullum crimen sine lege*, protected by Article 15, paragraph 1".[81] It also said that:

> *"Article 15, paragraph 1, requires any 'act or omission' for which an individual is convicted to constitute a 'criminal offence'. Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of* nullum crimen sine lege*, and the principle of legal certainty, provided by Article 15, paragraph 1".*[82]

The Inter-American Commission on Human Rights has also pointed out that "certain domestic anti-terrorism laws [...] violate the principle of legality because, for example, those laws have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise, or have legislated variations on the crime of 'treason' that denaturalizes the meaning of that offence and creates imprecision and ambiguities in distinguishing between these various offences".[83] This also has consequences for determining the legal procedures to be followed because, in the case of terrorist offences, international law and comparative law both lay down special procedures for extradition, asylum, amnesties and sentencing. The Human Rights Committee has also expressed concern about "the potentially overbroad reach of the definitions of terrorism under domestic law, [...] which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting terrorism (Articles 17, 19 and 21)".[84]

### ii) The restrictive interpretation of criminal law and the prohibition of analogy

The *nullum crimen sine lege* principle has two corollaries: the restrictive interpretation of criminal law and the prohibition of analogy.[85] The Human Rights Committee has pointed out that the imposition, by analogy, of criminal punishment for conduct not provided for in criminal law "is incompatible with the concept of *nullum crimen*

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81 Decision of 19 March 2004, Communication N° 1080/2002, Case of *David Michael Nicholas v. Australia*, para. 7.3.

82 *Ibid.*, para. 7.5.

83 Inter-American Commission on Human Rights, *Report on terrorism and human rights*, *op. cit.* 32, para. 226, and *Second report on the situation of human rights in Peru*, *op. cit.* 76, para. 80.

84 *Concluding Observations of the Human Rights Committee on United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 11.

85 This principle and its corollaries apply both to domestic criminal law and international criminal law. Thus Article 22 (2) of the Rome Statute states that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy".

*sine lege*, enshrined in Article 15 of the [ICCPR]".[86] This principle also includes the prohibition of retroactive national or international criminal law.[87] This principle of legality means "the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty".[88]

The *nullum crimen sine lege* principle is also linked to the type of behaviour of which a person is accused. Under international human rights law, the legitimate exercise of fundamental freedoms cannot be legally termed an offence because the law can only prohibit forms of behaviour that harm society.[89] Any definition of a terrorist crime, be it a general definition or a definition related to specific acts, has to conform to these principles. The Human Rights Committee has stressed that vague, imprecise and ambiguous definitions of the offence of terrorism in domestic legislation are in breach of the principle of legality of offences enshrined in Article 15 of the ICCPR and has urged States to adopt precise definitions of such offences.[90] The Inter-American Commission on Human Rights found that "[t]he definition of the crime of terrorism set forth in the [Peruvian anti-terrorist] decree is abstract and vague, and thereby violates the basic principle of legality, which is a basic tenet of the criminal law, whose ultimate objective is the juridical security the individual needs to know precisely what acts and omissions may trigger his or her criminal liability".[91] The Inter-American Commission of Human Rights has underscored that it is important to "ensure that crimes relating to terrorism are classified and described in precise and unambiguous language that narrowly defines the punishable offence, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable by other penalties".[92]

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86 *Concluding Observations of the Human Rights Committee on Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14.

87 The ICCPR (Article 15), the *European Convention on Human Rights* (Article 7), the *African Charter on Human and Peoples' Rights* (Article 7), the *Arab Charter on Human Rights* (Article 15) and the *American Convention on Human Rights* (Article 9).

88 Human Rights Committee, General Comment N° 29, *States of emergency (Article 4),* para. 7.

89 Georges Levasseur, "*Justice et Sûreté de l'Etat*", in *Revue de la Commission internationale de juristes*, Winter 1964, Vol. V, N° 2, p.264.

90 *Concluding Observations of the Human Rights Committee on Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 14; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; *Philippines*, CCPR/CO/79/PHL, 1 December 2003, para. 9; *Uzbekistan*, CCPR/CO/83/UZB, 6 April 2005, para. 18; and *Observations and recommendations of the Human Rights Committee on Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12.

91 Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, *op.cit.* 76, para. 80.

92 *Report on Terrorism and Human Rights*, *op. cit.* 32, "Recommendations", N° 10 (a).

Under international law, the exercise of certain fundamental rights and freedoms may be limited, but only within a framework defined by international law (see Principles 1, 4, 5 and 8, *Berlin Declaration*). In this regard, the Human Rights Committee considers any deprivation of liberty that seeks to punish the legitimate exercise of a fundamental right or freedom to be incompatible with the ICCPR. In countries where certain forms of expression and/or opposition to the goals of the ruling regime were classified as offences under criminal law, it has recommended that the criminal legislation in question be revised.[93]

Breaching the principle of legality may also undermine the right to asylum. The UN High Commissioner for Refugees has warned that "[i]f definitions are too broad and vague, as has sometimes been the case, there is a risk that the 'terrorist' label might be abused for political ends, for example to criminalize legitimate activities of political opponents, in a manner amounting to persecution".[94] Vague and imprecise definitions of terrorist offences, which allow legitimate forms of political opposition to be criminalized, therefore undermine the right to asylum.

### iii) Individual criminal responsibility and "terrorist" groups

The principle of individual, personal, criminal responsibility is also one of the fundamental tenets of contemporary criminal law. It has been expressly recognized in numerous international instruments.[95] Personal responsibility in the field of criminal law, as well as the individuality of punishment, are fundamental principles of international criminal law and peremptory norms.[96] As the Inter-American Commission on Human Rights has pointed out:

> *"[a]mong the most fundamental principles governing criminal prosecutions that are afforded protection under international human rights law are [...] the precept that no one should be convicted of an offence except on the basis of individual penal responsibility. [...] criminal prosecutions must comply with the fundamental requirement that no one should be convicted of an offence except on the basis of individual penal responsibility, and the corollary to*

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93 See, for example, the *Concluding Observations of the Human Rights Committee on Syrian Arab Republic*, CCPR/CO/71/SYR, 24 April 2001, para. 24, and *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10.

94 UN document A/AC.96/965, 11 September 2002, para. 39.

95 See, among others, the IV Geneva Convention (Article 33), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Article 75.4(b)), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Article 6.2(b)), the Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Articles 15 and 16), the Statute of the International Criminal Tribunal for the Former Yugoslavia (Article 7), the Statute for the International Criminal Tribunal for Rwanda (Article 6), the Rome Statute (Article 25) and the Statute of the Special Tribunal for Sierra Leone (Article 6), Article 5 (3) of the American Convention on Human Rights states that "[p]unishment shall not be extended to any person other than the criminal".

96 Pierre-Marie Dupuy, "*Normes internationales pénales et droit impératif (jus cogens)*", in H. Ascencio, E. Decaux and A. Pellet, *Droit international pénal*, Ed. A. Pedone, Paris 2000, Chapter 6, paras. 10 and 11, p.74.

> *this principle that there can be no collective criminal responsibility. […] This requirement has received particular emphasis in the context of post-World War II criminal prosecutions, owing in large part to international public opposition to convicting persons based solely upon their membership in a group or organization. […] This restriction does not, however, preclude the prosecution of persons on such established grounds of individual criminal responsibility such as complicity, incitement, or participation in a common criminal enterprise, nor does it prevent individual accountability on the basis of the well-established superior responsibility doctrine".*[97]

International law therefore does not provide for individuals to be criminally responsible merely for belonging to a criminal group. This issue was considered by the post Second World War Nuremberg Statute. Articles 9 and 10 of the Statute[98] targeted members of the Gestapo, the *Sicherheitsdienst des Reichsfuhrers* (S.D.) and the *Schutzstafflen der Nationalsozialistischen Deutschen Arbeiderpartei (*S.S.). The Nuremberg Tribunal declared them to be criminal organizations. Nevertheless, members of the above-mentioned groups were not found guilty simply because they belonged to them. The Tribunal stated that for a member of these groups to have been found guilty, he had to have been involved voluntarily and in full knowledge of the criminal purposes of the group, or to have actually participated in the commission of war crimes, crimes against peace or crimes against humanity. The International Committee of the Red Cross (ICRC) has pointed out that:

> *"after the Second World War and ever since, international public opinion has condemned convictions of persons on account of their membership of a group or organization. Objections were also raised against collective punishment inflicted indiscriminately on families or on the population of a district or building. […] It was therefore decided to outlaw all convictions and punishments which are not based on individual responsibility – in accordance with the now universally accepted principle that no one may be punished for an act he has not personally committed – as well as reprisals".*[99]

In his report on the establishment of an international tribunal for the former Yugoslavia, the UN Secretary General decided against employing the concept of individual criminal liability resulting from membership of an association or organization that is deemed criminal for the purposes of the jurisdiction of the International

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97 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 227.

98 Articles 9 and 10 of the Statute related to members of the Nazi Party Chiefs Body, the *Geheime Staatspolizei* (Gestapo), the *Sicherheitsdienst des Reichsfuhrers* (S.D) and the *Schutzstafflen der Nationalsozialistischen Deutschen Arbeiderpartei* (S.S.).

99 Commentary of the ICRC on Article 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, para. 3098 (http://www.cicr.org/ dih.nsf/e6e558c87e3c38c44125673c0045870a/5cb34a49d5067919c12563bd002db607?OpenDocument).

Criminal Tribunal for the Former Yugoslavia.[100] The European Court of Human Rights has made it clear that Article 5 of the *European Convention on Human Rights* does not make it legitimate for the authorities to arrest someone whom they believe may have committed an offence solely on the grounds that he or she belongs to a group of individuals who are considered dangerous because of their propensity to crime.[101] Thus the technique of establishing official lists of so-called "terrorist" groups, whereby the very fact of belonging to such groups becomes *ipso facto* a terrorist offence, regardless of whether the person concerned has knowledge of, participated in, or contributed towards the commission of terrorist acts, is a contravention of the principle of individual criminal responsibility.

### iv) Distinguishing between political offences and terrorist acts

Terrorist acts and political crimes share some common features, in particular, the fact that the perpetrators of both may be politically motivated. Nevertheless, terrorist acts and political crimes are two distinct categories of crime that are subject to separate rules, especially as far as extradition, asylum and amnesty are concerned.[102] When types of behaviour that constitute other offences, for example, political offences, but which have no connection with terrorism are termed 'terrorist acts', it distorts the meaning of what a terrorist offence is and creates imprecision and ambiguity when it comes to distinguishing between different types of offences. This is particularly true where the law equates any type of political offence – whether or not it involves violence or terrorist acts – with the crime of terrorism. This has damaging consequences for the legal procedures relating to political offences, particularly in the sphere of extradition, asylum, sentencing and amnesties.

Although international law does not provide a definition of what constitutes a political offence [103], it recognizes the notion – particularly in the field of extradition, right to asylum, amnesties and sentencing – and international case law frequently refers

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100 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704), para. 51.

101 European Court of Human Rights, Judgment of 6 November 1980, *Gizzardi v. Italy*, Series A N° 39, para. 102.

102 The notion of 'political offence' is also mentioned in different international instruments in connection with sentences. Thus, the *American Convention on Human Rights* prohibits the death penalty for political offences and ordinary offences that are related to political offences (Article 4.4)

103 As far as defining what constitutes a political offence is concerned, international law relies on domestic legislation although in some States the concept is not known. Criminal doctrine envisages several types: the political offence *stricto sensu*, the complex political offence and the ordinary offence committed on political grounds. However, the different schools of thought diverge on many points. Thus some of them stress the objective nature of criminal behaviour while others emphasize the political motivation or intention of the perpetrator. See, for example, the study by the International Commission of Jurists, *Aplicación de las declaraciones y convenciones internacionales referentes al asilo en América latina,* Geneva, September 1975, pp.16-19; Georges Levasseur, *Justice et sûreté de l'Etat*, in *La revue de la Commission internationale de juristes*, Winter 1964, vol. V, N°2, pp.280 *et seq.*; and Cherif Bassiouni, *International Terrorism and Political Crimes*, Charles C. Thomas Publisher, Singfield Illinois, USDA, 1973.

to it.[104] For example, the Inter-American Commission on Human Rights terms certain offences political offences, regardless of whether they have been categorized as political offences under domestic criminal legislation, as long as certain characteristic features of what constitutes a political offence are present.[105]

In international law, the procedures applicable to political offences and terrorist offences are different. The generally accepted rule is a person should be not extradited for political offences. Numerous treaties recognize this rule, either explicitly[106] or because of the principle of *non-refoulement*.[107] Crimes such as the attempted murder of a Head of State[108], crimes against humanity[109], war crimes[110], genocide[111] and enforced disappearance[112], even if committed for political reasons, are not deemed to be political offences for the purposes of extradition. Similarly, a terrorist offence is not a political offence and a suspect can be extradited.[113]

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104 See, for example, *Concluding Observations of the Human Rights Committee on Syrian Arab Republic*, 24 April 2001, CCPR/CO/71/SYR; Committee Against Torture, *Concluding Observations and Recommendations on China*, 26 June 1993, A/48/44, paras. 387-429; Inter-American Commission on Human Rights, *Report on the Human Rights Situation in the Republic of Cuba*, OAS document OEA/Ser.L/V/II.4 doc. 2 (Spanish) 20 March 1962; *Annual Report of the Inter-American Commission on Human Rights – 1997*, OAS document OEA/Ser.L/V/II.98, Doc. 6, 17 February 1998; and the *Annual Report of the Inter-American Commission on Human Rights – 2000,* OAS document OEA/Ser./L/V/II.111 doc. 20 rev., 16 April 2001: Decision N° 49/01, Cases 11,826 (Leroy Lamey), 11,843 (Kevin Mikoo), 11,846 (Milton Montique) and 11,847 *(Dalton Daley) v. Jamaica*, 4 April 2001.

105 See, for example, the *Report on the Human Rights Situation in the Republic of Cuba*, OAS document OEA/Ser.L/V/II.4, doc. 2, 20 March 1962; and the *Annual Report of the Inter-American Commission on Human Rights – 1997*, OAS document OEA/Ser.L/V/II.98, doc. 6, 17 February 1998: Decision N° 49/01 of 4 April 2001, Case N° s 11,826 (Leroy Lamaey), 11,843 (Kevin Mykoo), 11,846 (Milton Montique) and 11.847 *(Dalton Daley) v. Jamai*ca, paras. 131 and 137. In his study on amnesty laws and their role in the safeguard and promotion of human rights prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Louis Joinet laid down generally accepted criteria for distinguishing between political and ordinary offence (E/CN.4/Sub.2/1985/16, of 21 June 1985, paragraphs 47 and 48).

106 The *Montevideo Treaty on International Penal Law* of 1889 (Article 23), the *Treaty on Extradition and Protection Against Anarchism*, adopted at the Second International American Conference in 1902 (Article 2), the *Montevideo Convention on Extradition* of 1933 (Article 3), the *Caracas Convention on Territorial Asylum* of 1954 (Article 20), the *Montevideo Treaty on International Penal Law* of 1939 (Article 20), the *European Convention on Extradition* of 1957 (Article 3), the *Inter-American Convention on Extradition* of 1981 (Article 4) and the *Arab Charter on Human Rights* (Article 28).

107 Article 5 of the *European Convention on the Suppression of Terrorism*. See also P. Weis, *"Asilo y Terrorismo"*, *in La Revista*, International Commission of Jurists, N° 18-19, 1977, p.94 *et seq*.

108 For example, the *European Convention on Extradition* of 1957 (Article 3.3) and the *Montevideo Convention on Extradition* of 1933 (Article 3)

109 For example, the *Additional Protocol to the European Convention on Extradition* (Article 1).

110 *Ibid*.

111 For example, the *Convention on the Prevention and Punishment of the Crime of Genocide* (Article VII) and the *Additional Protocol to the European Convention on Extradition* (Article 1).

112 The *Inter-American Convention on the Forced Disappearance of Persons* (Article V) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 13).

113 For example, the *International Convention Against the Taking of Hostages*, the *European Convention on the Suppression of Terrorism* (Article 1), the *Inter-American Convention Against Terrorism* (Article 11), the *International Convention for the Suppression of Terrorist Bombings* (Article 11), the International *Convention for the Suppression of the Financing of Terrorism* (Article 14) and the *International Convention for the Suppression of Acts of Nuclear Terrorism* (Article 15).

The notion of "political offence" also has a close connection with the idea of refuge and the right to asylum. Several international instruments [114] recognize the right to asylum for acts that constitute political offences. However, in the different international instruments, and particularly those concerning the rights of refugees [115], the right to asylum and its subsequent protection is withheld from the perpetrators of certain crimes, such as crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the United Nations, among others. Although such crimes may have a political motivation, given their seriousness and the legal rights under attack, they are not deemed to be "political offences" for the purposes of the right to asylum and the perpetrators are denied the international protection that refugee status provides. As underscored by the Inter-American Commission of Human Rights:

> *"States have accepted that there are limits to asylum, based on several sources of international law, including that asylum cannot be granted to persons with respect to whom there are serious indicia that they may have committed international crimes, such as crimes against humanity (which include the forced disappearance of persons, torture, and summary executions), war crimes, and crimes against peace".* [116]

Terrorist acts also fall into the category of acts excluded from the right to asylum. In this regard, it should be recalled that UN Security Council Resolution 1373 (2001) calls on States to "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens", to take appropriate measures "before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts" and to "ensure (...) that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists".

The notion of 'political offence' also has a bearing on the issue of amnesties. The granting of amnesties for political offences was a frequent practice that allowed for the resolution of armed conflicts and a return to democracy.[117] The constitutions of many States allow amnesty to be granted to the perpetrators of political offences.

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114 The *Universal Declaration of Human Rights* (Article 14), the *Arab Charter on Human Rights* (Article 28), the *American Convention on Human Rights* (Article 22.7), the UN *Declaration on Territorial Asylum*.

115 See, among others, Article 1(f) of the *Convention relating to the Status of Refugees* and Article 1(2) of the *Declaration on Territorial Asylum*.

116 Recommendation on *Asylum and International Crimes* approved by the Inter-American Commission on Human Rights at its 108th regular session on 20 October 2000.

117 *Study on amnesty laws and their role in the safeguard and promotion of human rights*, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/16, of 21 June 1985. Certain schools of thought within the sphere of criminal law justify the granting of amnesties for political offences on the grounds that those who commit such offences are not anti-social in nature (see *inter alia*, Georges Levasseur, "*Justice et Sûreté de l'Etat*", in *Revue de la Commission internationale de juristes*, Winter 1964, Vol. V, N° 2, p.286.)

Similarly, numerous resolutions adopted by the UN General Assembly[118] and the former Commission on Human Rights[119], have recommended releasing the perpetrators of political offences, in particular, through granting them amnesty or clemency. The Human Rights Committee has also considered the granting of amnesties to the perpetrators of political offences or their release to be positive measures in terms of implementation of the ICCPR.[120] The Inter-American Commission of Human Rights has also recommended granting amnesty to the perpetrators of political offences.[121] Lastly, it should be noted that international humanitarian law also recommends that amnesties be granted to those who have fought against a government in the context of an internal armed conflict.[122]

Nevertheless, international human rights law and international humanitarian law set certain limits on the granting of amnesties and other similar measures. For example, the perpetrators of war crimes, genocide, crimes against humanity and gross human rights violations, among others, may not benefit from such measures. Even though there may have been a political motivation behind the acts committed, their extreme gravity and the legal rights violated as a result of them are such that they cannot be considered political offences or ordinary offences committed on political grounds. Human rights bodies and courts have repeatedly stated that amnesties and other similar measures which prevent the perpetrators of gross human rights violations from being brought before the courts, tried and sentenced are incompatible with State obligations under international human rights law.[123] For its part, the ICRC, has considered this type of amnesty to be inapplicable to grave breaches of international humanitarian law such as arbitrary killings, torture and

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118 See, for example, Resolution 32/171 of 16 December 1977, Resolution 32/116 of 16 December 1977 and Resolution 32/65 of 8 December 1977.

119 See, for example, Resolution 1993/69, *Situation in Equatorial Guinea*, 10 March 1993.

120 See, for example, the *Concluding Observations of the Human Rights Committee on Morocco*, 23 November 94, CCPR/C/79/Add.44, para. 6; *Syrian Arab Republic*, 24 April 2001, CCPR/CO/71/SYR, para. 3; *Armenia*, 19 November 1998, CCPR/C/79/Add.100, para. 6; and *Libyan Arab Jamahiriya*, 23 November 94, CCPR/C/79/Add.45, para. 7.

121 See, for example, the *Report on the Situation of Human Rights in the Republic of Nicaragua*, OAS document OEA/Ser.L/V/II.53, doc. 25, 30 June 1981, recommendations 3 to 5.

122 Article 6(5) of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) .

123 Human Rights Committee: General Comment N° 20 (44) on Article 7, 44th session of the Human Rights Committee (1992), in *Official Documents of the General Assembly, Forty-Seventh Session, Supplement N° 40 (A/47/40)*, appendix VI.A; *Report of the Human Rights Committee*, Supplement N° 40 (A/34/40), 1979, para. 81; and *Concluding Observations of the Human Rights Committee on Chile,* CCPR/C/79/Add.104, para. 7; *France*, CCPR/C/79/Add.80, para. 13; *Lebanon*, CCPR/C/79/Add.78, para. 12; *Republic of Croatia*, 4 April 2001, CCPR/CO/71/HRV, para. 11; *El Salvador*, CCPR/C/79/Add.34, para. 7; *Haiti*, A/50/40, paras. 224-241; *Peru*, 1996, CCPR/C/79/Add.67, paras. 9 and 10; *Peru*, 15 November 2000, CCPR/CO/70/PER, para. 9; *Uruguay*, CCPR/C/79/Add.19, paras. 7 and 11; and *Yemen*, A/50/40, paras. 242-265. Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others v. Peru)*.

disappearances.[124] Given that the terrorist acts that international instruments deem to be crimes are extremely serious and contrary to the purposes and principles of the United Nations, the perpetrators of such acts should not be granted amnesties or other similar measures.[125]

124 Letter dated 1995 from the ICRC, to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia. This interpretation was reiterated in another communication from the ICRC, dated 15 April 1997.

125 See resolution 1757 (2007), on the establishment of a Special Tribunal for Lebanon, adopted on 30 May 2007 by the UN Security Council. The *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Article 16)* and the *Statute of the Special Tribunal for Lebanon (Article 6)* exclude the application of amnesty for terrorist crimes. See also Article 10 of the Statute of Special Court for Sierra Leone, which stated that "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute [which include terrorist acts, according to Article 3(d) of the Statute] shall not be a bar to prosecution."

# Principle 4 – Derogations

*States must not suspend rights which are non-derogable under treaty or customary law. States must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national or ethnic origin, property, birth or other status.*

# Commentary

## 1. Unlawful State practices

Emergency powers are often invoked in the fight against terrorism. In some cases, there is no threat to the life of the nation concerned. Under states of emergency, security agencies often resort to unacknowledged detention and use ill-treatment and torture as a form of interrogation. Those detained under a state of emergency are frequently held in prolonged incommunicado detention or indefinite administrative detention. Practices employed in states of emergency currently include limitations on the judicial oversight of deprivation of liberty, restrictions on, or the denial of, *habeas corpus* and the establishment of special courts that lack basic judicial guarantees. In a number of countries, states of emergency have been in force for decades without justification. Some countries have adopted legislation to prevent any judicial oversight of both the declaration of states of emergency and any measures adopted as a result of them.

## 2. International legal framework

### i) Common legal framework regulating a state of emergency

The ICCPR, the *European Convention on Human Rights*, the *American Convention on Human Rights* and the newly adopted *Arab Charter on Human Rights* all envisage that, in time of public emergency, States may derogate from their obligations to respect and protect some rights.[126] Although the conditions under which derogation is permitted are formulated differently in each instrument, they all share essentially similar features. In time of public emergency and under strict conditions laid down in international human rights law, States may restrict, limit or suspend certain rights and freedoms. A state of emergency is often given a different name in national legislation, for example, "*état de siege*", "state of exception", "martial law", "suspension

126 The ICCPR (Article 4), the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 15), the *Arab Charter on Human Rights* (Article 4) and the *American Convention on Human Rights* (Article 27). The *African Charter on Human and Peoples' Rights* does not specifically provide for derogation but does permit the power to limit many rights in some circumstances.

of guarantees", "*état d'urgence"*, etc. Whatever name it has, States have an international obligation to fully comply with the provisions of international law relating to states of emergency.

Under international human rights law, such limitations or derogations of rights in times of emergency must be based on the principles of public declaration, legality, legitimacy, necessity and proportionality and be of limited duration. They must not affect rights that are non-derogable under treaty or customary law and *jus cogens* prohibitions. Rights that are subject to lawful limitation in times of emergency can never be deemed to have disappeared: derogation does not mean obliteration.[127]

According to international human rights law, including jurisprudence and case law[128]:

- any emergency must be declared and formal notification submitted to the relevant supervisory authority as provided in the relevant instruments (the principle of public declaration);
- states of emergency and derogations must be of an exceptional and temporary nature;
- States must act in accordance with the constitutional and legal provisions governing the proclamation and exercise of emergency powers (the principle of legality);
- derogations must not be inconsistent with other State obligations under international law, including international humanitarian law and international criminal law (the principle of legality);
- derogations must have a legitimate aim and not be discriminatory[129] (the principle of legitimacy);

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127 Nicole Questiaux, Special Rapporteur of the Sub-Commission, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN document E/CN.4/Sub.2/1982/15, para.192.

128 See, among others, Human Rights Committee, General Comment N° 29, *States of Emergency (Article. 4)*, adopted on 24 July 2001, UN document CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras 2, 4 and 6; European Court of Human Rights: Judgment (Merits) of 1 July 1961, *Case of Lawless v. Ireland;* Judgment (Merits and just satisfaction) of 18 January 1978, *Case of Ireland v. The United Kingdom*; Judgment (Merits) of 26 May 1993, *Case of Brannigan and McBride v. The United Kingdom*, and Judgment (Merits and just satisfaction) of 18 December 1996, *Case of Aksoy v. Turkey*; and the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

129 The grounds of unlawful discrimination listed in the ICCPR are race, colour, sex, language, religion or social origin. Political or other opinion, national or ethnic origin, property, birth or other status are also universally recognized grounds on which discrimination is forbidden (see the Durban Declaration, A/Conf.189/12, para.2.). There is emerging recognition that discrimination on the basis of sexual orientation is similarly repugnant.

- derogations are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation (the principle of necessity); and,

- the extent of any derogation must be strictly limited to that required by the exigencies of the situation (the principle of proportionality).

This last requirement refers to the duration, geographical coverage and material scope of the state of emergency and any derogations made as a result of the emergency. The Human Rights Committee has stated that "[n]evertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers".[130]

If no state of emergency has been declared, authorities may not derogate from their human rights obligations. They are bound to fully respect human rights and may only impose limitations on certain rights and freedoms. The official proclamation of a state of emergency is essential for the maintenance of the principles of legality and the rule of law at times when they are most needed.[131] The principle of necessity means that a State may only resort to a state of emergency when it is absolutely necessary and imperative to take emergency, temporary measures to respond to a situation that threatens the life of the nation and in respect of which the ordinary or normal powers and authority the State has at its disposal are insufficient.

Should a violent situation escalate to the level of a fully fledged conflict, the *Geneva Conventions* and *Hague Conventions* governing States' conduct enter into operation in order to protect people under international humanitarian law. However, in any event, the provisions of international human rights law relating to non-derogable rights and states of emergency apply during both international and non-international armed conflicts (see Principle 11, *Berlin Declaration*). The International Court of Justice confirmed that "[t]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency".[132] The Inter-American Commission on Human Rights stated that "the fundamental human rights protection of persons apply at all times, in peace, during emergency situations, and in war" and "States should refer to and consider pertinent provisions of international humanitarian law as the applicable *lex specialis* in interpreting and applying human rights protections in situations of armed conflict".[133]

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130 Human Rights Committee, General Comment Nº 29, *op.cit*. 32, para. 4.

131 Human Rights Committee, General Comment Nº 29, *op. cit.* 32, paras. 4 and 2.

132 International Court of Justice, Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, July 8 1996, International Court of Justice Reports 1996, para. 25.

133 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 49 and Recommendation Nº 3.

### ii) Never restrict non-derogable rights

Certain rights enshrined in human rights treaties may not be derogated from at any time (non-derogable rights), even in times of public emergency.[134] At the very least, the nine non-derogable rights that are common to all human rights treaties must be considered as non-derogable under customary international law: the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; freedom from enforced disappearance; freedom from imprisonment for failure to fulfil a contractual obligation; the right to recognition everywhere as a person before the law; the right not to be convicted for acts which, at the time they were committed, were not offences under national or international law and to benefit from the law that is most favourable; and the right to freedom of thought, conscience and religion. All States, whether or not they are parties to a general human rights treaty, have an obligation to respect these rights at all times, in all places and under all circumstances. A number of other rights, while not explicitly designated under conventions as non-derogable, have attained that status. In particular, the right to challenge the lawfulness of a detention (*habeas corpus, amparo*) is widely regarded as non-derogable.[135]

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134 In the case of the ICCPR: the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for failure to fulfil a contractual obligation, freedom from retroactive criminal liability, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion (Articles 6, 7, 8.1, 8.2, 11, 15, 16 and 18). *European Convention on Human Rights*: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude and freedom from retroactive liability (Articles 2, 3, 4.1 and 7). *American Convention on Human Rights*: the right to juridical personality, right to life, right to humane treatment, freedom from slavery, freedom from *ex post facto* laws, freedom of conscience, the rights of the family, right to a name, rights of the child, right to nationality, right to participate in government and the right to judicial guarantees essential to protect non-derogable rights (Articles 3, 4, 5,6, 9, 12, 17, 18, 19, 20, 23 and 27.2). The *Arab Charter on Human Rights*: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude or sexual exploitation, the right to a fair trial before an independent and impartial tribunal, freedom from arbitrary detention, freedom from retroactive criminal liability, freedom from imprisonment for failure to fulfil a contractual obligation, freedom of thought, conscience and religion, the right to humane treatment, the right to recognition as a person before the law, the right to leave one's own country, the right to asylum, the right to nationality and the right to judicial guarantees essential to protect non-derogable rights (Articles 4, 5, 8, 9, 10, 13, 14, 15, 18, 19, 30, 20, 22, 27, 28, and 29). See also the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2.2), the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article1), the *Inter-American Convention to Prevent and Punish Torture* (Article 5) and the Inter-*American Convention on Forced Disappearance of Persons* (Article X).

135 Human Rights Committee, General Comment Nº 29, *op. cit*. 32, paras.15-16, and the *Concluding Observations of the Human Rights Committee on Albania,* CCPR/CO/82/ALB, 2 December 2004, para. 9. See also the *American Convention on Human Rights* (Article 27); Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial guarantees in states of emergency*; and the *Arab Charter on Human Rights* (Article 4(b)). As far as enforced disappearance is concerned, Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance* stipulates that "any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful". See also Article 7 of the *Declaration on the Protection of All Persons from Enforced Disappearances*.

The Human Rights Committee has also highlighted the following:

- treating all persons deprived of their liberty with humanity and dignity;
- prohibitions on the taking of hostages, abductions and unacknowledged detentions;
- the protection of minority rights;
- the deportation or forcible transfer of a population without grounds permitted under international law;
- war propaganda or the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violation; and
- the right to an effective remedy for violations.[136]

The Human Rights Committee has also said that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception" [137] and most components of the right to a fair trial are widely regarded as non-derogable.[138]

Indeed, Article 4 (1) of the ICCPR states that derogations should not be "inconsistent with their [ie the State's] other obligations under international law". The Human Rights Committee has stated that "[A]rticle 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law".[139] It also said that "[t]he enumeration of non-derogable provisions in Article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. [...] States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law".[140] In addition, any action taken, and any limitations on rights, shall be confined solely to those that conform to the requirements of a democratic society.[141]

In international law, the following practices are prohibited in all circumstances and at all times, including during states of emergency: war crimes; crimes against humanity; torture and ill-treatment; the taking of hostages, abductions and unacknowledged

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136 Human Rights Committee, General Comment N° 29, *op. cit.* 32, paras. 13 and 14.

137 Views of 28 October 1992, Communication N° 263/1987, *M. Gonzalez del Río v. Peru*, CCPR/C/46/D/263/1987, para. 5.2.

138 Human Rights Committee, General Comment N° 29, *op. cit.* 32, and the Arab Charter on Human Rights (Article 4(b)).

139 Human Rights Committee, General Comment N° 29, *op. cit.* 32, para. 9.

140 *Ibid.*, para. 11.

141 Universal Declaration on Human Rights, Article 29 (2).

detention; the arbitrary deprivation of liberty, extrajudicial, arbitrary or summary executions; enforced disappearance; prolonged incommunicado detention; and the imposition of collective punishment.[142]

### iii) Judicial review of state of emergency

An important factor when it comes to observance of the rule of law and human rights is that both the declaration of a state of emergency and any emergency measures adopted under it should be subject to judicial oversight. The Human Rights Committee considered that removing the power to review the proclamation of a state of emergency from a Constitutional Court called into question the effectiveness of international standards concerning states of emergency and non-derogable rights and said that "Constitutional and legal provisions should ensure that compliance with Article 4 of the Covenant can be monitored by the courts".[143] The Inter-American Commission on Human Rights also shares the view that it is important for declarations of states of emergency to be subject to judicial review because it is "a crucial guarantee against the declaration of states of emergency other than on the grounds and pursuant to the limitations set forth in the [...] Constitution and international law".[144]

As the UN Special Rapporteur on states of emergency and human rights highlighted:

> *"[c]ontrary to a belief which is too widely held, states of emergency are not tantamount to the rule of the arbitrary. They are an institution of the rule of law involving a series of measures designed to come into force only when a crisis situation arises and which remain in reserve during ordinary periods. Therefore, whatever the political dimension which may be attributed to a given state of emergency, its legal nature is such that the acts which constitute it (proclamation, ratification, etc.) and the measures which are adopted when it*

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142 See, among others, the Human Rights Committee, General Comment N° 29, *op. cit.* 32; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2(2)); the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 3); the *Declaration on the Protection of All Persons from Enforced Disappearances* (Articles 6 and 7); the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 1); the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 1); the *Inter-American Convention to Prevent and Punish Torture*; the *Inter-American Convention on Forced Disappearance of Persons*; the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) (Article 4); the Lieber Code of 1863; the *Declaration on the protection of women and children in emergency and armed conflict*, adopted by UN General Assembly Resolution 3318(XXIX) of 14 December 1974 (Article 5); and the UN *Guiding Principles on Internal Displacement*.

143 *Concluding Observations of the Human Rights Committee on Colombia*, CCPR/C/79/Add.76, 5 May 1997, paras. 23 and 38.

144 *Third report of the situation of human rights in Colombia*, OAS document OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter II, "Human rights protection in the Colombian legal and political system", para. 69.

> *is in force (suspension or restriction of certain rights, etc.) must lie within the framework of the principles governing the rule of law and are thus subject to controls".*[145]

Judicial oversight of states of emergency is an inherent consequence of the principle of legality.[146]

145 UN document E/CN.4/Sub.2/1993/23, para. 51.

146 UN document E/CN.4/Sub.2/1997/19, 23 June 1997.

# Principle 5 – Peremptory norms

*States must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Acts in contravention of this and other peremptory norms of international human rights law, including extrajudicial execution and enforced disappearance, can never be justified. Whenever such acts occur, they must be effectively investigated without delay and those responsible for their commission must be brought promptly to justice.*

# Commentary

## 1. Unlawful State practices

In developing and carrying out counter-terrorism measures, some States have even called into question human rights norms that rank as peremptory norms of international law. Some countries have authorized the use of intensive interrogation techniques that amount to torture or cruel, inhuman or degrading treatment, including prolonged stress positions, sensory deprivation, the use of hoods, exposure to cold or heat, sleep disruption, 20-hour interrogation sessions, the removal of clothing and all personal and religious items and exploitation of detainees' phobias. In some countries, confessions obtained under torture, known euphemistically as "physical pressure in extreme circumstances", have been admitted as evidence in court. Senior government officials have tried to amend the definition of torture and cruel and inhuman treatment, to permit the use of so-called highly "persuasive" methods of interrogation and to exclude methods that have primarly a psychological impact.

States have adopted measures that allow unlawful "targeted killing" to take place or which exempt members of the security forces from responsibility for any deaths that they cause during anti-terrorist operations. Several States have resorted to international kidnapping, "extraordinary rendition" and the holding of so-called "ghost prisoners". These are people who are held in secret locations ("dark prisons" or "black sites") for long periods of time. They are kept outside the protection of the law with no opportunity to appeal to the courts about their situation and no communication with the outside world. The authorities refuse to acknowledge their detention or say what has happened to them or where they are being held. This amounts to enforced disappearance.

## 2. International legal framework

The use of practices such as torture, unlawful killings or enforced disappearances to combat terrorism can never be lawful because these practices violate peremptory

norms of international law *(jus cogens*).[147] Whether taken to combat terrorism in furtherance of a legal obligation or as an imperative policy objective, whether they are purported to save one life or thousands, such counter-terrorism measures are always prohibited.

### i) What is a peremptory norm of international law (*jus cogens*)?

A peremptory norm is an indelible[148] or "intransgressible"[149] norm of international law, the binding force of which is unconditional.[150] The International Court of Justice has referred to them as "elementary considerations of humanity".[151] Peremptory norms are as close as jurisprudence comes to absolute law. If a norm is peremptory, it is both binding and unconditional and can only be dissolved through displacement by another peremptory norm. The standard and generally accepted definition is that contained in the *Vienna Convention on the Law of Treaties*:

> *"A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*[152]

The 'international community as a whole' is generally considered to consist of a very large majority of States, but not necessarily all States.[153] Thus, no treaty can be made, nor any law enacted, that conflicts with a *jus cogens* norm, and no act committed in contravention of a *jus cogens* norm may be "legitimated by means of consent, acquiescence or recognition".[154]

The question as to which norms currently qualify under general international law as peremptory is not entirely settled. Still, it is uncontroversial to assert that certain fundamental human rights norms are peremptory.[155] They include freedom from

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147 The terms "peremptory norm of international law" and "*jus cogens*" are interchangeable.

148 I Brownlie, *Principles of Public International Law* 513 (1990).

149 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 226 and p. 257, para. 79.

150 The notion of 'peremptory' originated with classical international scholars, such as Vattel (see The Law of Nations, 55, secs.8-9 (Citty trans.). For a general study, see Lauri Hannikainen, *Peremptory Norms (*Jus Cogens*) in International Law : historical development, criteria, present status*, Lakimiesliiton Kustannus/ Finnish Lawyers' Publishing Company, Helsinki, 1988.

151 Judgment (Merits) of 9 April 1949, *Corfu Channel Case*, and Judgment of 27 June 1986, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.

152 Article 53 of the *Vienna Convention on the Law of Treaties*, adopted in May 1969 at the UN Conference on the Law of Treaties. See also Article 53 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986).

153 Vienna Conference Proceedings, UN Conference on the Law of Treaties, Official Records, First Session 472 (1968) (Comment of the Chairman summarizing the views of State drafters).

154 Sir Robert Jennings and Sir Arthur Watt (Eds), *Oppenheim's International Law,* (Ninth ed.), Vol. I, 8 , London, 1996.

155 According to the *American Law Institute's Restatement (Third) of Foreign Relations Law* (sect. 702(n)),

torture [156], extrajudicial or summary execution [157] and enforced disappearance [158]. There is also no doubt whatsoever that the prohibitions against hostage-taking [159], collective punishment [160], genocide [161], crimes against humanity [162] and war crimes [163] are *jus cogens* norms.

Regarding the absolute prohibition of torture, the Inter-American Commission on Human Rights has underlined that "all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited. This could include severe and deliberate mistreatment causing very serious and cruel suffering, such as severe beatings, suspending prisoners in humiliating and painful ways, rape and sexual aggression, electric shock, [...] death threats, prolonged

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peremptory human rights norms include the prohibitions against genocide, slavery or the slave trade, the murder or causing the disappearance of individuals, torture and other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination

156 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Anto Furundzija*, Judgment N° IT-95-17/1-T, para. 154; *The Prosecutor v. Delalic and others*, ICTY Trial Chamber, IT-96-21-T, para.454; *The Prosecutor v. Kunarac*, It-96-23-T and IT-96-23/1-T (22 February 2001); UN General Assembly Resolution A/RES/59/183; UN Commission on Human Rights Resolution ECN.4/RES/2005/39; and the UN Special Rapporteur on Torture (UN document E/CN.4/1986/15, para. 3, 19 Feb. 1986).

157 Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders (1980), Resolution N° 5 on Extralegal Executions, paras. 2 and 5, UN document A/CONF.87/14/Rev.1 (1981); Inter-American Court of Human Rights, Judgment of 14 March 2001, Case of *Barrios Altos (Chumbipuma Aguirre et al. v. Peru)*; Inter-American Commission on Human Rights, *Recommendation on Asylum and International Crimes*, 20 October 2000; and Nigel Rodley, *The Treatment of Prisoners under International Law*, Clarendon Press – Oxford, 1999, Second Edition, p.192.

158 Inter-American Court of Human Rights, Case of *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, Series C N° 153, para. 84.

159 General Comment N° 29, *States of emergency (Article 4)*, adopted on 24 July 2001, para. 11.

160 *Ibid.,* para. 11, and Rule 103, *Collective punishments are prohibited*, in International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I, Rules,* Cambridge Press University, 2005, p.374.

161 UN General Assembly Resolution 96 (I) of 11 December 1946; International Court of Justice, Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide;* International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment of 2 October 1998, *The Prosecutor of the Tribunal against Jean Paul Akayesu*, Case N° ICTR-96-4-T; International Criminal Tribunal for Rwanda, Trial Chamber II, Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*; and the ICTY, Trial Chamber, Judgment of 2 August 20001, *The Prosecutor v. Radislav Krstic "Srebrenica"*, Case N° IT-98-33. See also: Supreme Court of Israel, Decision of 29 May 1962, *Attorney General of Israel v. Eichmann.*

162 UN General Assembly Resolution 95 (I) of 11 December 1946, *Rapport du Secrétaire général établi conformément au paragraphe 2 de la résolution 808 (1993) du Conseil de sécurité et ses annexes*, UN document S/25704, para. 47; and the ICTY Judgment of 29 November 1996, *The Prosecutor v. Erdemovic*, Case N° IT-96-22-T.

163 UN General Assembly Resolution 95 (I) of 11 December 1946; ICTY, Appeal Court, Judgment of 20 February 2001, Case of *Mucic et al (" Celebici"),* IT-96-21; and ICTY, Appeal Court, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Case of *The Prosecutor v. Tadiç*, Tadic IT-94-1 ("Prijedor"). See also the Judgment of the Military Court of Appeal of Rome, 7 March 1998; the Judgment of the Supreme Court of Cassation, 16 November 1998, Case of *Haas and Priebke*; S. Ratner & J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 110 (1997); and T. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 558 (1995).

incommunicado detention, and deprivation of sleep".[164] It also said that, "in addition, while each case must be evaluated on its own circumstances, torture or other cruel, inhumane or degrading treatment could include more subtle treatments that have nevertheless been considered sufficiently cruel, such as exposure to excessive light or noise, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance, total isolation and sensory deprivation".[165]

### ii) The legal consequences of a peremptory norm of international law

The fact that norms such as those relating to torture and the right to life are peremptory in nature means that no bilateral or multilateral treaty allowing the abrogation of these rights may be entered into. Similarly, no laws or policies producing the same effect may be adopted by a State or by intergovernmental organizations. A cogent description of the legal consequences has been given by the International Criminal Tribunal for the Former Yugoslavia, an organ of the UN Security Council:

> *"The fact that torture is prohibited by a peremptory norm of international law has (...) effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand that on account of the* jus cogens *value of the prohibition against torture, treaties or customary rules providing for torture would be null and void* ab initio*, and then be unmindful of a state say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. [...] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provisions, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had* locus standi *before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful: or the victims could bring a civil suit for damage in a foreign court, which would therefore be asked* inter alia *to disregard the legal value of the national authorizing act. What is even more important is that perpetrators of torture acting upon or*

164 *Report on Terrorism and Human Rights, op.cit.* 32, paras. 211 and 213.

165 *Ibid*., para. 212.

> *benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime".*[166]

Fundamental human rights norms carry with them obligations *erga omnes*[167], meaning that every State has a legal interest in their fulfilment. As the International Court of Justice has stated, "given the importance of the rights involved, States can be deemed to have a legal interest in such rights being protected; the obligations in question are obligations *erga omnes*".[168] Such obligations may be demanded of and by all States. The International Court of Justice said that these obligations *erga omnes* "are derived, for example, from contemporary international law and the prohibition on acts of aggression and genocide, as well as the principles and norms relating to the basic rights of human beings, including protection from slavery and racial discrimination".[169] As the International Law Commission has explained in respect of its codification of the international law on state responsibility, "there is a substantial overlap between [*jus cogens* norms and obligations *erga omnes*]. [...] While peremptory norms of general international law focus on the scope and priority to be given to [...] fundamental obligations, the focus of [obligations *erga omnes*] is essentially on the legal interest of all States in compliance [...] in being entitled to invoke the responsibility of any State in breach".[170]

The Articles on Responsibility of States adopted by the International Law Commission provide that, in the case of a breach in respect of an obligation arising out of a *jus cogens* norm (such as torture), all other States have an obligation to cooperate to bring an end to the breach through lawful means and not to recognize as lawful a situation created by such a breach, or to render aid or assistance in maintaining that situation.[171] These obligations have been recognized by the International Court of Justice.[172] In addition, a State or group of States may demand the cessation of the

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166 ICTY, *The Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, para. 155.

167 International Court of Justice, Decision of 5 February 1970, Case concerning *Barcelona Traction Light and Power Company*, para. 34, in *Recueil des Arrêts de la Cour Internationale de Justice – 1970,* para. 33; and General Comment 31, UN Human Rights Committee, UN document CCPR/C/21/Rev.1/Add.13, para. 2.

168 International Court of Justice, Decision of 5 February 1970, Case concerning *Barcelona Traction Light and Power Company*, para. 34, in *Recueil des Arrêts de la Cour Internationale de Justice – 1970* (French original, free translation).

169 *Ibid*., See also, International Court of Justice, *East Timo*r Case *(Portugal v. Australia)*, Reports 1995, 90 at p.102.

170 International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*, Introductory Commentary to Part II, Chapter 3, paragraph (7) (2001).

171 *Ibid., Articles 40-41*

172 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Reports 2004, 136 at 200 (para. 159), requiring States not to recognize nor to render aid or assistance to the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory in violation of the right of the Palestinian people to self-determination.

torture and seek assurances and guarantees of non-repetition, as well as reparations on behalf of the torture victims.[173]

No State may therefore practice, cooperate in or assist with, or recognize or acquiesce in torture or other cruel, inhuman or degrading treatment or punishment, summary execution or enforced disappearances. On the contrary, States are obliged to take measures to prevent and punish such practices by their own officials as well as by other States. They must strictly apply the principles of *non-refoulement* and not expel, extradite or transfer people to States where there is a risk of torture or other ill-treatment.[174] The Human Rights Committee has reminded States that:

> *"the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment [...] in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under Article 7 of the [ICCPR]. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment".*[175]

Thus, States may not circumvent this prohibition by resorting to the practice of 'rendition', i.e. the seizure and transfer of suspects, outside of the normal legal proceedings of extradition, deportation, expulsion or removal, and without due process safeguards. States may not use evidence obtained under torture or other forms of ill-treatment in judicial proceedings, whether the ill-treatment was committed by the State conducting the legal proceedings or by another State. States should prosecute or extradite persons responsible for acts of torture, extrajudicial execution and enforced disappearance and may have an obligation to do so, such as in respect of States parties to the Convention against Torture.[176]

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173 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts,* Article 48.

174 *Soering v. United Kingdom*, European Court of Human Rights (Ser.A), Vol.161 81989); *Chahal v. The United Kingdom (*Judgment of 15 November 1996) and UN Human Rights Committee, General Comment 20, para.6.

175 *Concluding Observations of the Human Rights Committee on Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

176 UN Convention against Torture (Article 5).

# Principle 6 – Deprivation of liberty

*States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to habeas corpus or equivalent judicial procedures, at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.*

## Commentary

### 1. Unlawful State practices

As in the past, during the cold war and under military regimes [177], incommunicado detention, secret detention and administrative detention – also known as extra-judicial or preventive detention – are frequently used to detain people in the context of the fight against terrorism. Administrative detentions are ordered by the executive branch of the State with no judicial oversight and/or remedies. In many cases, incommunicado and administrative detentions are prolonged and sometimes extended indefinitely. In several countries, detainees are held in secret locations. Anti-terrorist legislation is used to detain peaceful members of political and social opposition groups and trades unions.

Prolonged pre-trial detention in terrorism cases currently occurs in many countries. Under anti-terrorist legislation, detainees often have no right of access to lawyers and the authorities refuse to provide basic information to their families. In many countries, detainees have to wait several months or years before being brought before a court. One of the most common anti-terrorist measures is to limit or suspend the right to a judicial remedy, such as *amparo* or *habeas corpus,* or to render them unworkable in practice.

A number of countries have set up a global system of rendition (also known as "extraordinary rendition"). The rendition process may operate in various ways.

177 For example, in the United Kingdom (1940), Ghana (Laws N° 57 of 1958 and N° 5 of 1959), Singapore (the Preservation of Public Security Ordinance of 1955 and Ordinances of 1958 and 1959), Philippines, Bulgaria (the law of 10 January 1959), Burma (Laws N° XXVIII and N° LXXIX of 1947), India (the Defence of India Act and Defence of India Rules of 1939, Prevention of Detention Act of 1951), Argentina (PEN legislation, Institutional Act of September 1 of 1977, Law 21,650 of September 26 of 1977, etc); Chile (1973 legislation on the state of siege and "State of War"), Uruguay (Decree N° 393/973), Paraguay (1959 legislation on the state of siege) and South Africa (Apartheid, the internal security acts of 1950 and 1976 and the terrorist act of 1967).

Some of those who have been rendered have been initially detained during an international armed conflict; others have been arrested or otherwise lawfully detained, and subsequently handed over to foreign intelligence services, outside of normal legal processes; others have been kidnapped by foreign intelligence services, apparently without the consent of the State in which the seizure took place. However the common factor is that each of these processes, at some point, removes the detained person from the protection of domestic or international law, denying them access to the courts or any other means of redress, or to any means of assessing their guilt or innocence of any offence, contrary to the most basic principles of respect for the rule of law, human dignity and fairness. This system of rendition has relied on the participation, tolerance or acquiescence of several countries around the world, and in particular of their intelligence services.

## 2. International legal framework

The practices described above contravene universally accepted international human rights standards and they also constitute violations of States' obligations under international law, in the event of territorial and extra-territorial application (see Principle 1, *Berlin Declaration*), including peremptory norms (see Principle 5, *Berlin Declaration*). At the same time they leave detainees defenceless and at risk of arbitrary detention and gross violations of human rights such as torture, ill-treatment, enforced disappearance and unacknowledged detention.

### i) The right to liberty and not to be arbitrarily deprived of liberty

International law recognizes and protects the right to liberty and the right not to be arbitrarily deprived of liberty.[178] The concept of deprivation of liberty assumes different forms, including arrest[179] and detention[180]. The "right to liberty" is closely connected with the "right to security of person".[181]

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178 *Universal Declaration of Human Rights* (Articles 3 and 9), *International Covenant on Civil and Political Rights* (ICCPR) (Article 9), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 16), *Convention on the Rights of the Child* (Article 37), *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 17), *Declaration on the human rights of individuals who are not nationals of the country in which they live* (Article 5.1), *African Charter on Human and Peoples' Rights* (Article 6), *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M), *American Declaration of the Rights and Duties of Man* (Articles I and XXV), *American Convention on Human Rights* (Article 7), *Arab Charter on Human Rights* (Article 14) and *European Convention on Human Rights* (Article 5).

179 The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides the following definition of 'arrest': "the act of apprehending a person for the alleged commission of an offence or by the action of an authority".

180 'Detention' means the condition of persons deprived of personal liberty except as a result of conviction for an offence (UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, "Use of Terms").

181 See, among others, the Human Rights Committee: Views of 25 October 2000, *Rodger Chongwe v. Zambia*, Communication Nº 821/1998, CCPR/C/70/D/821/1998; Views of 20 March 2000, *Carlos Dias v. Angola*, Communication Nº 711/1996, CCPR/C/68/D/711/1996; and Views of 12 July 1990, *William Eduardo Delgado Páez v. Colombia*, Communication Nº 195/1985, CCPR/C/39/D/195/1985. See also the European Court of

Any deprivation of liberty must conform to the following general principles: legality (material and procedural grounds), legitimacy (purpose of the detention), necessity, proportionality, and the protection of human rights, in particular, the right not to be arbitrarily detained.[182] Following on from this, the UN Human Rights Committee has underlined that "for an arrest to be in compliance with Article 9, paragraph 1, it must not only be lawful, but also reasonable and necessary in all the circumstances".[183] It has also stated that "[p]re-trial detention should be an exception and as short as possible".[184]

To protect the right to liberty, international law has established numerous guarantees that seek to protect people from unlawful or arbitrary detention or arrest. The Inter-American Commission on Human Rights has noted that among these "are the requirements that any deprivation of liberty be carried out in accordance with pre-established law, that a detainee be informed of the reasons for the detention and promptly notified of any charges against them, that any person deprived of liberty is entitled to judicial recourse, to obtain, without delay, a determination of the legality of the detention, and that the person be tried within a reasonable time or released pending the continuation of proceedings".[185]

According to the Human Rights Committee, "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[186] The European Court of Human Rights has reiterated that "lawful" detention requires not only that it complies with "a procedure prescribed by law" and with

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Human Rights, Judgment of 12 March 2003, *Öcalan v. Turkey.* Article 3 of the *Universal Declaration of Human Rights* refers to the right to life, the right to liberty and the right to security of the person.

182 See, among others, the Inter-American Court of Human Rights (Judgment of 21 January 1994, *Gangaram Panday*, paras. 46-47; 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; and Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras,* para. 78) and the European Court of Human Rights (Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, para. 48; 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; and Judgment of 15 November 1996, *Chahal v. United Kingdom*, para. 118).

183 Views of the Human Rights Committee, 5 November 1999, Communication Nº 631/1995, *Case of Aage Spakmo v. Norway*, para. 6.3, CCPR/C/67/D/631/1995, 11 November 1999.

184 Human Rights Committee, General Comment Nº 8, *Right to liberty and security of persons (Article 9)*, para. 3.

185 *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 120.

186 Views of 23 July 1990, Communication Nº 305/1988, *Hugo van Alphen v. the Netherlands*, CCPR/C/39/D/305/1988, para. 5.8; Views of 5 November 1999, Communication Nº 631/1995, *Aage Spakmo v. Norway*, CCPR/C/67/D/631/1995, para. 6.3; Views of 21 July 1994, Communication Nº 458/1991, *Albert Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991, para. 9(8); and Views of 3 April 1997, Communication Nº 560/1993, *A (name deleted) v. Australia*, CCPR/C/59/D/560/1993, para. 9.2.

the substantive and procedural rules established in the European Convention, but also that any deprivation of liberty should be consistent with the purpose of Article 5 of the European Convention, namely to protect individuals from arbitrariness.[187]

In this context it is worth pointing out that, according to the UN Working Group on Arbitrary Detention, deprivation of liberty is arbitrary in the following cases: when it manifestly cannot be justified on any legal basis; when it is the result of a judgment or sentence handed down for exercising the rights and freedoms enshrined in Articles 7, 13, 14, 18, 19, 20 and 21 of the *Universal Declaration of Human Rights*; or when the complete or partial non-observance of international standards relating to the right to a fair trial, as set forth in the *Universal Declaration of Human Rights* and relevant international instruments, is of such gravity that it renders the deprivation of liberty, of whatever kind, arbitrary. Detention, including pre-trial detention, on the grounds of vague or ill-defined criminal offences also amounts to arbitrary detention (see Principle 3, *Berlin Declaration*).

According to applicable international human rights treaties[188], the right to liberty may be the subject of derogation in times of emergency (see Principle 4, *Berlin Declaration*). However, such derogations must be consistent with other obligations under international law, including international customary law, in particular peremptory norms of international law that extend beyond the express list of non-derogable provisions established in human rights treaties,[189] and cannot deprive detainees of the safeguards designed to protect non-derogable rights. In this connection, the Human Rights Committee has pointed out that a state of emergency or state of war cannot be invoked as a justification for hostage-taking, abductions, unacknowledged detention, arbitrarily depriving people of their liberty, deviating from the fundamental principles of a fair trial, or denying anyone deprived of their liberty the right to be treated with humanity and respect for the inherent dignity of the human person.[190]

### ii) Secret detention, incommunicado detention and guarantees

Under international law, secret or unacknowledged detention, as well the taking of hostages and abductions, are absolutely prohibited. Indeed, the UN Human Rights Committee has pointed out that "[t]he absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international

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187 Judgment of 12 March 2003, *Öcalan v. Turkey*, para. 86; Judgment of 18 December 1986, *Bozano v. France,* para. 54; and Judgment of 27 September 1990, *Wassink v. the Netherlands*, para. 24. In similar vein, see also the Inter-American Court of Human Rights, Judgment of 21 January 1994, *Gangaram Panday Case,* para. 47, and Judgment of 12 November 1997, *Suárez Rosero Case,* para. 43, as well as the Inter-American Commission on Human Rights *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 121.

188 The ICCPR (Article 4), *American Convention on Human Rights* (Article 27) and *European Convention on Human Rights* (Article 5).

189 Human Rights Committee, *General Comment N° 29,* CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

190 *Ibid.,* paras. 11 and 13.

law".[191] The *International Convention for the Protection of All Persons from Enforced Disappearance* prohibits secret detention.[192] For the Human Rights Committee, holding people in secret and in secret locations violates the right of detainees to benefit from the protection of domestic and international law as well as the rights of the families of detainees.[193] It concluded that this practice cannot be justified by the stated need to remove the people concerned from the battlefield and called on States to "immediately cease [the] practice of secret detention and close all secret detention facilities".[194]

Regimes involving prolonged incommunicado detention, prolonged solitary confinement or prolonged total isolation are prohibited under international law. As pointed out by the UN Special Rapporteur on Torture, "incommunicado detention should be made illegal and is the most important determining factor as to whether an individual is at risk of torture".[195] The UN Human Rights Committee, the Committee against Torture and the Inter-American Court of Human Rights have all noted that the prolonged solitary confinement or incommunicado detention of a detained or imprisoned person may amount to prohibited acts such as torture or ill-treatment.[196] UN treaty bodies have recommended that States should make provisions against incommunicado detention and prohibit this practice by law.[197] The UN Working Group on Enforced or Involuntary Disappearances has pointed out that prolonged and indefinite incommunicado detention can amount to enforced disappearance if national authorities deny that they are holding the detainee in custody.[198] International law does not provide a clear time limit beyond which incommunicado detention would be deemed 'prolonged'. However, the Human Rights Committee

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191 *Ibid.*, para. 13 (b). See also the European Court on Human Rights, Judgment of 25 May 1998, *Kurt v. Turkey*, paras. 123 and 124.

192 Article 17 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance.

193 *Concluding Observations of the Human Rights Committee on United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12.

194 *Ibid*.

195 *Report of the Special Rapporteur,* E/CN.4/2004/56, para. 37, and *Report of the Special Rapporteur,* A/57/173, 2 July 2002, para. 16.

196 Human Rights Committee, General Comment N° 20: *Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 6; Committee against Torture (Reports A/54/44, paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182) and Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez Case* (para. 156) and Judgment of 12 November 1997, *Suarez Rosero Case* (paras. 90-91).

197 See, among others, the Human Rights Committee, General Comment N° 20, *op. cit.*; Report of the Human Rights Committee, A/54/40, *Concluding Observations on Chile* (para. 209); Report of the Human Rights Committee, A/53/40, *Concluding Observations on Tanzania* (para. 393) *and Uruguay* (242); *Preliminary Observations on Peru*, CCPR/C/79/Add.67, para. 23, and the Committee against Torture (*Concluding observations* on *Georgia* and *Ukraine*, in 1997; *Spain* (1998); *Libyan Arab Jamahiriya* (1999) and *Finland*, A/51/44, para.127).

198 E/CN.4/1435, 22 January 1981, paras. 175 *et seq.*; E/CN.4/1492, 31 December 1981, para. 158; and E/CN.4/1983/14, 21 January 1983, para. 96.

found incommunicado detention for a period of five days to be in contravention of Articles 9 and 14 of the ICCPR.[199]

Detainees must be held in official places of detention and the authorities must keep a record of their identities.[200] International human rights bodies and procedures have stressed the fundamental role these safeguards play in protecting the detainee and preventing enforced disappearances, unacknowledged detention and torture.[201] The UN Human Rights Committee has noted that "[t]o 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".[202]

The UN Working Group on Enforced or Involuntary Disappearances has stated that for places of detention to be "officially recognized":

> *"requires that such places must be official – whether they are police, military or other premises – and in all cases clearly identifiable and recognized as such. Under no circumstances, including states of war or public emergency, can any*

199 *Concluding Observations of the Human Rights Committee on Spain*, CCPR/C/79/Add.61, 3 April 1996, paras. 12 and 18.

200 Article 10.1 of the *Declaration on the Protection of All Persons from Enforced Disappearances*, Article 17 of *International Convention for the Protection of All Persons from Enforced Disappearance*, Rule 7 of the *Standard Minimum Rules for the Treatment of Prisoners*, Principles 20 and 29 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution,* Article XI of the *Inter-American Convention on Forced Disappearance of Persons*, Rules 7 and 8 of the *European Prison Rules*, and Principle M(6) of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*.

201 See, among others, the Human Rights Committee (General Comments N° 20 – Article 7 of the Covenant, para. 11, and N° 21 – Article 10 of the Covenant, para. 6.; and *Concluding Observations on the Republic of Kyrgyzstan*, CCPR/CO/69/KGZ, para. 7; *Tunisia*, CCPR/C/79/Add.43, para. 15; *Sudan*, CCPR/C/79/Add.85, para. 15; *Morocco*, CCPR/C/79/Add.113, para. 16; *Algeria*, CCPR/C/79/Add. 95, para. 12; *India*, CCPR/C/79/Add. 81, para. 24; *Cyprus,* CCPR/C/79/Add.88, para. 5; and *Peru*, CCPR/C/79/Add.67, para. 5); the Committee against Torture (*Bolivia*, CAT/C/XXVI/Concl.3/rev.1, para. 21; and *Observation on Tunisia*, A/54/44 (para. 88-105); *Egypt*, A/54/44 (para. 197-216); and *Cameroon*, AT/C/XXV/Concl.5, para. 7); and the Working Group on Enforced and Involuntary Disappearances (General comments on Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance; UN document E/CN.4/1997/34, paras. 24 and 30; and E/CN.41992/18, para. 204). See also the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* 32.

202 General Comment N° 20*, op. cit.* 196*,* para. 11.

*State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the Declaration [for the Protection of All Persons from Enforced Disappearances], without exception".*[203]

At this point it is worth bearing in mind that international humanitarian law provides similar safeguards.[204]

### iii) The right of detainees to have prompt access to lawyers, family members and medical personnel

As the Human Rights Committee has underlined, "the protection of the detainee also requires that prompt and regular access be given to [...] lawyers".[205] The right to have prompt access to a lawyer is universally recognized and protected.[206] Relevant principles state that people should be provided access to a lawyer "*without delay*".[207] Principle 7 of the UN *Basic Principles on the Role of Lawyers* stipulates that "all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention". The Human Rights Committee stated that "all persons who are arrested must immediately have access to counsel" [208] and that "the use of prolonged detention without any access to a lawyer or other persons of the outside world violates Articles [of] the Covenant (Articles 7, 9, 10 and 14, para. 3,b)".[209] The Committee has recommended "that no one is held for more than 48 hours without access to a lawyer" [210] and that all detainees, including those being held in administrative detention, have the right to prompt access to a lawyer.[211] The UN Special Rapporteur on Torture has pointed out that "in accordance with international law,

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203 General comments on Article 10 of the Declaration, E/CN.4/1997/34, para. 24.

204 The IV Geneva Convention establishes the obligation of the Occupying Power to notify the Protecting Power of the place of detention or the residence of civilian defendants (Article 71) and the obligation of the Detaining Power to inform the enemy Powers about the geographical location of places of internment of civilians (Article 83). See also the IV Geneva Convention, Article 136 *et seq.*

205 General Comment N° 20, *op. cit.* 196, para. 11. See also the *Concluding Observations of the Human Rights Committee on Tajikistan,* CCPR/CO/84/TJK, 18 July 2005, para. 11, and *Thailand*, CCPR/CO/84/THA, 8 July 2005, para. 15.

206 The *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 17), the *Standard Minimum Rules for the Treatment of Prisoners* (Rule 93), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 17 and 18), the UN *Basic Principles on the Role of Lawyers* (Principles 1, 5, 6, 7 and 8), the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution* (Principle 6) and the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M.2).

207 See, among others, Principle 18 (3) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and Principle 7 of the UN *Basic Principles on the Role of Lawyers*.

208 *Concluding Observations of the Human Rights Committee on Georgia*, CCPR/C/79/Add.75, 5 May 1997, para. 27.

209 *Concluding Observations of the Human Rights Committee on Israel*, CCPR/CO/78/ISR, para. 13.

210 *Ibid.*

211 *Concluding Observations of the Human Rights Committee on Israel*, CCPR/CO/78/ISR, para. 13, and *Switzerland*, CCPR/C/79/Add.70, para. 26; and Views of 27 July 1993, Communication N° 326/1988, Case of *Henry Kalenga v. Zambia,* CCPR/C/48/D/326/1988, para. 6.3.

and as confirmed by States' practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: [...] the right to have access to a lawyer within 24 hours from the time of arrest".[212]

The right to prompt access to a lawyer without delay includes the right to consult and communicate with him or her, without interception, censorship and in full confidentiality.[213] The Human Rights Committee has stated that forbidding detainees "to speak or to write to anyone", in particular their lawyer, while in preventive detention constitutes a violation of the ICCPR.[214]

Certain restrictions on the right to have access to a lawyer are permitted under international law. However, the decision to restrict a person's right to legal assistance must comply with certain criteria and judicial safeguards.[215] Such restrictions cannot result in prolonged incommunicado detention or prolonged solitary confinement, both of which are forbidden by international law.[216] The UN Special Rapporteur on Torture has pointed out that "[i]n exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association".[217] The European Court of Human Rights has found that "detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. [...] Moreover, within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. [...] In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld".[218]

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212 *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 18. See also: E/CN.4/2004/56, para. 32.

213 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 18 (3)) and the UN Basic Principles on the Role of Lawyers (Principle 8).

214 Decision of 6 November 1997 in *Victor Alfredo Polay Campos v. Peru,* in *Communication N° 577/1994: Peru*, CCPR/C/61/D/577/1994, 9 January 1998, para. 8.4.

215 In other words, such a decision must be taken only in exceptional circumstances. These circumstances must, in turn, be specified by law or lawful regulations. There must be a determination of the indispensability of the suspension or restriction. The restriction must be for the purpose of maintaining security or public order. It must be taken by a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantee of competence, impartiality and independence.

216 Human Rights Committee, General Comment N° 7, *The prohibition of torture or to cruel, inhuman or degrading treatment or punishment (Article 7)*, para. 2, and General Comment N° 20, *The prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7)*, paras. 6 and 11. See also the *Concluding observations of the Human Rights Committee on Spain* (CCPR/C/79/Add.61, 3 April 1996, paras. 12 and 18), *Israel* (CCPR/C/79/Add.93, 18 August 1998, paras. 20 and 21) and *Peru* (CCPR/C/79/Add.67, 25 July 1996, paras. 23 and 24), and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 15).

217 E/CN.4/2004/56, para. 32, and *Report of the Special Rapporteur,* A/57/173, 2 July 2002, paras. 16 and 17.

218 Judgment of 26 May 1993, *Brannigan and McBride v. the United Kingdom,* para. 64.

International human rights standards recognize and protect the right of detainees to immediately inform their family of their arrest, detention or transfer and to communicate with them.[219] It is a basic safeguard designed to prevent enforced disappearances and unacknowledged detention. Detainees and prisoners shall have the right to be visited by and to correspond with members of their family and friends and shall be given adequate opportunity to communicate with the outside world.[220] The Human Rights Committee has recommended on several occasions that States ensure that information concerning detentions and the place or places of detention, including details of transfers, is provided promptly to the families and lawyers of those deprived of their liberty.[221] Allowing visits, especially from family members, is also a measure that is normally required for reasons of humanity.[222] The Human Rights Committee has found the prolonged, total isolation of a detainee from his or her family to "constitute inhuman treatment within the meaning of Article 7 and [be] inconsistent with the standards of human treatment required under Article 10, paragraph 1, of the Covenant".[223] The UN Special Rapporteur on Torture has pointed out that, "in accordance with international law, and as confirmed by States' practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: [...] the right to inform a relative or friend about the detention".[224]

The right to have prompt access to medical personnel and medical assistance is an essential safeguard that is universally recognized.[225] The Inter-American Commission on Human Rights has made it clear that this right constitutes a fundamental standard for the protection of detainees, including people held in administrative detention,

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219 The *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 17), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 15, 16.1 and 19), the *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 10), the *Standard Minimum Rules for the Treatment of Prisoners* (Rules 37 and 92), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 17), the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution* (Principle 6) and the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M).

220 The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 19), the *Standard Minimum Rules for the Treatment of Prisoners* (Rules 37, 38, 39 and 92) and the UN *Rules for the Protection of Juveniles Deprived of the Liberty* (Rules 59, 60, 61 and 62).

221 See, among others, the Human Rights Committee, *Concluding Observations on Tunisia* (CCPR/C/79/Add.43, para. 15), *Algeria* (CCPR/C/79/add. 95, para. 12) and *India* (CCPR/C/79/Add. 81, para. 23). See also Articles 17 (3) and 18 of *the International Convention for the Protection of All Persons from Enforced Disappearance*.

222 Human Rights Committee, General Comment N° 9, *Humane treatment of persons deprived of liberty* (Article 10), para. 3.

223 Views of 6 November 1997, Communication N° 577/1994, Case of *Víctor Alfredo Polay Campos v. Peru*, para. 8.6, CCPR/C/61/D/577/1994, 9 January 1998.

224 *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 18. See also E/CN.4/2004/56, para. 32.

225 The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 24), the *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 10) and the *Standard Minimum Rules for the Treatment of Prisoners* (Rules 37 and 92).

that cannot be suspended even in situations allowing derogation in emergency situations.[226]

### iv) The right of detainees to be informed of the reason for their arrest and any charges and evidence against them and to be brought promptly before a court

The right of detainees to be informed is universally recognized and protected.[227] The Inter-American Commission on Human Rights has observed that "where detention is not ordered or promptly supervised by a competent judicial authority, where the detainee may not fully understand the reason for the detention or have access to legal counsel, and where the detainee's family may not have been able to locate him or her promptly, there is clear risk, not just to the legal rights of the detainee, but also to his or her personal integrity".[228] International human rights bodies have determined that any delay in bringing a person before a competent court must not exceed a few days, and beyond this the delay will generally not be considered reasonable.[229]

In the case of people arrested or detained on criminal charges, these rights are linked to the right to be tried without undue delay.[230] Indeed, the Human Rights Committee has stated that "Article 14, paragraph 3(c), of the Covenant prescribes that anyone charged with a criminal offence has the right to be tried without undue delay, and that Article 9, paragraph 3, provides further that anyone detained on a criminal charge shall be entitled to trial within a reasonable time or release".[231]

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226 *Report on Terrorism and Human Rights*, *op. cit.* 32, paras. 127 and 139 and Recommendation N° 7.

227 The *International Covenant on Civil and Political Rights* (Article 9), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 16), the *Convention on the Rights of the Child* (Article 37), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 10 and 11), the *Declaration on the human rights of individuals who are not nationals of the country in which they live* (Article 5), the *African Charter on Human and Peoples' Rights* (Article 6), the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M), the *American Convention on Human Rights* (Article 7), the *Arab Charter on Human Rights* (Article 14) and the *European Convention on Human Rights* (Article 5).

228 *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 121.

229 The Human Rights Committee, General Comment N° 8, *Right to liberty and security of persons (Article 9)*, 1982, para. 2 (In a case involving anti-terrorist legislation, the Committee considered that prolonged detention in police custody for up to four days (twice the normal length) before the person was brought promptly before a court was incompatible with the provisions of the ICCPR – *Concluding Observations of the Human Rights Committee on France*, CCPR/C/79/Add.80, 4 August 1997, para. 23.); the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 122, and the European Court of Human Rights, Judgment of 29 November 1988, *Brogan and Others v. the United Kingdom*, para. 62.

230 The ICCPR (Article14.3(c)), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article18.3(c)), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 38), the *African Charter on Human and Peoples' Rights* (Article 7.1(d)), the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M), the *American Convention on Human Rights* (Article 8.1), the *Arab Charter on Human Rights* (Article 14.3(c)) and the European Convention on Human Rights (Article 6.1).

231 Human Rights Committee, Views of 4 April 1995, Communication N° 447/1991, *Leroy Shalto (Trinidad and Tobago)*, para. 7.2, CCPR/C/53/D/447/1991.

Anyone who is arrested on a criminal charge has the right to be tried within a reasonable time or to be released.[232] Both prolonged detention without trial and prolonged detention waiting for a trial that is unduly delayed are prohibited by international law and both constitute arbitrary detention.

### v) The right to *habeas corpus* or other similar judicial procedures

One of the most important safeguards to protect the right to liberty and the right not to be arbitrarily deprived of liberty is *habeas corpus* or similar judicial procedures that can challenge the legality of the deprivation of liberty. Such judicial remedies are not only important for protecting the right to liberty and preventing arbitrary detention. Indeed, *habeas corpus* and similar procedures can also prevent torture, ill-treatment[233], enforced disappearance[234], incommunicado detention[235] and other grave violations of human rights. The UN General Assembly emphasized, many years ago, the fundamental importance of such judicial remedies for protecting people from arbitrary and/or unlawful detention, effecting the release of people who have been detained because of their political views or convictions, including in the pursuit of trade union activities, clarifying the whereabouts and fate of missing and disappeared persons and preventing torture and ill-treatment.[236]

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232 The ICCPR (Article 9.3), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 16.6), the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 38), the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle M), the American Declaration of the Rights and Duties of Man (Article XXV), the *American Convention on Human Rights* (Article 7.5), the *Arab Charter on Human Rights* (Article 14.e) and the *European Convention on Human Rights* (Article 5.3).

233 The importance of *habeas corpus* in preventing torture and ill-treatment has been underlined by the Committee against Torture (Special Rapporteur on the question of torture (E/CN.4/2004/56, para. 39; E/CN.4/2003/68, para. 26 (i); and *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 16) and the Inter-American Court on Human Rights (Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and (8) American Convention on Human Rights*), para. 38).

234 The importance of *habeas corpus* in the prevention of enforced disappearances had been underlined by the UN Working Group on Enforced or Involuntary Disappearances: E/CN.41983/14, para. 141; E/CN.41986/18/Add.1, paras. 55-58; E/CN.41989/18/Add.1, para. 136; E/CN.41990/13, para. 346; E/CN.41991/20/Add.1, para. 167; E/CN.41991/20, para. 409; E/CN.41992/18, paras. 368-370; and E/CN.41993/ 25, para. 514; the UN Independent Expert responsible for studying the legal and human rights framework for the protection of all persons against unforced or involuntary disappearances (E/CN.4/2002/71); and the Inter-American Court on Human Rights: Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and (8) American Convention on Human Rights*), para. 38.

235 See, among others, the European Court of Human Rights, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, paras. 62-63, and *Öcalan v. Turkey*, 12 March 2003, para. 86.

236 Resolution 34/178 entitled "The right of *amparo, habeas corpus* or other legal remedies to the same effect", 17 December 1979.

The Inter-American Court of Human Rights has stated that *habeas corpus* and *amparo*:

> *"the purpose of which is to prevent the abusive nature and illegality of detentions carried out by the State, are also strengthened by the latter's status as guarantor of the rights of detainees by virtue of which [...] it 'has the responsibility of both guaranteeing the rights of the individual in its custody and of providing information and proof of what has happened to the detainee'."*[237]

The Inter-American Court has underscored that "safeguarding a person from the arbitrary exercise of public authority is the primary purpose of international human rights protection. The absence of effective domestic remedies therefore leaves a person defenceless".[238] The UN Special Rapporteur on Torture has pointed out that, "in accordance with international law, and as confirmed by States' practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: the right to *habeas corpus*. [...] These safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment while in detention".[239]

In the opinion of the Human Rights Committee, the suspension of *habeas corpus* – including on state security grounds – violates Article 9 (4) of the ICCPR.[240] The European Court of Human Rights has found *habeas corpus* to be a basic safeguard against abuse.[241] The European Court has ruled that depriving a person of their liberty without proceedings for *habeas corpus* and judicial review before the domestic courts of the decision to detain them violates Article 5 (4) of the *European Convention on Human Rights*.[242] The African Commission on Human and Peoples' Rights took the view that suspending the right to *habeas corpus* for state security reasons violated Articles 6 and 7 (1) (a) and (d) of the *African Charter on Human and Peoples' Rights*.[243]

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237 Judgment of 7 September 2004, Case of *Tibi v. Ecuador,* para. 129 [Spanish original, free translation]. See also Judgment of 8 July 2004, Case of *Gómez Paquiyauri v. Peru*, para. 98, and Judgment of 18 September 2003, Case of *Bulacio v. Argentina*, para. 138.

238 Judgment of 7 September 2004, Case of *Tibi v. Ecuador,* para. 130 [Spanish original, free translation].

239 *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 18.

240 See, among others, the *Concluding Observations of the Human Rights Committee on Nigeria*, CCPR/C/79/Add.64, para. 7; Views of 26 October 1979, Communication N° 9/1977, *Edgardo Dante Santullo Valcada v. Uruguay*, CCPR/C/8/D/9/1977; Views of 29 July 1980, Communication N° 6/1977, *Miguel A. Millan Sequeira v. Uruguay*, CCPR/C/10/D/6/1977; and Views of 27 March 1981, Communication N° 37/1978, *Esther Soriano de Bouton v. Uruguay,* CCPR/C/12/D/37/1978.

241 Judgment of 26 May 1993 (Merits), *Brannigan and McBride v. The United Kingdom,* para. 63.

242 Judgment of 15 November 1996, *Chahal v. The United Kingdom*, paras. 132 and 133.

243 Decision of 15 November 1999, Communication N° 143/95 and 150/96, *Constitutional Rights Project and Civil liberties Organization v. Nigeria*, para. 31.

Although the right to *habeas corpus* is not explicitly mentioned in the list of non-derogable rights contained in the ICCPR, the Human Rights Committee has said that:

> *"[A]rticle 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in Article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective [...] [T]he principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency [...] In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".*[244]

The non-derogable nature of *habeas corpus* is also recognized in UN international instruments[245] and the doctrine developed by the special procedures of the former UN Commission on Human Rights. Indeed, the Working Group on Arbitrary Detention, among others, has stressed that the right to challenge the legality of detention or to petition for a writ of *habeas corpus* or remedy of *amparo* must be guaranteed in all circumstances.[246] Resolution 1992/35 of the former UN Commission on Human Rights, entitled *habeas corpus*, urged States to maintain *habeas corpus* even during a state of emergency.

The right to *habeas corpus* or *amparo* is non-derogable under the American Convention on Human Rights[247] and the Arab Charter on Human Rights.[248] The Inter-American Court of Human Rights has reaffirmed it in the following terms: the right to judicial review, such as *habeas corpus*, is itself non-derogable because it is essential for the protection of other non-derogable rights.[249] The Inter-American Commission

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244 General Comment N° 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16. See also the *Concluding Observations of the Human Rights Committee on Albania,* CCPR/CO/82/ALB, 2 December 2004, para. 9.

245 See Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, Principle 32 of *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and Article 9 of the *Declaration on the Protection of All Persons from Enforced Disappearances*.

246 *Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, para. 85, and E/CN.4/1994/27, para. 74.

247 Article 27 of the *American Convention on Human Rights*.

248 Articles 4 and 14 of the *Arab Charter on Human Rights*.

249 Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987, "*Habeas corpus *in*

on Human Rights has also reiterated the non-derogable nature of *habeas corpus*.[250] Although it is not explicitly mentioned in the list of non-derogable rights contained in the European Convention on Human Rights, the European Court considers that, even in cases of administrative detention on security grounds (extrajudicial detention), a measure that is only acceptable in time of emergency, the right to *habeas corpus* must be maintained.[251] The African Commission on Human and Peoples' Rights has stated that "[n]o circumstances whatever must be invoked as a justification for denying the right to *habeas corpus*, *amparo* or similar procedures".[252]

The right to challenge the legality of any deprivation of liberty – by means of *habeas corpus, amparo* or similar such judicial procedures – implies that the authority responsible for determining its legality must be a judicial body, in other words, independent of the executive branch of government.[253] That judicial body must be an independent and impartial court established by law. The Human Rights Committee, the UN Working Group on Arbitrary Detention [254], the Inter-American Commission and Court and the African Commission on Human and Peoples' Rights have all declared that military courts are not competent to try civilians. The UN Special Rapporteur on the Independence of Judges and Lawyers has considered that "[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[255] In the case of civilians who are deprived of their liberty, the right to challenge the legality of detention or to petition for a writ of *habeas corpus* or remedy of *amparo* must in all circumstances be guaranteed under ordinary jurisdiction.

Limiting the grounds for obtaining a writ of *habeas corpus* to, for example, the absence of a legal right to place a person in custody or the manifest violation of due process, impairs its effectiveness as a way of challenging the legality of detention. The requirement that all other remedies be exhausted also impairs its effectiveness. The Human Rights Committee has stressed that such limitations or restrictions are incompatible with Article 9 (4) of the ICCPR.[256] To be effective as a remedy, *habeas*

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*emergency situations"*, and *Advisory Opinion OC-9/87 of 6 October 1987*, *"Judicial guarantees in states of emergency"*.

250 *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 138.

251 Judgment of 1 July 1961, *Lawless v. Ireland*; Judgment of 18 January 1978, *Ireland v. the United Kingdom*; and Judgment of 26 May 1993, *Brannigan and McBride v. the United Kingdom*.

252 Principle M (5(e)) of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*.

253 The European Court on Human Rights, Judgment of 22 October 2002 (Merits), *Murat Sakik and others v. Turkey*, para. 31; the Inter-American Court of Human Rights, Advisory Opinion N° OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) American Convention on Human Rights*), paras. 35 and 42; the African Commission on Human and Peoples' Rights, Principle M (5(e)) of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*.

254 *Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, para. 85. See also, *Report of the Working Group on Arbitrary Detention*, E/CN.4/1994/27, para. 74.

255 E/CN.4/1998/39/Add.1, para. 78.

256 *Concluding Observations of the Human Rights Committee on Japan*, CCPR/C/79/Add.102, 19 November 1998, para. 24.

*corpus* must be able to be invoked without limitation or restriction. Prolonged or delayed *habeas corpus* proceedings are also incompatible with Article 9 of the ICCPR.[257]

### vi) Administrative detention

According to international jurisprudence and doctrine, administrative detention on security grounds, including in the context of fighting terrorism, is only permissible under exceptional circumstances or in the event of derogation from human rights treaty obligations.[258]

The Human Rights Committee has stated that "if so-called preventive detention [administrative detention] is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1 of Article 9 of the ICCPR), information of the reasons must be given (para. 2 of Article 9 of the ICCPR) and court control of the detention must be available (para. 4 of Article 9 of the ICCPR) as well as compensation in the case of a breach (para. 5 of Article 9 of the ICCPR). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14, must also be granted".[259]

The UN *Standard Minimum Rules for the Treatment of Prisoners* stipulates that persons arrested or imprisoned without charge [administrative detention] shall be accorded the same protection as that accorded to prisoners under arrest or awaiting trial, namely, presumption of innocence, medical assistance, communication with family and friends and access to a legal adviser, and that the same general rules of detention shall apply, namely, maintenance of a register of detention, the separation of convicted prisoners and untried detainees and contact with medical services from the outside world.[260]

The Human Rights Committee considers that administrative detention and incommunicado detention should be confined to very limited and exceptional cases [261]

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257 *Concluding Observations of the Human Rights Committee on Dominican Republic*, CCPR/CO/71/DOM, 26 March 2001.

258 See, among others, the *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN document E/CN.4/826/Rev.1, paras. 783-787; the European Court of Human Rights, Judgment of 1 July 1961, *Lawless v. Ireland* (paras. 13, 15 and 20), Judgment of 18 January 1978, *Ireland v. The United Kingdom* (para. 214), and Judgment of 26 May 1993, *Brannigan and McBride v. The United Kingdom*; the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 138; the *Concluding Observations of the Human Rights Committee on Jordan*, UN document CCPR/C/79/Add.35, A/49/40, paras. 226-244, and *Morocco*, UN document CCPR/C/79/Add.44, para. 21.

259 General Comment Nº 8, *Right to liberty and security of persons (Article 9),* 30 June 1982, para. 4.

260 Rule 95 of the *UN Standard Minimum Rules for the Treatment of Prisoners*.

261 *Concluding Observations of the Human Rights Committee on Jordan*, CCPR/C/79/Add.35, A/49/40, paras. 226-244, and *Morocco*, CCPR/C/79/Add.44, para. 21

and limited in time, *inter alia,* for a short period of time, and should not be indefinite [262].

According to international jurisprudence and doctrine [263], States must provide the following safeguards when they use administrative detention for security reasons in the context of fighting terrorism:

- Detainees have the right: to be informed of the reasons for their detention; to have prompt access to legal counsel (48 hours), family and, where necessary or applicable, medical and consular assistance; to be treated humanely; to have access to *habeas corpus* and the right of appeal to a competent court;
- Guarantees against prolonged incommunicado and indefinite detention;
- Detainees must be held in official places of detention and the authorities must keep a record of their identity;
- The grounds and procedures for detention shall be prescribed by law and reasonable time limits set on the length of preventive detention;
- Extending administrative detention:
    - A State might be justified in subjecting individuals to administrative detention for a period longer than would be permissible under ordinary circumstances, where their extended detention can be demonstrated to be strictly necessary because of an emergency situation;
    - Appropriate judicial bodies and proceedings should review detentions on a regular basis when detention is prolonged or extended;
    - Any such detention must continue only as long as the situation necessitates.

### vii) "Extraordinary rendition" and the responsibility of foreign States

The system of extraordinary rendition, generally accompanied by secret detention, not only constitutes a violation of the right to liberty and security of the person but also entails multiple human rights violations of: the right to be free from torture and cruel, inhuman or degrading treatment; the right to an effective remedy; the right to protection of the law; and in extreme cases, the right to life. Additionally, renditions

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262 *Concluding observations of the Human Rights Committee on Zambia*, CCPR/C/79/Add.62, para. 14.

263 See the International Commission of Jurists, *International Legal Framework on Administrative Detention and Counter-terrorism,* Geneva, March 2006 (http://www.icj.org).

may violate a range of other rights, including freedom of movement, and the right to private and family life. Where rendition leads to secret detention, it would amount to an enforced disappearance and, in many circumstances, extraordinary rendition constitutes a violation of the principle of *non-refoulement*. This system often violates *jus cogens* prohibitions (see Principle 5, *Berlin Declaration*).

Concerning *jus cogens* prohibitions, all States have the obligation to protect against and punish gross human rights violations and crimes under international law (obligation *erga omnes)* (See Principle 5, *Berlin Declaration*). Where there is a violation of obligations *erga omnes*, or a systematic violation of a norm of *jus cogens*, all States have the duty:

- not to recognize the situation as lawful including by refraining from acts which imply recognition;
- not to render aid or assistance in the violation;
- to co-operate with other States to bring the situation in violation of human rights to an end.

It is a well-recognized principle of international law that States may be held internationally responsible where they knowingly render aid or assistance in the commission of internationally wrongful acts, including violations of human rights obligations.[264] Where a State knowingly provides aid or assistance in the seizure, transfer or illegal detention of a person held within the renditions system, it will be internationally responsible for the violations of human rights involved. Furthermore, officials of foreign intelligence services may incur criminal responsibility where they aid or assist in renditions or secret detentions that involve international crimes, including grave breaches of the Geneva Conventions or other war crimes.[265]

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264 International Law Commission, *Articles on Responsibility of States for internationally wrongful acts*, General Assembly Resolution A/RES/56/83, 28 January 2002, Article 16.

265 Article 25 (3) Rome Statute of the International Criminal Court.

# Principle 7 – Fair trial

*States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military tribunals. Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings. Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.*

# Commentary

## 1. Unlawful State practices

Civilians suspected of terrorist acts are frequently brought before special or extraordinary tribunals or military courts. Some States try civilians before military commissions that are outside the military justice system and under the authority of the executive branch. In other countries, civilians accused of terrorist offences are tried by national security courts, composed of civilian and military judges. Others have introduced court proceedings that allow anonymous witnesses, secret evidence and at times "faceless" judges, prosecutors and other court officials, practices that also occurred in the past. In some countries, although there are no "faceless judges", special procedural laws allow secret evidence to be used and witnesses to remain anonymous and prevent the accused from having access to legal documents and evidence, either in full or in part. Other countries have established special judicial procedures that fundamentally curtail or restrict the rights of defendants. Trials of alleged terrorists are often held *in camera*. Statements made under torture or ill-treatment are also sometimes used as evidence in judicial and administrative proceedings. Another routine measure used in the context of combating terrorism and serious crime is to authorize the armed forces to take on the role of judicial police or examining magistrates.

## 2. International legal framework

### i) The right to be tried by an independent and impartial tribunal

The right to be tried by an independent and impartial tribunal is universally recognized and protected in numerous international human rights treaties and

instruments[266] and international humanitarian law.[267] The Special Rapporteur of the former United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Mr. L.M Singhvi, quite rightly pointed out that "impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake".[268] The UN Human Rights Committee has taken the view that the right to an independent and impartial tribunal is "an absolute right that may suffer no exception".[269] The right to be tried by an independent and impartial tribunal is directly linked to the principle of the separation of powers, one of the basic principles of the rule of law (see Principle 2, *Berlin Declaration*).

As a corollary of the principle of the separation of powers, only the judicial organs of the State are authorized to dispense justice. Indeed, the Human Rights Committee has reiterated that, even in time of war or in a state of emergency, "[o]nly a court of law may try and convict a person for a criminal offence".[270] The Inter-American Court of Human Rights has also taken the view that:

> *"[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person's guilt has been established with all*

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266 For example, at universal level: the *Universal Declaration of Human Rights* (Article 10), the *International Covenant on Civil and Political Rights* (Article 14.1), the *International Convention on the Elimination of All Forms of Racial Discrimination* (Article 5(a)), the *Convention on the Rights of the Child* (Articles 37(d) and 40.2), the *UN Basic Principles on the Independence of the Judiciary*, the *UN Guidelines on the Role of Prosecutors* and the *UN Basic Principles on the Role of Lawyers*. Among those to be found at regional level are the following: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 6.1); *Recommendation N° R (94) 12 on the independence, efficiency and role of judges*, adopted on 13 October 1994 by the Committee of Ministers of the Council of Europe; the *Guidelines on Human Rights and the Fight against Terrorism* drawn up by the Committee of Ministers of the Council of Europe and adopted on 11 July 2002 (Guideline IX); the *Charter of Fundamental Rights of the European Union* (Article 47); the *American Declaration of the Rights and Duties of Man* (Article XXVI); the *American Convention on Human Rights* (Article 8.1); the *African Charter on Human and Peoples' Rights* (Articles 7 and 26); the *African Charter on the Rights and Welfare of the Child* (Article 17); the *Arab Charter on Human Rights* (Article 13) and the *Charter of Paris for a new Europe: A new era of Democracy, Peace and Unity*, adopted on 21 November 1990 by the Meeting of the Heads of State or Government of the Participating States of the Conference on Security and Cooperation in Europe, held under the auspices of the Organization for Security and Cooperation in Europe.

267 For example, Article 84 of the *III Geneva Convention*, Articles 54, 64 to 74 and 117 to 126 of the IV Geneva Convention, Article 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts* (Protocol I), and Article 6 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

268 E/CN.4/Sub.2/1985/18, para. 75.

269 Decision of 28 October 1992, Communication N° 263/1987, Case of *Miguel González del Río v. Peru*, para. 5.2, CCPR/C/46/263/1987, 20 November 1992. See also the *Arab Charter on Human Rights* (Articles 4 and 13).

270 CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

> *due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled* ius puniendi*".*[271]

The Inter-American Court of Human Rights, reviewing a series of counter-terrorism measures, the consequence of which was to militarize the court system, considered that such measures impaired the rule of law and undermined the principle of effective separation of the branches of government.[272]

### ii) The right to be tried by ordinary courts and the use of special courts

Principle 5 of the *Basic Principles on the Independence of the Judiciary* states that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals". This provision reaffirms the principle of the 'natural judge' (*juez natural, juge naturel, giudice naturale, gesetzlicher Richter*), also known as the principle of the 'lawful judge' or the right to a 'competent tribunal'. The concept of the 'natural judge' is an integral component of contemporary criminal law. It has its basis in the principle *nemo iudex sine lege,* which means that the law can only be enforced by organs and judges legally established for that purpose. This principle is expressed in the Anglo-Saxon legal tradition as the right to be tried by one's peers or equals. The principle of the 'natural judge' means that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. Pursuing this line of thinking, the principle of the 'natural judge' also constitutes a fundamental guarantee of the right to a fair trial. As a corollary of this principle, emergency, *ad hoc*, 'extraordinary', *ex post facto* and special courts are forbidden. The principle of the 'natural judge' is also founded on the principle of equality before both the law and the courts and is enshrined in the constitutions and basic laws of many countries.[273] The International Criminal Tribunal for the Former Yugoslavia said that the aim of the principle of the 'natural judge', a concept recognized in several constitutions throughout the world, was "to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial".[274]

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271 Report N° 49/00, Case 11,182, *Rodolfo Gerbert, Ascencio Lindo et al. v. Peru*, 13 April 2000, para. 86.

272 *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 238.

273 In some constitutions this has been done in a positive manner by asserting that everyone has the right to be tried by his/her 'natural judge' or that no one can be removed from his/her 'natural judge'. Some constitutions expressly use the term 'natural judge' while others refer to the 'competent tribunal' or 'the previously established court'.

274 International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Decision of 2 October 1995 in the case of *The Prosecutor v. Dusko Tadic, aka "Dule"*, para. 62.

This principle has been reiterated by the former Commission on Human Rights in several of its resolutions.[275] The Commission has reiterated that "everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".[276] The principle of the 'natural judge', or at least its corollary forbidding the setting up of *ad hoc*, special or *ex post facto* courts, is also to be found in extradition law.[277]

The ban on 'extraordinary' and special courts, which is the corollary of the principle of the 'natural judge', should not be confused with the question of specialized jurisdictions.[278] Although the principle of the 'natural judge' is based on the dual principle of equality before both the law and the courts, which means that laws should not be discriminatory or applied in a discriminatory way by judges, nevertheless, as the Human Rights Committee has pointed out, "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory".[279] However, as the Human Rights Committee has

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275 See, for example, Resolution 1989/32 in which it recommended that States should take account of the principles contained in the Draft Universal Declaration on the Independence of Justice, also known as the *Singhvi Declaration*. Article 5 of the *Singhvi Declaration* stipulates that: "(b) No *ad hoc* tribunal shall be established to displace jurisdiction properly vested in the court; (c) Everyone shall have the right to be tried with all due expedition and without undue delay by ordinary courts or judicial tribunal under law subject to review by the courts; [...] (e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts".

276 Operative paragraph N° 2 of Resolutions N° 2002/37 of 22 April 2002 and N° 2003/39 of 23 April 2003.

277 Article 4 of the *UN Model Treaty on Extradition*, for example, states that "[e]xtradition may be refused in any of the following circumstances: [...] g) If the person whose extradition has been requested has been sentenced or would be liable to be tried in the requesting State by an extraordinary or *ad hoc* court or tribunal". In the Americas this type of clause has long existed in the context of extradition. One example is the *Convention on Extradition* signed in Montevideo in 1933, Article 3 of which allowed the State from whom extradition was being sought to refuse extradition "[w]hen the accused must appear before any extraordinary tribunal or court of the demanding State". Similarly, the *Treaty on International Penal Law*, signed in Montevideo in 1940, stipulated in Article 20 that "[e]xtradition shall not be granted: [...] i) When the person sought would have to appear before a tribunal or court taking cognizance of exceptions". The *Inter-American Convention on Extradition*, signed in Caracas in 1981, also states in Article 4 that "[e]xtradition shall not be granted: [...] 3. When the person sought has been tried or sentenced or is to be tried before an extraordinary or *ad hoc* tribunal of the requesting State". More recently, Article 13 of the *Inter-American Convention to Prevent and Punish Torture*, signed in 1985, stipulates that "[...] Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that [...] he will be tried by special or *ad hoc* courts in the requesting State".

278 For example, those dealing with labour, administrative, family and commercial matters and, as an exceptional case, those predicated on the specificity of those being prosecuted, such as indigenous peoples and juveniles. See, among others, the *Convention on the Rights of the Child* (Article 40 (3)), the *UN Standard Minimum Rules for the Administration of Juvenile Justice*, the *Vienna Declaration and Programme of Action*, Part I, para. 20, and ILO Convention 169. See also the *Concluding Observations of the Committee on the Rights of the Child* on *Maldives*, CRC/C/15/Add.91, CRC/C/79, 5 June 1998, para. 240; *Russian Federation*, CRC/C/15/Add.110, 10 November 1999, para. 69; *Czech Republic*, CRC/C/15/Add.81, CRC/C/69, 27 October 1997, para. 198; and *Uganda*, CRC/C/15/Add.80, CRC/C/69, 27 October 1997, para. 153; and the Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, 28 August 2002, *Legal Status and Human Rights of the Child*.

279 Views on the case of *S. W. M. Broeks v. the Netherlands*, Communication N° 172/1984 (9 April 1987), UN document Supp. N° 40 (A/42/40) at 139 (1987), annex VIII.B, para. 13. See also, among others, Views on the case of *Zwaan-de-Vries v. The Netherlands,* Communication N° 182/1984 (9 April 1987), UN document

repeatedly stated, a difference in treatment is only acceptable if it is founded on reasonable and objective criteria.[280] The European Court of Human Rights concluded that, "regard being had to the principles which normally prevail in democratic societies", a difference in treatment is only discriminatory when it "has no objective and reasonable justification".[281]

The Human Rights Committee took the view that "trial before courts other than the ordinary courts is not necessarily, *per se,* a violation of the entitlement to a fair hearing"[282] and was valid if the State's decision "was based upon reasonable and objective grounds".[283] However, the Human Rights Committee has repeatedly expressed its concern at the use of special courts[284] and has, on several occasions, recommended that such courts be abolished.[285] For example, it recommended the abrogation of "all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts".[286] The Human Rights Committee has also viewed the abolition of special courts as a positive contributing factor in achieving national implementation of the ICCPR.[287]

The Inter-American Commission on Human Rights has recalled that:

> *"the jurisprudence of the inter-American system has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process. This has included in particular the use of* ad hoc *or special courts or military tribunals to prosecute civilians for security offences in times of emergency, which practice has been condemned by this*

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Supp. N° 40 (A/42/40) at 160 (1987), annex VIII.B; Views on the case of *Ibrahima Gueye and others v. France*, Communication N° 196/1985 (3 April 1989), CCPR/C/35/D/196/1985, 6 April 1989; and Views on the case of *Alina Simunek v. The Czech Republic*, Communication N° 516/1992 (19 July 1995), CCPR/C/54/D/516/1992, 31 July 1995.

280 *Ibid*.

281 European Court of Human Rights, Decision dated 23 July 1968 on the merits of the case entitled *Certain aspects of the laws on the use of languages in education in Belgium*, p.34.

282 Decision of 4 April 2001, Communication N° 819/1998, Case of *Joseph Kavanagh v. Ireland*, para. 10.1, CCPR/C/71/D/819/1998, 26 April 2001.

283 *Ibid*., para. 10.2.

284 Views adopted on 20 July 1994 with regard to Communication N° 328/1988, *Roberto Zelaya Blanco v. Nicaragua*, CCPR/C/51/D/328/1988; and the *Concluding Observations of the Human Rights Committee on Nigeria*, CCPR/C/79/Add.65 and CCPR/C/79/Add.64; *Morocco*, A/47/40, 23 October 1991, paras. 48-79, and CCPR/C/79/Add.113, 1 November 1999, para. 18; *France*, CCPR/C/79/Add.80, 4 August 1997, para. 23; *Iraq*, CCPR/C/79/Add.84, 19 November 1997, para. 15; and *Egypt*, A/48/40, 9 August 1993, para. 706.

285 See, for example, the *Concluding Observations of the Human Rights Committee on Gabon*, CCPR/CO/70/GAB, 10 November 2000, para. 11.

286 *Preliminary concluding observations of the Human Rights Committee on Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 11.

287 See, for example, the *Concluding Observations of the Human Rights Committee on Guinea*, CCPR/C/79/Add.20, 29 April 1993, para. 3, and *Senegal*, CCPR/C/79/Add.10, 28 December 1992, para. 3.

*Commission, the Inter-American Court and other international authorities. The basis of this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes".*[288]

The African Commission on Human and Peoples' Rights has taken the view that the setting up of special tribunals, the composition of which is left to the discretion of the executive, thereby removing cases from the jurisdiction of the ordinary courts, violates the impartiality of the courts, regardless of the qualifications members of any such special courts may be expected to have.[289]

### iii) "Faceless" justice systems

In respect of the use of "faceless" judges, courts and public prosecutors, the Human Rights Committee[290], the UN Committee against Torture[291], the UN Special Rapporteur on the Independence of Judges and Lawyers[292], the Inter-American Court of Human Rights[293] and the Inter-American Commission on Human Rights[294] have all found the practice to be inconsistent with basic judicial guarantees and the right to be tried by an independent and impartial tribunal. The Human Rights Committee has ruled that "trials by special tribunals composed of anonymous judges are

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288 *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 230.

289 Decision of 31 October 1998, Communications 137/94, 139/94, 154/96 and 161/97, Case of *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, para. 86. See also the decision relating to Communication 87/93.

290 Views adopted on 6 November 1997 with regard to Communication N° 577/1994, Case of *Víctor Alfredo Polay Campos v. Peru*, CCPR/C/61/D/577/1994, 9 January 1998; Views of the Human Rights Committee adopted in July 2000 with regard to Communication N° 688/1996, Case of *María Sybila Arredondo v. Peru*, CCPR/C/69/D/688/1996, 14 August 2000; Decision of the Human Rights Committee, 21 October 2005, Communication N° 1125/2002, Case of *Jorge Luis Quispe Roque v. Peru*, CCPR/C/85/D/1125/2002, 17 November 2005; Decision of the Human Rights Committee, 22 July 2003, Communication N° 981/2001, Case of *Teofila Gómez Casafranca v. Peru*, CCPR/C/78/D/981/2001, 19 September 2003; and the *Concluding Observations of the Human Rights Committee on Peru,* CCPR/C/79/Add.67, 25 July 1996, paras. 12 and 19, and *Colombia,* CCPR/C/79/Add.76, 3 May 1997, para. 21.

291 *Concluding Observations of the Committee against Torture on Peru,* A/50/44, 26 July 1995, para. 68.

292 Reports of the Special Rapporteur on the Independence of Judges and Lawyers – *Mission to Peru*, E/CN.4/1998/39/Add.1, 19 February 1998, and *Mission to Colombia,* E/CN.4/1998/39/Add.2, 30 March 1998.

293 Judgment of 30 May 1999 Case of *Castillo Petruzzi et al v. Peru*, para. 133, and Judgment of 25 November 2004, Case of *Lori Berenson Mejía v. Peru*, para. 147.

294 *Second Report on the Situation of Human Rights in Peru*, *op. cit. 76*, paras. 103, 104 and 113, and the *Third Report on the Situation on Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121-124.

incompatible with Article 14 of the Covenant".[295] The Inter-American Commission on Human Rights has stated that:

> *"[i]t has been said that if no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. [...] Certainly, the right to know who is sitting in judgment, to determine his or her subjective competence, i.e. to determine whether a judge is covered by one of the grounds of disqualification or recusal, is a basic guarantee. The anonymity of the judges strips the accused of that basic guarantee, and also violates his right to be judged by an impartial court [and] the fundamental right to due process of law".*[296]

For its part, the Inter-American Court of Human Rights found that having anonymous judges means that "defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence"[297] or "suitability".[298]

With regard to procedures that allow secret evidence to be used and/or witnesses to remain anonymous or which totally or partially prevent the accused from having access to legal documents and evidence, the Human Rights Committee has called on States "to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access".[299] The Inter-American Commission on Human Rights has taken the view that systems of criminal procedure that allow secret evidence and secret witnesses do not provide adequate due process guarantees.[300] The Commission stressed that, if witnesses are secret, "the defendant is [...] prevented from carrying out any effective examination of the witnesses against him".[301] It should be noted that the jurisprudence of the European Court of Human Rights is more nuanced with regard to anonymous witnesses and secret evidence. It does not rule out the use of anonymous witnesses *per se*. Nevertheless, the Court has said that no one should be convicted solely or mainly on the basis of evidence that has not been subjected to adversarial argument during the

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295 Decision of 6 November 1997 in *Victor Alfredo Polay Campos v. Peru, op. cit. 290,* para. 8.8. See also the Decision of 6 July 2000 in *María Sybila Arredondo v. Peru*, in Communication N° 688/1996, CCPR/C/69/D/688/1996, 14 August 2000, para. 11.

296 *Second Report on the Situation of Human Rights in Peru*, *op. cit*. 76, paras. 103, 104 and 113.

297 Judgment of 30 May 1999, Case of *Castillo Petruzzi et al. v. Peru*, para. 133.

298 Judgment of 25 November 2004, Case of *Lori Berenson Mejía v. Peru*, para. 147. [Spanish original, free translation.]

299 *Concluding Observations of the Human Rights Committee on Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13. Along similar lines, see the *Concluding Observations of the Human Rights Committee on United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18.

300 The Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, *op. cit*. 76, paras. 103, 104 and 110, and *Third report on the situation of human rights in Colombia*, *op. cit*. 144, paras. 121, 122, 123 and 124.

301 *Third report on the situation of human rights in Colombia*, *op. cit*. 144, paras. 123.

preliminary investigation or the trial.[302] Any anonymous witness must be subjected to the principle of adversarial proceedings and cannot be the only or main basis for conviction.[303]

### iv) Military tribunals

With regard to military tribunals, the UN Special Rapporteur on the Independence of Judges and Lawyers has stated that "[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[304] In the last 20 years, the Human Rights Committee has taken the view that the practice of trying civilians in military courts is not compatible with obligations under the ICCPR and, in particular, those arising from Article 14.[305] The Human Rights Committee has recalled that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice".[306] The UN Working Group on Arbitrary Detention has considered that "if some form of military justice is to continue to exist, it should observe four rules: (a) It should be incompetent to try civilians; [...] [and] (c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; [...]".[307] In a case concerning civilians tried for terrorist acts by a military tribunal, the Inter-American Court of Human Rights found that the prosecution of civilians by a military tribunal violated the right to a fair trial and was at variance with the principle of 'natural judge'.[308] The Inter-American Commission on Human Rights has also long held that the prosecution of civilians, notably for political offences,

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302 Judgment of 14 December 1999, Case of *A.M. v. Italy*.

303 Judgment of 20 November 1989, Case of *Kostovski v. The Netherlands*; Judgment of 15 June 1992, Case of *Lüdi v. Switzerland*; Judgment of 26 March 1996, Case of *Doorson v. The Netherlands;* and Judgment of 23 April 1992, Case of *Van Mechelen and others v. The Netherlands.*

304 E/CN.4/1998/39/Add.1, para. 78.

305 *See, among others, Concluding Observations of the Human Rights Committee on Egypt* (CCPR/C/79/Add.23, 9 *August 1993,* para. 9, *and* CCPR/CO/76/EGY, 1 November 2002, para. 16); *Russian Federation* (CCPR/C/79/Add.54, 26 July 1995, para. 25); *Kuwait* (CCPR/CO/69/KWT, 27 July 2000, para. 17); *Slovakia* (CCPR/C/79/Add.79, 4 August 1997, para. 20); *Uzbekistan,* (CCPR/CO/71/UZB, 26 May 2001, para. 15); *Venezuela* (CCPR/C/79/Add.13, 28 December 1992, para. 8); *Cameroon*, (CCPR/C/79/Add.116, 4 November 1999, para. 21); *Algeria* (CCPR/C/79/Add.1, 25 September 1992, para. 5); *Nigeria* (CCPR/C/79/Add.64, 3 April 1996); *Poland* (CCPR/C/79/Add.110, 29 July 1999, para.21); *Peru* (CCPR/C/79/Add.67, 25 July 1996, para. 12, and CCPR/CO/70/PER, 15 November 2000, para. 11); *Lebanon* (CCPR/C/79/Add.78, 1 April 1997, para. 14); *Chile* (CCPR/C/79/Add.104, 30 March 1999, para. 9); *Syria* (CCPR/CO/71/SYR, para. 17); *Morocco* (CCPR/C/79/Add.113, 1 November 1999, para. 18 and A/47/40, 23 October 1991, para.58); *Tajikistan* (CCPR/CO/84/TJK, 18 July 2005, para. 18); *Serbia and Montenegro* (CCPR/CO/81/SEMO, 12 August 2004, para. 20); *Democratic Republic of Congo* (CCPR/C/COD/CO/3, 26 April 2006, para. 21); and *Egypt* (CCPR/CO/76/EGY, 28 November 2002, para. 16).

306 *Concluding Observations of the Human Rights Committee on Peru*, CCPR/CO/70/PER, 15 November 2000, para. 11.

307 *Report of the Working Group on Arbitrary Detention*, E/CN.4/1999/63, 18 December 1998, para. 80.

308 Decision of 30 May 1999, *Castillo Petruzzi et al v. Peru*. See also the decision of 17 September 1997, *Loayza Tamayo v. Peru*, Series C, N° 33, para. 61.

by military tribunals violates the right to an independent and impartial tribunal.[309] In its resolution on terrorism and human rights, the Inter-American Commission on Human Rights affirmed that, according to its own jurisprudence:

> *"military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the Inter-American Commission on Human Rights has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens and others who find themselves under the jurisdiction of a State, an impartial judge, the right to be assisted by freely-chosen counsel, and access by defendants to evidence brought against them together with the opportunity to contest it".*[310]

The African Commission on Human and Peoples' Rights has reaffirmed the "right of civilians not to be tried by military courts" and that "[m]ilitary courts should not in any circumstance whatsoever have jurisdiction over civilians".[311] In its general recommendations as well as in its resolutions on countries and decisions on individual cases, the African Commission has taken the view that the trial of civilians by military personnel is in breach of Articles 7 and 26 of the *African Charter on Human and Peoples' Rights* and the UN *Basic Principles on the Independence of the Judiciary*.[312]

The European Court of Human Rights has decided cases concerning the participation of military judges in the trials of civilians by National Security Courts, on which civilian judges also sit. The military judges concerned were serving in the army, which in turn took its orders from the executive, and remained subject to military discipline and subordinate to the administrative authorities and the army, which were both heavily involved in appointing them. The Court said that such circumstances raise legitimate doubts about the independence and impartiality of such courts and are in breach of Article 6 (1) of the *European Convention on Human Rights*.[313]

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309 See, among others, the *Report on the situation of human rights in the Republic of Nicaragua*, OEA/Ser.L/V/II.53, doc. 25 of 30 June 1981; the *Report on the situation of human rights in the Republic of Colombia*, OEA/Ser.L/V/II.53, doc. 22, 30 June 1981; and the *Report on Chile*, OEA/Ser.1/V/II/17.

310 Resolution on *"Terrorism and Human Rights"*, of 12 December 2001.

311 African Commission on Human and Peoples' Rights, *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, principle L, African Union document DOC/OS (XXX) 247.

312 See, among others, the Resolution on Nigeria, March 1995; Decision of 6 November 2000, Communication N° 223/98 (Sierra Leone); Decision of April 1997, Communication N° 39/90 (Cameroon); Decision of 31 October 1998, Communication N° 137/94, 139/94, 154/96 and 161/97 (Nigeria); Decision of 15 November 1999, Communication N° 151/96; Decision of 15 November 1999, Communication N° 206/97 (Nigeria); Decision of 1995, Communication N° 60/91; and Decision of 1995, Communication N° 87/93 (Nigeria).

313 Judgment of 9 June 1998, *Case of Incal v. Turkey* (N° 41/1997/825/1031); Judgment dated 28 October 1998, Case of *Çiraklar v. Turkey* (70/1997/854/1061); Judgment of 8 July 1999, Case of *Gerger v. Turkey* (N° 24919/94); Judgment of 8 July 1999, Case of *Karatas v. Turkey* (N° 23168/94); Judgment of 8 July 1999, Case of *Baskaya and Okçuoglu v. Turkey* (N° 23536/94 and 24408/94); Judgment of 8 July 1999, Case of *Sürek and Özdemir v. Turkey* (N° 23927/94 and 24277/94); Judgment of 15 October 2002, Case of *Karakoç and others v. Turkey* (N° 27692/95, 28138/95 and 28498/95); and Judgment of 28 January 2003, Case of *Demirel*

The Human Rights Committee has on several occasions expressed serious concern about measures to combat terrorism and serious crime that authorize the armed forces to discharge the judicial police function and it has recommended that States take action to ensure that the judicial police are answerable to the judiciary.[314] The Inter-American Commission on Human Rights has on several occasions criticized the fact that the armed forces have been given judicial authority and has pointed out that the practice leads to serious human rights violations.[315]

### v) Fair trial

The Human Rights Committee has said: "States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance [...] deviating from fundamental principles of fair trial, including the presumption of innocence".[316] The Human Rights Committee also went on to say that "[s]afeguards related to derogation, as embodied in Article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations".[317]

The Human Rights Committee has emphasized that all trials should be conducted with full respect for the fair trial safeguards provided by Article 14 of the Covenant, including, in particular, the right of defendants to communicate with counsel and the right to have time and facilities to prepare their defence and the right to have their conviction reviewed.[318] The Human Rights Committee has recalled that "the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. Sufficient time and facilities must be granted to the accused and his counsel to prepare the defence for the trial: this requirement

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*v. Turkey* (Nº 39324/98).

314 See the *Concluding Observations of the Human Rights Committee on France*, CCPR/C/79/Add.80, 4 August 1997, para. 16ff; *Bolivia*, CCPR/C/79/Add. 74, 1 May 1997, paras. 17 and 34; and *Colombia,* CCPR/C/79/Add.76, 3 May 1997, para. 19.

315 See the *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para. 35; *Report on the Situation of Human Rights in Brazil,* 1997, para. 86; *Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993*, para. 24; *Second Report on the Situation of Human Rights in Peru, op. cit. 76,* para. 210; *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, Doc. 21, rev., 6 April 2001, para. 31; and the *Second Report on the Situation of Human Rights in Colombia,* OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993.

316 General Comment Nº 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11. See also the *Concluding Observations of the Human Rights Committee on Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13.

317 *Ibid*., para. 16.

318 *Concluding Observations of the Human Rights Committee on Peru*, CCPR/CO/70/PER, 15 November 2000, paras. 12 and 19.

applies to all stages of the judicial proceedings".[319] The Human Rights Committee has stated that counter-terrorist legislation allowing detainees to be held in incommunicado detention for several days and denying them access to a lawyer of their own choosing and the right to appeal against court decisions is inconsistent with Article 14 of the ICCPR.[320]

The Inter-American Commission on Human Rights has made it clear that "most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law".[321] Among the protections which "apply to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict" [322], the Inter-American Commission on Human Rights drew particular attention to the following "non-derogable procedural protections":

> *"the right of an accused to prior notification in detail of the charges against him or her, the right to defend himself or herself personally and to have adequate time and means to prepare his or her defense which necessarily includes the right to be assisted by counsel of his or her choosing or, in the case of indigent defendants, the right to counsel free of charge where such assistance is necessary for a fair hearing, and the right to be advised on conviction of his or her judicial and other remedies and of the time limits within which they may be exercised, which may include a right to appeal the judgment to a higher court".*[323]

In this context, it should be borne in mind that international humanitarian law has established minimum guarantees with regard to judicial matters. Indeed, Article 75 (4) of Protocol I to the *Geneva Conventions* refers to fundamental guarantees with regard to judicial matters that must be respected even during international armed conflicts, including the establishment of an "impartial and regularly constituted court". As the International Committee of the Red Cross (ICRC) has stated, this "emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value of human life is sometimes small".[324] The ICRC has pointed out that "Article 75, even more than

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319 Decision of 4 July 1989, Communication N° 272/1988, Case of *Alrick Thomas v. Jamaica*, CCPR/C/44/D/272/1988, 8 April 1992, para. 11.4. See also the Decision of 24 July 1989, Communication N° 283/1988, Case of *Aston Little v. Jamaica*, CCPR/C/43/D/283/1988, 19 November 1991, para. 83.

320 See, among others, the *Concluding Observations of the Human Rights Committee on Spain*, CCPR/C/79/Add.61, 3 April 1996; *France*, CCPR/C/79/Add.80, 4 August 1997; and *United Kingdom of Great Britain and Northern Ireland,* A/50/40, 3 October 1995.

321 *Report on Terrorism and Human Rights*, *op. cit.* 32, para. 261.

322 *Ibid*.

323 *Report on Terrorism and Human Rights*, *op. cit.* 32, Chapter IV, "Recommendations", point 10 E.

324 ICRC, Commentary on Article 75, paragraph 4 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol I), para. 3084. Article 6, paragraph 2, of Protocol II refers to a "court offering the essential guarantees of independence and impartiality". According to the ICRC, "this sentence reaffirms the principle that anyone accused of having

common Article 3 of the 1949 Conventions, which was called a 'mini Convention', constitutes a sort of 'summary of the law' particularly in the very complex field of judicial guarantees, which will certainly facilitate the dissemination of humanitarian law and the promulgation of its fundamental principles".[325] While respect for these judicial guarantees is compulsory during armed conflicts, such guarantees must be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater if not equal to that recognized in wartime.

In any case, the following judicial guarantees must be applied in all circumstances:

(a) Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law;

(b) Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;

(c) No one shall be punished for an offence except on the basis of individual criminal responsibility;

(d) Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;

(e) Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(f) No one may be compelled to testify against himself or herself or to confess guilt;

(g) Everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions that apply to witnesses against him or her;

(h) Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a court according to law;

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committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgement is given by 'a court offering the essential guarantees of independence and impartiality'" (ICRC, Commentary on Article 6, paragraph 2 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), para. 4601).

325 ICRC, Commentary on Article 75 of Protocol I to the Geneva Conventions, para. 3007.

(i) Anyone who is found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

### vi) Torture and evidence

One of the consequences of the absolute prohibition of torture and ill treatment under international law (see Principles 4 and 5, *Berlin Declaration*) is the prohibition on the use as evidence in any proceedings, including judicial proceedings, of statements or confessions obtained as a result of torture or other prohibited forms of treatment[326], the only exception being when it is used as evidence against a person accused of torture.

Prosecutors can come into possession of evidence against suspects, which they know or believe on reasonable grounds to have been obtained by unlawful methods that constitute a grave violation of the suspect's human rights. Especially if such methods involve torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they should refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and take all necessary steps to ensure that those responsible for using such methods are brought to justice.[327]

### vii) Lawyers

For lawyers to be able to discharge their professional functions in an independent manner, States must protect them from any interference with their work. Such interference can range from being prevented from communicating with their clients to threats and physical attacks. The UN *Basic Principles on the Role of Lawyers* include a set of provisions that establish safeguards in this respect: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".[328]

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326 The ICCPR (Articles 7 and 14 (2,g)); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 15); the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Articles 10 and 18(3,g)); the UN *Guidelines on the Role of Prosecutors* (Guideline 16); the *American Convention on Human Rights* (Articles 5.2 and 8.3); the *Inter-American Convention to Prevent and Punish Torture* (Articles 5 and 10); the *African Charter of Human and Peoples' Rights* (Article 5); the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, (Principle F (g) (l)); the *Arab Charter of Human Rights* (Articles 8 and 16(f)); the *European Convention of Human Rights* (Article 3); and the *Guidelines on Human Rights and the Fight Against Terrorism* of the Council of Europe (Guideline IV).

327 UN *Guidelines on the Role of Prosecutors* (Guideline 16) and *Principles and Guidelines on the right to a fair trial and legal assistance in Africa* (Principle F (l)).

328 Principle 16.

Furthermore, the *Principles* stipulate that "[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".[329] According to Principle 18 of the UN *Basic Principles on the Role of Lawyers*, "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions". This rule is extremely important due to the tendency, in certain countries, to assume that lawyers support their clients' causes. This problem was identified by the Special Rapporteur on the Independence of Judges and Lawyers, who has noted his concern at "the increased number of complaints concerning Governments' identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to such accusations".[330] The Special Rapporteur concluded that "identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned".[331]

329 Principle 17.

330 *Report of the Special Rapporteur on the independence of judges and lawyers,* E/CN.4/1998/39, para. 179.

331 *Ibid.*

# Principle 8 – Fundamental rights and freedoms

*In the implementation of counter-terrorism measures, States must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to self-determination; as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate.*

## Commentary

### 1. Unlawful State practices

Since 11 September 2001, the exercise of fundamental freedoms, such as freedom of expression, association and assembly and the right to strike, has been criminalized in several countries in the name of fighting terrorism. This tendency becomes even more worrying when inter-governmental organizations adopt legal instruments to counter terrorism that allow some methods of exercising the above-mentioned rights and freedoms to be criminalized.[332] Domestic legislation frequently relies on vague, ambiguous and imprecise definitions of terrorist offences that result in the criminalization of legitimate forms of exercising fundamental freedoms, peaceful political and/or social opposition and other lawful acts. In several cases, although there has been no real threat of terrorism, the fight against terrorism has been used as a pretext to adopt measures that are designed to curb freedoms and muzzle political and social opposition. States frequently use anti-terrorism legislation to detain members of opposition parties and trade unions for their peaceful activities. Political dissidents and journalists have been subjected to harassment, including legal or administrative proceedings, for criticizing anti-terrorism measures or policies. States often use anti-terrorism legislation to introduce censorship in order to curb the dissemination of information or muzzle their critics. A number of countries have adopted a vague and/or broadly defined offence of "incitement to terrorism", which often criminalizes the legitimate exercise of the right to freedom of expression and inhibits constructive political, media and community debate on issues related to terrorism. In certain countries anti-terrorism legislation has been used to stop indigenous peoples from presenting claims in the context of exercising their right to self-determination.

Some States attempt to delegitimize the exercise of the right to self-determination by wrongly labelling it as terrorism, including when a people resorts to arms under

332 For example, the *Convention on the Prevention and Combating of Terrorism* adopted by the Organization for African Unity (OAU), in adopting a fairly wide definition of what constitutes a "terrorist act", has left it open for certain methods of exercising the right to strike to be criminalized at a later date.

circumstances that are not prohibited by international law. In several countries, State security agencies and military forces have the power – sometimes under anti-terrorism legislation and sometimes *de facto* – to carry out raids on private houses, intercept private correspondence and telephone communication and to use wire-tapping and record conversations without applying for a warrant or being subjected to judicial oversight.

## 2. International legal framework

### i) Fundamental rights and freedoms

The fundamental freedoms of expression, religion, conscience or belief, association and assembly and the right to strike are universally recognized and protected.[333] The rights to freedom of thought, conscience and religion are protected unconditionally and cannot be subject to derogation. No limitations of any kind are permitted on freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice. This right protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. No one can be compelled to reveal his or her thoughts or adherence to a religion or belief. International law distinguishes freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief, on which there can be reasonable restriction.

### ii) The right to freedom of expression

The right to freedom of expression includes the right to express thoughts and ideas and the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice.[334] Limiting this right by means of arbitrary interference therefore affects not only the individual's right to impart information and express

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333 The *Universal Declaration of Human Rights* (Articles 18, 19, 20 and 23.4), *International Covenant on Economic, Social and Cultural Rights* (Article 8), *International Covenant on Civil and Political Rights* (ICCPR) (Articles 18, 19, 21 and 22), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Articles 12, 13 and 24), *Declaration on the human rights of individuals who are not nationals of the country in which they live* (Article 5(1,e) (2 and 8 (1,b)), *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* (Articles 1, 5,6 7, 9 and 12), *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (Article 2), *African Charter on Human and Peoples' Rights* (Articles 8, 9, 10 and 11), *Declaration of Principles on Freedom of Expression in Africa, American Declaration of the Rights and Duties of Man* (Articles III, IV, XXI and XXII), *American Convention on Human Rights* (Articles 12, 13, 15 and 16), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador* (Article 8), OAS *Declaration of Principles on Freedom of Expression*, *Arab Charter on Human Rights* (Articles 24 30, 32, 34 and 35), *European Convention on Human Rights* (Articles 9, 10 and 11), *European Social Charter* (Part 1, para. 5, Articles 5 and 6), the *Freedom of Association and Protection of the Right to Organize Convention*, 1948 (ILO) and ILO *Convention N° 151 concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service*.

334 Human Rights Committee, *Concluding Observations of the Human Rights Committee on Iraq*, CCPR/C/79/Add.84, 19 November 1997, para. 17, and the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 273.

ideas but also the right of the community as a whole to receive all types of information and opinions.[335]

Under international law, the exercise of rights and fundamental freedoms, including freedom of expression, can be limited. However, such limitations or restrictions cannot be introduced in an arbitrary way, since international law itself sets out the framework within which they may be imposed. Indeed, the Human Rights Committee has stated that "the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself".[336] Restrictions on the right to freedom of expression must cumulatively meet the following conditions: they must be 'provided by law'; they may only be such that are necessary for respect of the rights or reputations of others, or the protection of national security or of public order, or of public health or morals; and they must be justified as being 'necessary' for the State in question to achieve one of those legitimate purposes.[337] The Human Rights Committee further considered "that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights".[338]

Any propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited.[339] The European Court of Human Rights has stated that the clear incitement of violence, hostility or hatred between citizens is a fundamental criterion for distinguishing between freedom of expression and terrorism.[340] Under the *European Convention on Human Rights*, freedom of expression may be restricted "for preventing the disclosure of information received in confidence" and "for maintaining the authority and impartiality of the judiciary".[341]

The Inter-American Commission on Human Rights has stated that, although some limitations on freedom of expression may be justified to protect public order or national security in the fight against terrorism, "the requirement that any subsequent

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335 Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, para. 30.

336 Human Rights Committee, General Comment N° 10, *Freedom of expression*, para. 4

337 *Ibid.*, para. 4. See also Views of 8 November 1996, Communication 550/1993, *Robert Faurisson v. France*, CCPR/C/58/D/550/1993, paras. 9 (4) and (6), and Views of 21 July 1994, Communication N° 458/1991, Case *Albert Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991, para. 9.7.

338 Views of 21 July 1994, Communication N° 458/1991, Case *Albert Womah Mukong v. Cameroon*, para. 9.7, CCPR/C/51/D/458/1991.

339 Article 20 of the ICCPR and Article 13 (5) of the *American Convention on Human Rights*.

340 Judgment on merits of 25 November 1997, *Zana v. Turkey*, and Judgment on merits of 8 June 1998, *Incal v. Turkey*.

341 Article 10 of the *European Convention on Human Rights*.

penalties must be established by law means that it must be foreseeable to the communicator that a particular expression may give rise to legal liability [...] An overly broad or vague provision may not fulfil the requirement of foreseeability and therefore may violate the terms of Article 13(2) [of the *American Convention on Human Rights*]".[342] The Inter-American Commission on Human Rights has recommended that States "impose subsequent penalties for the dissemination of opinions or information only through laws that have legitimate aims, that are clear and foreseeable and not overly broad or vague, and that ensure that any penalties are proportionate to the type of harm they are designed to prevent".[343]

The African Commission on Human and Peoples' Rights has found the following to constitute violations of freedom of expression: the detention of members of opposition parties and trade unions under legislation outlawing all political opposition during a state of emergency; the failure of a State to investigate attacks against journalists that violated their right to express and disseminate information and opinions; and State harassment that sought to disrupt the legitimate activities of an organization that informs and educates people about their rights.[344]

Under the *American Convention on Human Rights*, the prohibition of prior censorship, with the sole exception of regulating access for the moral protection of childhood and adolescence, is absolute.[345] The Inter-American Court has said that prior censorship constitutes an extreme violation of the right to freedom of expression because "governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news [...] Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society".[346]

### iii) The right to freedom of expression and the offence of incitement to terrorism

States can legitimately criminalize incitement to acts of terrorism under their international legal duty to protect against acts of terrorism through the criminal law.[347] This obligation also arises from the positive obligation to protect under international human rights law[348], as well as from the prohibition of any propaganda for war

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342 *Report on Terrorism and Human Rights*, *op. cit.* 334, para. 316.

343 *Ibid*., "Recommendations" N° 11 (b).

344 *Sir Dawda K. Jawara v. the Gambia,* Communications 147/95 and 149/96, and *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria,* Communications 137/94, 139/94, 154/96 and 161/97.

345 *Report on Terrorism and Human Rights*, *op. cit.* 334, para. 273.

346 Inter-American Court of Human Rights, Advisory Opinion OC-5/85, para. 54.

347 See *inter alia*: Security Council Resolution 1624 (2005), para. 1; *Convention on the Prevention of Terrorism* of the Council of Europe; the *European Union Framework Decision on Combating Terrorism*.

348 See *inter alia*: Article 2 and 5 of the ICCPR; Article 1 of *the American Convention on Human Rights*; Articles

or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[349] Under international law, it is well established that States have obligations to protect the lives and physical integrity of those within their jurisdiction from the acts of private individuals, by means of an adequate legal framework, including criminal offences where appropriate, and the effective enforcement of the law.[350]

Prosecutions for incitement to acts of terrorism, by their nature, interfere with rights of freedom of expression, and will often impact on political expression. Such interferences must meet the requirements under international law, as noted above, that they be prescribed by law, necessary in a democratic society to serve specified legitimate aims, and be non-discriminatory. Freedom of expression is one of the essential foundations of a democratic society. Freedom of expression applies not only to the flow of "information" or "ideas" that is received favourably or with indifference, or regarded as inoffensive, but also covers expression that offends, shocks or disturbs.[351] There can be no democracy without pluralism [352] and the State is the ultimate guarantor of the principle of pluralism.[353] The dissemination of political ideas that do not conform with the views of a ruling elite (such as separatism, restoration of the monarchy, changes to the legal and constitutional structures) are not in themselves incompatible with the principles of democracy and as such cannot

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1 and 17 of the *European Convention on Human Rights*; and Articles 1 and 27 (2) of *the African Charter on Human and Peoples' Rights*.

349 Article 20 of the ICCPR and Article 13 (5) of the *American Convention on Human Rights*.

350 Human Rights Committee, General Comment N° 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8; European Court of Human Rights, Judgments concerning the following cases: *Ergi v. Turkey* (1998), *Tanrikulu v. Turkey* (1999), *Demiray v. Turkey* (2000), *X and Y v. Netherlands* (1985), *Osman v. UK* (1988) and *A v. UK* (1998); Inter-American Court of Human Rights, Judgment of 29 July 1988, Case of *Velásquez-Rodríguez v. Honduras*; Inter-American Commission on Human Rights, Report N° 42/00 of 13 April 2000, Case N° 11,103, *Pedro Peredo Valderrama* (Mexico) and Report N° 54/01 of 16 April 2001, Case 12,051, *Maria da Penha Maia Fernandes* (Brazil); African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, paras. 57 and 61 (30th Ordinary Session, Oct. 2001).

351 European Court of Human Rights: Judgment of 8 July 1999, Applications N° 23927/94 and 24277/94, Case of *Sürek and Özdemir v. Turkey*; Judgment of 26 September 1995, Case of *Vogt v. Germany*; Judgment of 30 January 1998, Application N° 133/1996/752/951, Case of *United Communist Party of Turkey and Others v. Turkey*; Judgment of 12 July 2005, Applications N° 42853/98, 43609/98 and 44291/98, *Güneri and Others v. Turkey*; Judgment of 21 June 2007, Application N° 57045/00, *Shechev v. Bulgaria*; Judgment of 3 May 2007, Application N° 1543/06, *Backowski and Others v. Poland*; Judgment of 12 December 2006, Application N° 10504/03, *Linkov v. Czech Republic*; Judgment of 2 October 2001, Applications N° 29221/95 and 29225/95, Case of *Stankav and the United Macedonian Organisation Ilinden v. Bulgaria*; and Judgment of 10 July 1998, Application N° 57/1997/841/1047, Case of *Sidiropoulos and Others v. Greece*. See also: Inter-American Court of Human Rights, Judgment of 5 February 2001, *Olmedo Bustos et al. v. Chile* ("Last Temptation of Christ"), and Inter-American Commission on Human Rights, *Annual Report on Human Rights 1994*, "Report on the Compatibility of *Desacato* Laws with the American Convention on Human Rights", OEA/Ser.L/V/11.88, Doc. 9 rev (1995).

352 European Court of Human Rights, Judgment of 30 January 1998, Application N° 133/1996/752/951, Case of *United Communist Party of Turkey and Others v. Turkey,* para. 43, and Judgment of 8 July 1999, Applications N° 23927/94 and 24277/94, Case of *Sürek and Özdemir v. Turkey*, para. 57.

353 European Court of Human Rights, Judgment of 24 November 1993, Case of *Informationsverein Lentia and Others v. Austria*, para. 38.

be considered to be jeopardizing the integrity or the national security of a country. The Human Rights Committee has pointed out that "the provisions of Article 20, paragraph 1, [prohibition of any propaganda for war] do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations".[354]

Any definition of "incitement to terrorism" must meet the requirements of criminal law principles. According to the principle of legality of offences, a core principle of the rule of law, the offences of incitement to acts of terrorism must be sufficiently clearly formulated for individuals to foresee to a reasonable extent the application of the law and to regulate their conduct to avoid breaching the law (see Principle 3, *Berlin Declaration*). Furthermore, incitement to terrorism should be a criminal offence only where there is a subjective intention to incite acts of terrorism, and where the speech concerned causes the commission of an act of terrorism or an imminent risk of such an act. These conditions reflect the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* [355], Principle 6 of which states:

> *"Expression may be punished as a threat to national security only if a government can demonstrate that:*
>
> *(a) the expression is intended to incite imminent violence;*
>
> *(b) it is likely to incite such violence;*
>
> *(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."*

Similarly, the Inter-American Commission on Human Rights has pointed out that "laws that broadly criminalize the public defense (*apología*) of terrorism or of persons who might have committed terrorist acts, without considering the element of incitement 'to lawless violence or to any other similar action,' are incompatible with the right to freedom of expression." [356] The Inter-American Commission has recommended that States "refrain from promulgating laws that broadly criminalize, without an additional requirement of a showing of an intent to incite lawless violence

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354 General Comment Nº 11, *Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20)*, para. 2.

355 These principles were endorsed by the UN Special Rapporteur on the right to freedom of opinion and expression (UN document E/CN.4/1996/39, Appendix). They were also referred to by the former UN Commission on Human Rights in several resolutions (see Resolution 2000/38 of 20 April 2000) as well as by the Inter-American Commission on Human Rights.

356 *Report on Terrorism and Human Rights*, *op. cit. 32,* para. 323. See also, Commission of International Jurists, *Report of the Commission of International Jurists on the Administration of Justice in Peru*, 30 November 1993, page 24.

or any other similar action and a likelihood of success, the public defense (*apología*) of terrorism or of persons who might have committed terrorist acts".[357]

### iv) The rights to freedom of assembly and association

The Human Rights Committee has underlined that "the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society."[358] Along the same lines, the European Court of Human Rights has pointed out that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively".[359] The Human Rights Committee has pointed out that "the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities."[360] States must not only safeguard rights to freedom of assembly and association but also refrain from applying unreasonable indirect restrictions upon that right.[361]

Any restrictions on the rights to freedom of assembly and association must cumulatively meet the following conditions: (a) they must be provided by law; (b) they may only be imposed for one of the purposes set out in Article 22 (2) of the ICCPR [the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others]; and (c) they must be "necessary in a democratic society" for achieving one of these purposes.[362] With regard to restrictions on the rights to freedom of

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357 *Ibid*., "Recommendations" Nº 11 (c).

358 Views of 31 October 2006, Communication Nº 1274/2004, *Viktor Korneenko and Others v. Belarus*, para. 7.3 (UN document CCPR/C/88/D/1274/2004). See also Views of 20 July 2005, Communication Nº 1119/2002, Case *Jeong-Eun Lee v. Republic of Korea*, para. 7.2, (UN document CCPR/C/84/D/1119/2002) and Views of 17 October 2006, Communication Nº 1039/2001, Case of *Boris Zvozskov and Others v. Belarus*, para. 7.2 (CCPR/C/88/D/1039/200).

359 Judgment of 20 February 2003, Application Nº 20652/92, Case of *Djavit An v. Turkey*, para. 56.

360 Views of 31 October 2006, Communication Nº 1274/2004, *Viktor Korneenko and Others v. Belarus*, para. 7.2 (UN document CCPR/C/88/D/1274/2004).

361 European Court of Human Rights, Judgment of 26 April 1991, Case of *Ezelin v. France,* and Judgment of 20 February 2003, Case of *Djavit An v. Turkey;* Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit. 32,* para. 359.

362 Views of 31 October 2006, Communication Nº 1274/2004, *Viktor Korneenko and Others v. Belarus*, para. 7.2 (UN document CCPR/C/88/D/1274/2004). Along the same lines see also: Articles 26 (2) and 40 (2) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Article 16 of the *American Convention on Human Rights*; Article 11 of the *European Convention on Human Rights;* and Article 8 (1,b) of the *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live*.

assembly and association, the Inter-American Commission on Human Rights has pointed out that:

> *"any limitations must be established by or in conformity with laws that are enacted by democratically elected and constitutionally legitimate bodies and are tied to the general welfare. Such rights cannot be restricted at the sole discretion of governmental authorities. Moreover, any such restriction must be in the interest of national security, public order, or to protect public health or morals or the rights or freedoms of others, and must be enacted only for reasons of general interest and in accordance with the purpose for which such restrictions have been established. The restrictions must additionally be considered necessary in a 'democratic society', of which the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law are fundamental components. Similarly, while the rights to freedom of assembly and of association are not designated to be non-derogable, any measures taken by states to suspend these rights must comply strictly with the rules and principles governing derogation including the principles of necessity and proportionality".*[363]

### v) The right to strike

As far as limitations or restrictions on the right to strike are concerned[364], the UN Committee on Economic, Social and Cultural Rights and the International Labour Organization's Union Freedom Committee have taken the view that a general restriction on the right to strike is permissible only in the case of services that are classified as essential, which the International Labour Organization defines as those whose suspension could jeopardize the safety or life of all or part of the public.[365] The Committee on Economic, Social and Cultural Rights pointed out that legislation under which participation in strikes is punishable by compulsory labour or made a criminal offence is in breach of the *International Covenant on Economic, Social and Cultural Rights*.[366] The Committee pointed out that certain restrictions placed by law on the right to strike cannot be justified on grounds of national security or public order.[367]

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363 *Report on Terrorism and Human Rights*, *op. cit. 32,* para. 360.

364 See, in particular, the International Covenant on Economic, Social and Cultural Rights (Article 8), ILO Convention Nº 87 concerning Freedom of Association and Protection of the Right to Organize and ILO Convention Nº 151 concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service.

365 See, among others, the *Concluding Observations of the Committee on Economic, Social and Cultural Rights on Azerbaijan*, E/C.12/1/Add.20, 22 December 1997, para. 32.

366 See, among others, the *Concluding Observations of the Committee on Economic, Social and Cultural Rights on Iraq*, E/C.12/1/Add.17, 12 December 1997, para. 31, and *Tunisia*, E/C.12/1/Add.36, 14 May 1999, para. 25.

367 *Concluding Observations of the Committee on Economic Social and Cultural Rights on Colombia*, E/C.12/1995/18, 6 December 1995, para. 188.

The Human Rights Committee has criticized the very broad or vague definitions of terrorism currently used in the legislation of several States and under which legitimate methods of exercising fundamental rights could be criminalized.[368] The Human Rights Committee has recommended that States in which legitimate forms of freedom of expression or social and political peaceful opposition have been made criminal offences revise their legislation.

### vi) The right to self-determination

The right to self-determination is a recognized human rights and a principle of international law.[369] By virtue of that right all peoples freely determine their political status, and freely pursue their economic, social and cultural development. The Committee on the Elimination of Racial Discrimination has recognized the right,[370] but has recalled that international law has not interpreted the right to self-determination as recognizing the general right of peoples to unilaterally declare secession from a State.[371]

International law has recognized the legitimacy and legality of the use of violence by national liberation movements "fighting against colonial domination and alien occupation and against racist regimes".[372] These are movements fighting for the right to self-determination in accordance with the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. They are not just any national liberation movements, but those recognized as fighting colonial domination, foreign occupation or racist regimes. The circumstances in which such struggles are viewed as legitimate in the eyes of

368 See, for example, the *Concluding Observations of the Human Rights Committee on Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Peru*, CCPR/C/79/Add.72, 18 November 1996, para. 12; *Egypt*, CCPR/C/79/Add.23, 9 August 1993; *Estonia*, CCPR/CO/77/EST, 3 April 2003, para. 8; *Syria*, CCPR/CO/71/SYR, 24 April 2001, para. 24; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Mauritius*, CCPR/CO/83/MUS, 27 April 2005; and *Philippines*, CCPR/CO/79/PHL, 1 December 2003, para. 9.

369 See, among others, the *International Covenant on Economic, Social and Cultural Rights* (Article 1); the ICCPR (Article 1); the *Declaration on the Granting of Independence to Colonial Countries and Peoples*; and General Assembly resolution 1803 (XVII) of 14 December 1962, *Permanent sovereignty over natural resources*. See also the International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004.

370 General Recommendation N° 21, *Right to self-determination*, 23/08/96, para. 4.

371 *Ibid.*, para. 6; Decision 1 (55) on Kosovo (Federal Republic of Yugoslavia), of 9 August 1999, para. 4.

372 See, among others, Article 1.4 of Additional Protocol I to the Geneva Convention, Article 12 of the *International Convention against the Taking of Hostages* and the UN *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

international law are laid down in various UN General Assembly resolutions.[373] The World Conference on Human Rights (Vienna 1993) said that:

> *"[t]aking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination [...] The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right".*[374]

While it is clear that, under international law and, more particularly, international humanitarian law, the struggle against foreign occupation, colonial domination or racist regimes is legitimate and should not be equated with terrorism, it is nonetheless true that not all methods of doing so are authorized and some acts, in particular terrorist acts, are prohibited.[375] If the members of national liberation movements commit terrorist acts in the course of a legitimate struggle, they are criminally accountable for them. However, this does not criminalize the legitimate struggle as such. The problem arises when armed struggle against colonial domination, alien occupation or racist regimes, in the context of exercising the right to self-determination in accordance with the principles of international law, is defined *per se* as a criminal offence or terrorism under national legislation. Doing so contravenes international law and constitutes a denial of the right to self-determination.

Traditionally, the scope of the right to self-determination has been limited to situations in which peoples are under colonial or other forms of alien domination or foreign occupation. However, more recently, UN treaty bodies have recognized that the right to self-determination should not be confined solely to such situations. Indeed, the Human Rights Committee stated that "the right to self-determination did not apply only to colonial situations but also to other situations, and that the people of a given territory had to be able to determine their political and economic destiny".[376] The Committee recalled that the "principle [of the right to self-determination] applies to all peoples and not merely to colonized peoples".[377] The Committee also emphasized, with regard to indigenous peoples, that "the right to

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373 For example, in resolution 2105 (XX) of 20 December 1965, the General Assembly recognized the legitimacy of the struggle waged by peoples under colonial domination to exercise their right to self-determination and independence. In resolution 3103 (XXVIII) of 12 December 1973, entitled *Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes*, the General Assembly spelled out the legal status of national liberation movement fighters.

374 *Vienna Declaration and Programme of Action*, UN document A/CONF.157/23, para. 2.

375 For example, Article 33 of the IV Geneva Convention of 1949 and Article 51 of the *Additional Protocol to the Geneva Conventions, 12 August 1949 relating to the protection of victims of non-international conflicts*.

376 *Concluding Observations of the Human Rights Committee on Iraq*, 31 October 1991, A/47/40, para. 195 [French original, free translation].

377 *Observations of the Human Rights Committee on Azerbaijan*, 3 August 1994, CCPR/C/79/Add.38, A/49/40, paras. 291-311.

self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence".[378] Anti-terrorism legislation that criminalizes the legitimate exercise of the right to self-determination *per se*, especially the defence of land and natural wealth and resources, is incompatible with international law.

### vii) The right to privacy

The right to privacy is universally recognized and protected.[379] The issues it deals with cover a wide spectrum ranging from phone tapping to sexual orientation. It requires that every person be protected against arbitrary or unlawful interference with his or her privacy, family, home or correspondence as well as against unlawful attacks on his or her honour or reputation. The Human Rights Committee has underlined that "this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons".[380]

The right to privacy may be subjected to restrictions or interference. However, the Human Rights Committee has said that such interference or restriction may be permitted only if essential in the interests of society, and national legislation must specify in detail the precise circumstances in which such interference is possible.[381] Such interference must be lawful and not arbitrary. Indeed, as also stressed by the Human Rights Committee, "'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances".[382] A decision to make use of such authorized interference must be made only by the authority designated by law, and on a case-by-case basis. However, the Human Rights Committee has stated that the monitoring or censorship of correspondence should be subject to satisfactory legal safeguards against their arbitrary application, including judicial oversight and judicial remedy. Searches of a person's home should be restricted to a

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378 *Concluding Observations of the Human Rights Committee on Canada*, 7 April 1999, CCPR/C/79/Add.105, para. 8. The Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have expressed concerns in connection with the right to self-determination of indigenous peoples (*Concluding Observations of the Human Rights Committee on Mexico*, 27 July 1999, CCPR/C/79/Add.109, para. 19; CERD, *Decision 5 (54) on the Sudan*, 19 March 1999, A/54/18, para.10; and the *Concluding Observations of the Committee on Economic, Social and Cultural Rights on Russian Federation*, 12 December 2003, E/C.12/1/Add.94, para. 39).

379 The *Universal Declaration of Human Rights* (Article 12), ICCPR (Article 17), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Article 14), *American Convention on Human Rights* (Article 11) and *European Convention on Human Rights* (Article 8).

380 Human Rights Committee, General Comment Nº 16, para. 1.

381 *Ibid.*, para. 7.

382 *Ibid.*, para. 4. See also Views of the Human Rights Committee of 3 April 2001, *Rafael Armando Rojas García v. Colombia*, Communication 687/1996, CCPR/C/71/D/687/1996, 16 May 2001.

search for necessary evidence and should not be allowed to amount to harassment. In the case of personal or body searches, States must take effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. The Human Rights Committee found that the monitoring of phone, email and fax communications of individuals, both within and outside a State, without any judicial or other independent oversight raises serious questions about their compatibility with the right to an effective remedy and the right to privacy (Articles 2(3) and 17 of the ICCPR).[383] It called on States to ensure that "any infringement on individuals' rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected".[384]

The European Court of Human Rights has said that a State has a duty not to interfere with its subjects' privacy except in strictly limited circumstances prescribed by law that are in the public interest and necessary in a democratic society. The European Court has found situations in which individuals were being subjected to secret surveillance by means of telephone-tapping and in which the State monitored prisoners' correspondence to be violations of the right to respect for private and family life.[385]

The Inter-American Commission on Human Rights has pointed out that, in the case of interference for investigative purposes, any search must be justified by a "well-substantiated search warrant issued by a competent judicial authority, spelling out the reasons for the measure being adopted and specifying the place to be searched and the objects that will be seized".[386]

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383 *Concluding Observations of the Human Rights Committee on The United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 21.

384 *Ibid*.

385 See, among others, the Judgment of 24 April 1990, *Huvig v. France*, and The Judgment of 28 June 1984, *Campbell and Fell v. The United Kingdom*.

386 Report 01/95 of 7 February 1995, *Alán García v. Peru*, Case 11,006.

# Principle 9 – Remedy and reparation

*States must ensure that any person adversely affected by counter-terrorism measures of a State, or of a non-State actor whose conduct is supported or condoned by the State, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.*

# Commentary

## 1. Unlawful State practices

In the fight against terrorism, the legal remedies normally available for human rights violations have frequently been curtailed, leaving victims of abuses committed by State actors in the course of counter-terrorism operations defenceless. Counter-terrorism legislation frequently restricts the right of those under arrest or in detention to be brought promptly before a judge or other officer authorized by law to exercise judicial power as well as the right to have the legality of the detention subjected to judicial review. Certain countries have adopted policies to prevent foreigners from having access to domestic courts in violation of the right to a remedy and the right to judicial review of their detention. Many States adopt policies on data collection, secret surveillance and other methods of information-gathering without putting adequate safeguards in place to ensure that those affected can legally challenge such measures. Sometimes, those concerned are unaware of the existence of such measures or have no right to judicial review. Many countries have introduced legislation curtailing the power of the courts to check that counter-terrorism measures are compatible with the rule of law. Furthermore, judicial review is often expensive, delayed and confined to individual cases. Some States have passed counter-terrorism legislation that grants security forces full or partial immunity from prosecution if they commit abuses in the course of counter-terrorism operations.

## 2. International legal framework

### i) The right to a remedy

Under international human rights law, every person has a right to an effective remedy before an independent authority in the event that his or her human rights have been violated, so that they can obtain relief and redress. This right is enshrined in the vast majority of universal and regional human rights instruments and is so widely accepted that it is a principle of customary international law.[387]

387 See the *International Covenant on Civil and Political Rights* (ICCPR) (Article 2.3), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 13), the *Convention on the*

While the right to a remedy is not specifically mentioned in international treaties as a non-derogable right[388], it is one of the most fundamental and essential rights for the effective protection of all other human rights and must be guaranteed even in times of emergency.[389] The Human Rights Committee stated that the obligation to provide remedies for any violation of the provisions of the ICCPR "constitutes a treaty obligation inherent in the Covenant as a whole".[390] For its part, the Inter-American Court of Human Rights has said that "the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention".[391] Remedies must also be guaranteed in a non-discriminatory manner, including to non-citizens.[392]

Remedies take different forms in different jurisdictions, for example, the remedy of *amparo*, *recours pour excès de pouvoir*, *habeas corpus*, remedies in administrative or civil courts, *partie civile* in a criminal process. They can be administrative, criminal or civil in nature. While States generally have discretion with regard to how the right to an effective remedy is implemented within their domestic order, the nature of the

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*Elimination of All Forms of Racial Discrimination* (Article 6), the *International Convention for the Protection of All Persons from Enforced Disappearance* (Articles 12, 17.2 (f) and 20), Article 6.2 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, the *Universal Declaration of Human Rights* (UDHR) (Article 6.2), the *Declaration on the Protection of All Persons from Enforced Disappearance* (Articles 9 and 13), the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions* (Principles 4 and 16), the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Principles 4-7), the *Vienna Declaration and Programme of Action* (Article 27), the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Articles 13, 160-162 and 165), the *Declaration on Human Rights Defenders* (Article 9), the *European Convention on Human Rights* (Article 13), the *Charter of Fundamental Rights of the European Union* (Article 47), the *American Convention on Human Rights* (Articles 7.1(a) and 25), the *American Declaration of the Rights and Duties of Man* (Article XVIII), the *Inter-American Convention on Forced Disappearance of Persons* (Article III (1)), the *Inter-American Convention to Prevent and Punish Torture* (Article 8.1), the *African Charter of Human and Peoples' Rights* (Article 7(a)) and the *Arab Charter on Human Rights* (Article 9).

388 Nevertheless, the *American Convention on Human Rights* prohibits the suspension of judicial guarantees that are essential for the protection of non-derogable rights (Article 27.1). Similarly, the *International Convention for the Protection of All Persons from Enforced Disappearance* establishes *habeas corpus* as non-derogable.

389 See the Human Rights Committee: *General Comment 29 on derogations during a state of emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14; the UN Commission on Human Rights: Resolution on *habeas corpus*, E/CN.4/RES/1992/35, 28 February 1992, para. 2; the European Court of Human Rights: *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 83; and the Inter-American Court of Human Rights: Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, 30 January 1987, Series A N° 8, para. 42, and Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, operative paras. 2 and 3.

390 Human Rights Committee: *General Comment 29 on derogations during a state of emergency*, *op. cit.* 32, para. 14.

391 Judgment of 3 November 3 1997, *Castillo Páez Case*, para. 82.

392 *Concluding Observations of the Human Rights Committee on Belgium*, 12 August 2004, CCPR/CO/81/BEL, paras. 9 and 11; Committee on the Elimination of Racial Discrimination, *General Recommendation N° 30 on Discrimination Against Non Citizens*, 1 October 2004, para. 18; and House of Lords, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, Judgment of 16 December 2004.

remedy varies according to the gravity of the violation and, in the case of serious human rights violations, such as torture or cruel, inhuman or degrading treatment or extra-judicial, summary or arbitrary executions, the remedy must be judicial in nature.[393]

The authority deciding on the remedy must be independent and not subject to interference by the bodies against which the complaint is brought.[394] The authority must have the power to review State conduct in a manner that will afford genuine and appropriate relief.

Although the right to be brought promptly before a judge is derogable in time of emergency (see Principle 6, *Berlin Declaration*), such derogations are subject to the test of proportionality and can never lead to indefinite detention without any procedural remedy.[395] The right to judicial review of the legality of the detention (*habeas corpus* or similar remedies) is non-derogable. In addition, persons must receive free legal assistance if needed and, if they are in detention, it must be guaranteed from the time their detention begins.[396]

A correlative of the right to a remedy is the duty of the State to ensure a prompt, thorough, independent and impartial investigation of any human rights violations[397] and to ensure that the perpetrators of serious human rights violations are brought to justice.[398] Where impunity prevails, justice is denied, in violation of the

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393 Human Rights Committee: *F. Birindwa ci Birhashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, 29 November 1989, CCPR/C/37/D/241/1987, para. 14, and *Nydia Erika Bautista v. Colombia*, 13 November 1995, CCPR/C/55/D/563/1993, para. 8.2.

394 The *Declaration on the Protection of All Persons from Enforced Disappearance* (Article 13); the *Vienna Declaration and Programme of Action* (Article 27); the Human Rights Committee: *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 15; European Court of Human Rights, *Keenan v. the United Kingdom*, Judgment of 3 April 2001, Reports 2001-III, para. 122; and the Inter-American Court of Human Rights: Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, Series A N° 9, para. 24.

395 Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, HRI/GEN/1/Rev.5/Add.1, paras. 14-15.

396 *Concluding Observations of the Human Rights Committee on Belgium,* 12 August 2004, CCPR/CO/81/BEL, para. 6; *Philippines*, 1 December 2003, CCPR/CO/79/PHL, para. 12, and *Poland*, 2 December 2004, CCPR/CO/82/POL, para. 14.

397 See the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 12); the UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by the General Assembly in December 2000; the *Declaration on the Protection of All Persons from Enforced Disappearance* (Article 13); the *Vienna Declaration and Programme of Action* of 1993 (Article 62); the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 9); the Human Rights Committee: *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, op. cit.* 394, para. 15; the Inter-American Court of Human Rights: *Velásquez Rodríguez v. Honduras,* Judgment of July 29, 1988, Series C N° 4, para. 174; the European Court of Human Rights: *McCann v. the United Kingdom,* Judgment of 27 September 1995, Series A N° 324, para. 161; and the African Commission on Human and Peoples' Rights: *Malawi African Association et al. v. Mauritania*, Communications 54/91 *et al.* (27th Ordinary Session, May 2000), recommendations, lit. 1.

398 Human Rights Committee, General Comment N° 31, *op. cit.* 394, para. 18.

rights to an effective remedy and reparation.[399] The Human Rights Committee has explicitly insisted that counter-terrorism legislation cannot exempt law enforcement and military personnel from liability for harm caused during counter-terrorist operations.[400]

### ii) The right to reparation

The right to a remedy and the right to reparation are closely linked. While there is some debate about the relation between remedies and reparations, there is unanimity in international jurisprudence that every victim of a human rights violations has a right to an effective procedural remedy against the violation, as well as a right that the violation should cease and a right to reparation for the harm suffered, and that the State has a duty to prevent violations from recurring.[401]

It is a general principle of public international law that any wrongful act, that is to say, any violation of an obligation under international law, gives rise to an obligation to make reparations.[402] This principle, established by the Permanent Court of International Justice and upheld by international jurisprudence, has been reaffirmed by the International Law Commission [403] and the UN General Assembly [404]. International human rights law is not an exception to this principle; the responsibility of States to provide reparation arises when there is a breach of an international obligation, whatever its origin. The violation of States' obligation to respect and ensure respect for human rights gives rise to an independent international obligation to provide reparation (see Principle 1, *Berlin Declaration*). The right to reparation is universally recognized and protected by both international human rights treaties and

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399 Theo Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN document E/CN.4/Sub.2/8, 2 July 1993, paras. 126-127.

400 *Concluding Observations of the Human Rights Committee on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 13.

401 See Human Rights Committee, General Comment N° 31, *op. cit.* 394, paras. 15-17.

402 *Factory at Chorzow, Jurisdiction,* Judgement N° 8, 1927, Permanent Court of International Justice, Series A, no. 17, p.29; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, International Court of Justice Reports 1949, p.184; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Romanie, deuxième phase*, avis consultatif, CIJ, Recueil, 1950, p.228. See also Article 1 of the *Draft Articles on State Responsibility* adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State" (UN document A/CN.4/L.602/Rev.1, 26 July 2001).

403 See *International Law Commission: report on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001)*, official document of the General Assembly, fifty-sixth session, Supplement N° 10 (A/56/10).

404 Resolution 56/83 of 12 December 2001.

declarative instruments.[405] It has also been recognized by international courts.[406] It has been referred to not only as a basic principle of general international law but as one of the basic pillars of the rule of law and a democratic society.[407] Similarly, violations of the norms of international humanitarian law give rise to a duty to make reparations.[408]

Reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[409] Restitution is meant to reverse or annul the act that caused the violation and is recognized in a number of human rights instruments.[410]

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405 At the universal level, see, among others, the *Universal Declaration of Human Rights* (Article 8), the ICCPR (Articles 2.3, 9.5 and 14.6), the *International Convention on the Elimination of All Forms of Racial Discrimination* (Article 6), the *Convention on the Rights of the Child* (Article 39), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 14), the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 24) and the *Rome Statute for an International Criminal Court* (Article 75). It is also established in the *Rules of Procedure and Evidence* of the International Tribunal for Yugoslavia and the International Tribunal for Rwanda (Rule 106), as well as in several regional instruments, for example, the *European Convention on Human Rights* (Articles 5.5, 13 and 41), the *American Convention on Human Rights* (Articles 25, 68 and 63.1), the *African Charter of Human and Peoples' Rights* (Article 21.2) and the *Arab Charter on Human Rights* (Articles 8, 14, 19 and 23). It is also important to mention the following international standards: the UN *Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985; the *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 19), General Assembly resolution 47/133 of 18 December 1992; the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; the *Declaration on the Elimination of Violence against Women*; and the *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (Principles 31-34), recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81 of 21 April 2005.

406 See, for example, the ruling of the Inter-American Court of Human Rights in the *Velásquez Rodríguez Case*, Series C, N° 4 (1989), para. 174. See also the ruling of the European Court of Human Rights on *Papamichalopoulos v. Greece* (Article 50), European Court of Human Rights, Series A, N° 330-B (1995), p.36.

407 Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by Meleander, G., Article 8, in Eide *et al.* (eds.); *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press (1992), p.143; See also the following cases from the Inter-American Court of Human Rights: *Blake v. Guatemala* (Reparations), Series C, (1999) N° 48, para. 63; *Castillo Paez v. Peru,* Series C (1997) N° 34, paras. 82-83; *Suárez Rosero v. Ecuador,* Judgment of 12 November 1997, Series C N° 35, para. 65; *Loyaza Tamayo v. Peru* (Reparations), Judgment of 27 November 1998, para. 169; and *Castillo Paez v. Peru* (Reparations), Judgment of 27 November 1998, para. 106.

408 Under international humanitarian law, the *Hague Convention regarding the Laws and Customs of Land Warfare* (Article 3, 1907 Hague Convention IV) includes specific requirements to pay compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision relating to liability for grave breaches, and the 1977 Additional Protocol I (Article91) specifically provides for liability to pay compensation. The *Rome Statute of the International Criminal Court* refers to the *Draft UN basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p.5, note 5.

409 For classifications of the different forms of reparation, see Article 34 of the *Draft Articles on State Responsibility* and Articles 18-23 of the *Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

410 See the *American Convention on Human Rights* (Article 63.1), the *European Convention on Human Rights* (Article 41), the *Rome Statute on the International Criminal Court* (Article 75), the UN *Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights*

In the context of terrorism, it has been held that persons convicted as a result of an unfair trial have a right to a retrial [411], persons in detention must be released [412] and unlawful convictions must be erased from the criminal records. As the Inter-American Court of Human Rights has put it, "[r]eparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others)".[413]

Beyond the re-opening of criminal proceedings, other legal rights may also have to be restored. 'Restoration of legal rights' means the re-recognition of rights that have been denied to the person as a result of a human rights violation. The most important example in this area is the rectification of a person's criminal record following a trial and conviction that has violated human rights. Human rights treaties establish that if a person has been wrongfully convicted as a result of a miscarriage of justice, the State should provide him or her with compensation.[414] However, the consequences of a conviction must also be reversed if a person has been convicted wrongfully; mere compensation will not repair the harm done.[415]

Compensation is monetary reparation for economically assessable damage. The damage can be assessed either on the basis of the available material evidence, or, if insufficient material evidence is available, on an equitable basis. It covers physical harm; moral harm; lost opportunities, including employment, education

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*Law and Serious Violations of International Humanitarian Law* (Principle 19); the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 24), the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Principles 8-10) and the *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (Principles 31-34).

411 Human Rights Committee: *Raul Sendic Antonaccio v. Uruguay*, CCPR/C/14/D/63/1979, 28 October 1981, para. 21; *Polay Campos v. Peru*, 9 January 1998, CCPR/C/61/D/577/1994, para. 10; *Semey v. Spain*, 21 August 2003, CCPR/C/78/986/2001, para. 9.3; Inter-American Court of Human Rights: *Castillo Petruzzi et al Case*, Judgment of 30 May 1999, Series C N° 52, para. 217-221; European Court of Human Rights: *Ükünç and Günes v. Turkey,* Judgment of 18 December 2003, para. 32; *Gençel v. Turkey*, Judgment of 23 October 2003, para. 27; African Commission on Human and Peoples' Rights: *Civil Liberties Organisation v. Nigeria*, Communication 151/96 (26th Ordinary Session, November 1999); *Avocats sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (28th Session, Nov 2000); and the International Court of Justice: *LaGrand Case (Germany v. the United States),* Judgment of 27 June 2001, International Court of Justice Reports 2001, p.514, para. 125.

412 Human Rights Committee: *Sarma v. Sri Lanka*, 31 July 2003, CCPR/C/78/D/950/2000, para. 11; *Casafranca de Gómez v. Peru*, 20 August 2000, CCPR/C/78/D/981/2001, para. 9; *Polay Campos v. Peru, 9 January 1998,* CCPR/C/61/D/577/1994, para. 10; and *Teillier Arredondo v. Peru,* 14 August 2000, CCPR/C/69/D/688/1996, para. 12.

413 *Loayza Tamayo v. Peru (Reparations),* Judgment of 27 November 1998, Series C N° 42, para. 85.

414 Article 14(6) of the ICCPR, Article 3 of Protocol 7 to the *European Convention on Human Rights* and Article 10 of the *American Convention on Human Rights*.

415 Inter-American Court of Human Rights: *Loayza Tamayo v. Peru (Reparations)*, Judgment of 27 November 1998, Series C N° 42, para. 122; Committee of Ministers of the Council of Europe, Interim resolution DH (2001) 106, 23 July 2001, on *Violations of Freedom of expression in Turkey: Individual measures*; Interim Resolution ResDH(2004)13 concerning *Dorigo Paolo v. Italy*, Interim Resolutions DH(99)258 of 15 January 1999 (finding of a violation) and DH(2002)30 of 19 February 2002 (reopening of judicial proceedings in violation of the European Convention on Human Rights).

and social benefits; material damages and loss of earnings; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[416]

Rehabilitation is a form of redress that is relevant not only for physical or psychological damage but also for damage to a victim's dignity, social situation and legal situation.[417]

While compensation for non-material damage is a form of monetary reparation for physical or mental suffering, distress, harm to the reputation or dignity and other moral damage, satisfaction is a different, non-financial form of reparation for moral damage or damage to dignity or reputation.

The different forms of reparation are usually cumulative. This is not true, however, for restitution and compensation: compensation is due when restitution cannot be obtained – even though, of course, a violation may frequently entail restitution (for example, of property) and also compensation for moral damage. However, in general, while not all available forms of reparation are necessary in all cases, States cannot always choose to award just one form of reparation.

Victims of arbitrary arrest or detention must have an enforceable right to compensation.[418] The Human Rights Committee has also found that if conditions of detention violate international human rights law, the detainee must be released if those conditions do not improve.[419]

### iii) Monitoring by an independent authority

An independent authority with comprehensive powers to monitor all counter-terrorism measures is therefore necessary in order to uphold legal standards on a systematic basis, even if it cannot be a substitute for judicial review. The need for independent review has also arisen at the level of UN counter-terrorism measures. The UN Secretary-General's High Level Panel on Threats, Challenges and Change observed that the listing of terrorist entities and individuals by the Security Council

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416 See Principle 20 of the UN *Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

417 See *General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, 12 January 1998, E/CN.4/1998/43, para. 75, which speaks of 'legal and social rehabilitation'. See also Article 24.5(c) of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

418 Article 9 (5) of the ICCPR and Article 5 (5) of the *European Convention on Human Rights*.

419 Human Rights Committee, *Reece v. Jamaica*, 21 July 2003, CCPR/C/78/D/796/1998, para. 9.

raised serious accountability issues and possibly violated fundamental human rights norms and conventions. It suggested that "[t]he Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch list".[420]

420 *A more secure world: Our shared responsibility*, Report of the High Level Panel of the Secretary General on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 152.

# Principle 10 – *Non-refoulement*

*States may not expel, return, transfer or extradite a person suspected or convicted of acts of terrorism to a State where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial, or be subject to the death penalty.*

# Commentary

## 1. Unlawful State practices

The current "war on terror" has put the principle of *non-refoulement* under threat. States try to disregard it in various ways, by circumventing existing legal procedures, not evaluating the risks of returning people to other countries, asking for unreliable diplomatic assurances that people will not be ill-treated, or forcing people to leave 'voluntarily'. Arguments frequently put forward by States for failing to respect the principle include that they are seeking to get rid of certain individuals who are considered dangerous, but against whom there is insufficient admissible evidence to prosecute them for a criminal offence, or who cannot be expelled legally, or to avoid formal legal procedures that would give those concerned the opportunity to legally challenge the decision. One method of avoiding extradition procedures currently in use is for people to be handed over directly from one law enforcement agency to another, with no involvement of the judicial authorities and no opportunity for those concerned to contact their family or a lawyer. Other States use extradition procedures that do not comply with the provisions of criminal law and international human rights law. Some of them argue that since extradition treaties do not deem terrorism to be a political offence, the principle of *non-refoulement* does not apply.

## 2. International legal framework

### i) The principle of *non-refoulement* and counter-terrorism

The principle of *non-refoulement*, prohibiting States to return, deport, extradite, expel, transfer or otherwise send anyone to a country where he or she faces a real risk of serious human rights violations, is one of the most fundamental principles of general international law. It has its origins in refugee law[421] and international regulations on extradition[422] but is now an integral part of human rights law where

421 The 1951 *Convention relating to the Status of Refugees* (Article 33), the OAS *Convention on Territorial Asylum* (Article IV and the Organization of African Unity's *Convention Governing the Specific Aspects of Refugee problems in Africa* (Article II (3)).

422 See, among others, the *International Convention against Taking Hostages* (Article 9), *European Convention*

it applies to all individuals. It is firmly established in several universal and regional legal instruments[423] as well as in the international customary law that is binding on all States.

The principle of *non-refoulement* is a *jus cogens* norm and is absolute in nature (see Principle 5, *Berlin Declaration*). It cannot be subject to derogation or restriction under any circumstances.[424] It protects individuals against serious violations of human rights. These are to be understood as meaning any violation of human rights that are deemed absolute and non-derogable and constitute peremptory norms of international law (*jus cogens*), such as torture, ill-treatment, extrajudicial execution and enforced disappearance. However, the Human Rights Committee has taken the view that the principle of *non-refoulement* can apply to practically any right when there are substantial grounds for believing that there is a real risk of irreparable harm.[425] The principle of *non-refoulement* applies in cases where the decision to remove an individual clearly amounts to discrimination on grounds of race, colour, sex, language, religion, social origin, nationality or political opinion.[426]

The principle of *non-refoulement* applies whenever there is a risk of serious violation of human rights. It is this risk which is the focus of attention, and the nature of the removal or the activities of the person concerned are not important. The principle

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*on Extradition* (Article 3), *European Convention on the Suppression of Terrorism* (Article 5), the *Inter-American Convention on Extradition* (Article 4) and the UN *Model Treaty on Extradition* (Article 3).

423 See, among others, the *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* (Article 3.1), the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 16), the *Declaration on Territorial Asylum* (Article 3.1), the *Declaration on the Protection of All Persons from Enforced Disappearances* (Article 8), the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 5), the *American Convention on Human Rights* (Article 22.8), the *Inter-American Convention to Prevent and Punish Torture* (Article 13.4), the *Arab Charter of Human Rights* (Article 28) and the *European Convention of Human Rights* (Article 3). Although the *International Covenant on Civil and Political Rights* does not explicitly provide for it, the Human Rights Committee has pointed out that the principle of *non-refoulement* is inherent in States' obligation under the Covenant to guarantee the right not to be subjected to torture or ill-treatment (General Comment 20, para. 9).

424 See, among others, the *Report of the Special Rapporteur on torture, Mr. Theo van Boven,* UN document. E/CN.4/2002/137 of 26 February 2002, para. 14 ("It must be emphasized that the protection offered by the principle of non-refoulement is of an imperative nature."), and the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, OAS document OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 1 October 1985.

425 Human Rights Committee, Views of 30 July 1993, *Kindler v. Canada*, Communication N° 470/1991, para. 13.2, and Human Rights Committee, General Comment N° 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* para. 12. See also the *Concluding Observations of the Human Rights Committee on Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15; *Thailand*, CCPR/CO/84/THA, 8 July 2005, para. 17; *Uzbekistan*, CCPR/CO/83/UZB, 6 April 2005, para. 12; *United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; *Ukraine*, CCPR/C/UKR/CO/6, 28 November 2006, para. 9; *Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 13; and *Egypt*, CCPR/CO/76/EGY, 28 November 2002, para. 16.

426 See the Human Rights Committee, General Comment N° 29, *Derogations from provisions of the Covenant during a state of emergency,* 24 July 2001, para. 8; the *American Convention on Human Rights* (Article 22 (8); the *International Convention against Taking Hostages* (Article 9); the *European Convention on Extradition* (Article 3); the *European Convention on the Suppression of Terrorism* (Article 5); the *Inter-American Convention on Extradition* (Article 4); and the UN *Model Treaty on Extradition* (Article 3).

covers any involuntary removal of an individual from one country to another, whatever form it takes or name it is given (deportation, expulsion, return, extradition, transfer, etc) and regardless of whether the proceedings followed were legal (i.e., *de facto* or *de jure*). The traditional distinction made in public international law between extradition, expulsion, return, etc, is not really relevant here.[427] All individuals without distinction are entitled to benefit from the principle of *non-refoulement*. Even if a person has been involved in terrorism or committed other types of serious criminal offences (and has been convicted for them), the protection offered by the principle cannot be denied to him or her.[428] Indeed, as the Committee against Torture has also pointed out, the principle of *non-refoulement* applies "irrespective of whether the individual concerned has committed crimes and the seriousness of those crimes".[429] The Human Rights Committee has recalled that "[n]o person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment".[430] Unlike under the Convention relating to the Status of Refugees (1951), Report of the Special Rapporteur on Torture, UN Doc. A/59/324, 1 September 2004, para. 27. This is the case because of the absolute nature of the human rights at stake and the gravity of the violations that may occur.

### ii) Prohibition on torture and ill-treatment and *non-refoulement*

The principle of *non-refoulement* applies if there is a risk of torture or cruel, inhuman or degrading treatment or punishment.[431] It is explicitly recognized in Article 3(1) of the Convention against Torture which states that "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

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427 See, among others, the Committee against Torture, *Josu Arkauz Arana v. France,* Communication N° 063/1997, UN document CAT/C/23/D/63/1997, 5 June 2000, and *Conclusions and Recommendations of the Committee Against Torture on United Kingdom*, UN document CAT/C/CR/33/3, 25 November 2004, para. 5(e). See also the *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN document A/59/324, 1 September 2004, para. 34.

428 See, among others, the European Court of Human Rights, Judgment of 17 December 1996, *Ahmed v. Austria*, p.278, and the Committee against Torture, Views of 28 April 1997, *Paez v. Sweden*, Communication N° 039/1996, para. 14.5.

429 Committee against Torture, Views of 5 May 1999, *M. B. B. v. Sweden,* Communication N° 104/1998, 5 May 1999, para. 6.4. See also the Decision of the Committee against Torture of 20 May 2005, Communication N° 233/2003, Case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para. 13.

430 *Concluding Observations of the Human Rights Committee on Canada*, CCPR/C/CAN/CO/5*, 20 April 2006, para. 15*. See also the Concluding Observations of the Human Rights Committee on: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; Ukraine, CCPR/C/UKR/CO/6, 28 November 2006, para. 9; Morocco, CCPR/CO/82/MAR, 1 December 2004, para. 13; and Egypt, CCPR/CO/76/EGY, 28 November 2002, para. 16.

431 See, among others, the *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* (Article 3.1), the *Inter-American Convention to Prevent and Punish Torture* (Article 13.4), the *African Charter of Human and Peoples' Rights* (Article 13.4), the *Arab Charter on Human Rights* (Article 4(c)) *and the European Convention on Human Rights* (Article3).

Although the ICCPR contains no explicit provision on the subject, the Human Rights Committee considered the principle of *non-refoulement* to be inherent in its Article 7.[432] This has also been endorsed by various universal and regional human rights bodies.[433] The obligation not to return ("*refouler*") forms an integral part of the general prohibition on torture and other forms of inhuman treatment which not only makes it incumbent on States not to carry out torture themselves but also requires them to "prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture".[434]

The Human Rights Committee has recalled that the principle of *non-refoulement* means that the State should adopt "all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of *inter alia*, their transfer, rendition, extradition, expulsion or *refoulement* if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment".[435] The difference between the various forms of prohibited treatment (torture and cruel, inhuman or degrading treatment) is not relevant here: given that the prohibition on all of them is absolute and non-derogable, the principle of *non-refoulement* applies to them all without distinction.[436]

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432 See the Human Rights Committee, General Comment N° 20, *Replacing General Comment 7 concerning prohibition of torture and cruel treatment or punishment*, para. 9.

433 See the Human Rights Committee, Views of 5 November 1993, *Chitat Ng v. Canada,* Communication 469/1991; Decision of the Human Rights Committee, 25 October 2006, Communication N° 1416/2005, Case of *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006; *Concluding Observations of the Human Rights Committee: Canada,* CCPR/C/79/Add. 105, 7 April 1999, para. 13; Human Rights Committee, Views of 31 October 1994, *Keith Cox v. Canada,* Communication 539/1993; Human Rights Committee, Views of 4 November 1997, *G.T. v. Australia*. Communication 706/1996; Decision of the Committee against Torture, 20 May 2005, Communication N° 233/2003, Case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005; European Court of Human Rights: Judgment (Merits and just satisfaction) of 7 July 1989, *Case of Soering v. The United Kingdom*; Judgment (Merits) of 20 March 1991, *Case of Cruz Varas and others v. Sweden*, A201, para. 69; Judgment (Merits) of 30 October 1991, *Case of Vilvarajah and others v. The United Kingdom*, A205; and Judgments in the cases of *Khan v. Canada, Alan v. Switzerland, Aemei v. Switzerland, Mutombo v. Switzerland, Tala v. Sweden, Falakaflaki v. Sweden, A v. Netherlands, Ayas v. Sweden, Haydin v. Sweden, and H.D. v. Switzerland*; and the African Commission on Human and Peoples' Rights, Communication N° 97/93, *Modisse v. Botswana*

434 Report of the Special Rapporteur on Torture, UN Doc. A/59/324, 1 September 2004, para. 27. As explained by the International Criminal Tribunal for the Former Yugoslavia in the Furundzija case, "It is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture" (International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundzija,* N° IT-95-17/1-T, Judgment of 10 December 1998, para. 148).

435 *Concluding Observations of the Human Rights Committee on The United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16.

436 See the Human Rights Committee, General Comment N° 20, *op. cit*. 432, in which the Human Rights Committee explicitly acknowledges the application of the principle in the case of *"torture or cruel, inhuman or degrading treatment or punishment"* (para. 9).

The Committee against Torture has also pointed out that the risk of torture may come from non-State actors who are, *de facto,* exercising functions that normally belong to the authorities. For example, in a case concerning the proposed deportation of a Somali national from Australia to Somalia, the Committee noted that:

> *"for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that,* de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in Article 1".*[437]

The Committee concluded that expulsion to Somalia would constitute a violation by Australia of Article 3 of the Convention.

### iii) Enforced disappearances and extra-judicial executions

The principle of *non-refoulement* also applies when there is a risk of enforced disappearance[438] since this practice in itself constitutes "a grave and flagrant violation of human rights and fundamental freedoms"[439] and "an offence to human dignity".[440]

Extrajudicial executions constitute a serious violation of the absolute and non-derogable right to life to which the principle of *non-refoulement* applies. This has been clearly confirmed in the UN *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*[441]*,* Article 5 *of* which states that "no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country".

### iv) Violations of fair trial rights and *non-refoulement*

According to international jurisprudence, the right to be tried by an independent and impartial tribunal established by law is absolute[442] (see Principle 2, *Berlin*

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437 Decision of 14 May 1999, Case of *Sadiq Shek Elmic v. Australia*, Communication N° 120/1998, CAT/C/22/D/120/1998, 25 May 1999, para. 6.5.

438 The UN *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 8) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 16).

439 The UN *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 1).

440 *Ibid*.

441 ECOSOC Resolution 1989/65, 24 May 1989.

442 Human Rights Committee, Views of 28 October 1992, Communication N° 263/1987, *M. Gonzalez del Río v. Peru,* CCPR/C/46/D/263/1987, para. 5.2.

*Declaration*) Indeed, this right embodies the principle of the 'natural judge' that is enshrined in several international instruments, meaning that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".[443] The corollary of the principle of the 'natural judge' is that the setting up of *ad-hoc*, special or *ex post facto* courts is forbidden. This right cannot be restricted under any circumstances and is also covered by the principle of *non-refoulement*. Indeed the *UN Model Treaty on Extradition*[444] states that "[e]xtradition may be refused in any of the following circumstances: [...] If the person whose extradition has been requested has been sentenced or would be liable to be tried in the requesting State by an extraordinary or *ad hoc* court or tribunal".[445]

The fundamental components of fair trial are non-derogable[446] and consequently are also covered by the principle of *non-refoulement*. Indeed, the *UN Model Treaty on Extradition* includes among the mandatory grounds for refusing extradition situations in which "the person whose extradition is requested [...] has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the ICCPR, Article 14 [or], if the judgment of the requesting State has been rendered *in absentia*, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defense and he has not had or will not have the opportunity to have the case retried in his or her presence".[447] The Council of Europe *Guidelines on Human Rights and the Fight against Terrorism* state that "when the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition" (Article XIII, para. 4).

### v) The death penalty and *non-refoulement*

Firmly established in the treaty systems at both universal[448] and regional[449] level, prohibition of the death penalty is gradually becoming a part of general international law. Significant limitations and restrictions are already imposed on it, including

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443 Principle N° 5 of the UN *Basic Principles on the Independence of the Judiciary*.

444 Resolution 45/116 of 14 December 1990.

445 Article 4 of the UN Model Treaty on Extradition.

446 Human Rights Committee, General Comment N° 29, *Article 4: Derogations during a state of emergency*, para. 11.

447 Article 3 (f) and (g) of the UN *Model Treaty on Extradition*.

448 Second Optional Protocol to the ICCPR and the *Convention on the Right of the Child* (Article 37).

449 Within the Council of Europe context, see Protocols 6 and 13 to the *European Convention on Human Rights*, and recent jurisprudence from the European Court of Human Rights (*Öcalan v. Turkey,* Application N° 46221/99, 12 March 2003, Part III). Within the EU context, see Article 2 of the *Charter of Fundamental Rights of the European Union*. As far as the Inter-American system is concerned, see the *American Convention on Human Rights* (Article 4.1) and the *Protocol to the American Convention Abolishing the Death Penalty*. Already back in 1969 when the *American Convention on Human Rights* was adopted, fourteen out of the nineteen delegations present declared their *"firm hope of seeing the application of the death penalty eradicated"* (OAS document OEA/Ser.K/XVI/1.2, p. 467 – *The desirable state of affairs in the hemisphere*).

with regard to the principle of *non-refoulement*. States that have already abolished the death penalty have an obligation both not to implement it and not "to expose a person to the real risk of its application".[450] This latter duty[451] means, as the Human Rights Committee has stated, not "remov[ing], either by deportation or extradition, individuals from their jurisdiction, if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out".[452] States that have not yet abolished the death penalty cannot remove a person to another country without verifying that all the restrictions and limitations international law imposes on it are being respected. Such restrictions concern the method of execution (which must not amount to inhuman and degrading treatment), the type of offences involved (only the most serious ones), the age and status of the perpetrator (minors, individuals under 18 years of age at the time the offence was committed, pregnant women, new mothers, and individuals who have become insane are all excluded), and the effective presence of fair trial guarantees.[453]

### vi) Assessing the risk of *refoulement*

International law lays down detailed rules for testing whether there is a real risk that serious human rights violations will occur. Firstly, the State has to evaluate both the specific situation of the individual concerned and the general situation in the target country.[454] Although the former should be seen as decisive, the fact that a consistent pattern of gross, flagrant, massive or systematic violations of human rights exists in the other State should be taken as a strong argument in favour of the individual. At the same time, the fact that there is no such consistent pattern does not mean that the individual may not be at risk.[455] Secondly, the possibility that a threat may come not from the State itself but from non-State actors should be taken into account, if it can be shown that this threat is real and the official authorities of the State in question are unable to provide appropriate protection.[456] Thirdly, the State has to assess the risk that exists both in the country to which it intends to directly send the

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450 Human Rights Committee, *Roger Judge v. Canada,* Communication N° 829/1998, 5 August 2003, para. 10.4.

451 This obligation is a natural step in moving towards complete prohibition of the death penalty in international law. As this is a dynamic process, new duties are gradually being imposed on States in this context. This is also reflected in the jurisprudence of international human rights bodies which have to respond to that process and possibly adapt their jurisprudence to it. (Compare the Human Rights Committee judgments in the cases of *Kindler v. Canada, op. cit.* 425, and *Roger Judge v. Canada, op. cit.*).

452 Human Rights Committee, *Roger Judge v. Canada*, *op. cit.* 450, para. 10.4.

453 *Safeguards guaranteeing protection of the rights of those facing the death penalty*.

454 See Article 3 (2) of the *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* and Article 8 (2) of the *Declaration on the Protection of All Persons from Enforced Disappearances*.

455 See the Committee against Torture decisions in the following cases: *Mutombo v. Switzerland,* Communication N° 13/1993, 27 April 1994, para. 9.3; *Khan v. Canada,* Communication N° 15/1994, 15 November 1994; *Tala v. Sweden,* Communication N° 43/1996, 13 November 1996, para. 10.1; and *Ahmed Hussein Mustafa Kamil Agiza v. Sweden,* Communication N° 233/2003, CAT/C/34/D/233/2003, 24 May 2005, para. 13.3.

456 European Court of Human Rights, *HLR v. France,* 24573/94, 27 April 1997 (the threat came from drug traffickers).

individual and in "any other state, to which [the person concerned] may be expelled later".[457] Fourthly, the decisive factor in the State's evaluation is the point in time when the decision on *refoulement* is being made.[458]

Fifthly, it must be possible for the person concerned to legally challenge the decision relating to his/her case.[459] Given the specific nature of the principle of *non-refoulement*, this legal procedure must be seen as the main judicial remedy and the only effective one, and should satisfy certain requirements, namely: a) the judicial body which rules on any appeal has to be different from the one that made the original decision; b) the judicial body making the decision has to be impartial and independent and all the requirements for fair trial have to be met; and c) the decision on removal should not be enforced until the legal challenge has been considered and it has been completed.[460]

### vii) The use of "diplomatic assurances"

The Human Rights Committee has expressed serious reservations and criticism of the use of so-called "diplomatic assurances" and has reminded States that they should comply with their obligation to respect one of the fundamental principles of international law, namely, the principle of non-refoule*ment*.[461] The Committee stated that "the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties".[462] The Committee also observed that "where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture".[463] The

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457 Committee against Torture, General Comment N° 1: "The Committee is of the view that the phrase "another State" in Article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited". *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (Article 3 in the context of Article 22)*, UN document A/53/44, annex IX at 52 (1998), para. 2.

458 See, for instance, European Court of human Rights*, Ahmed v. Austria,* 17 December 1996, para. 43.

459 See, among others, the Human Rights Committee, *General Comment 15 – The position of aliens under the Covenant*, 11 April 1986; Human Rights Committee, *Concluding Observations of the Human Rights Committee on People's Democratic Republic of Korea,* CCPR/CO/72/PRK, 27 August 2001, para. 21; Committee against Torture, Decision of 9 November 1999 in *Josu Arkauz Arana v. France*, Communication N° 63/1997, CAT/C/23/D/63/1997, 5 June 2000, para. 11.5.

460 See the Human Rights Committee, *Mohamed Alzery v. Sweden,* Communication N° 1416/2005, 10 November 2006, para. 11.8.

461 *Concluding Observations of the Human Rights Committee on Sweden*, CCPR/CO/74/SWE, 24 April 2002, para. 12; *Thailand*, CCPR/CO/84/THA, 8 July 2005, para. 17; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15; *Uzbekistan*, CCPR/CO/83/UZB, 6 April 2005, para. 12; *United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; *Ukraine*, CCPR/C/UKR/CO/6, 28 November 2006, para. 9; and *Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 13.

462 Decision of the Human Rights Committee, Case of *Mansour Ahani v. Canada*, Communication N° 1051/2002, 29 March 2004, para. 10.7

463 *Ibid.,* para. 10.6.

Committee has concluded that States should "exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals. [...] [States] should further recognize that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be".[464] The Committee found that returning someone to a country in which he or she risks being subjected to torture or other prohibited treatment, based solely on the securing of diplomatic assurances, and all the more so if such assurances do not comprise a mechanism for monitoring compliance, entailed the international responsibility of the State carrying out the expulsion.[465] The Committee said that "[w]hen a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion".[466]

The Committee against Torture has also found that when a State expels someone to a country in which it knows, or should have known, that there is consistent and widespread use of torture against detainees and where the person runs the real risk of being tortured, it incurs international responsibility because it has violated Article 3 of the *Convention against Torture*.[467] The Committee stressed that "[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk".[468]

For its part, the European Court of Human Rights has found that the handing over of someone by a State with 'diplomatic guarantees' when that person runs a serious risk of being tortured constitutes a violation of that State's obligation not to return, expel or extradite people to countries where there is a serious risk that they will be subjected to torture or ill-treatment.[469]

In his report to the General Assembly, the UN Secretary General said that "[o]n the issue of diplomatic assurances, two major problems arise – that of sufficiency of the assurances and that of the implication that torture is commonplace in the country

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464 *Concluding Observations of the Human Rights Committee on United States of America,* CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16.

465 Decision of the Human Rights Committee of 25 October 2006, Communication N° 1416/2005, Case of *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006.

466 *Concluding Observations of the Human Rights Committee on Sweden*, CCPR/CO/74/SWE, 24 April 2002, para. 12.

467 Decision of the Committee against Torture of 20 May 2005, Communication N° 233/2003, Case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para. 13.4.

468 *Ibid*.

469 Judgment of 15 November 1996, *Karamjit Singh Chahal v. United Kingdom*, application N° 70/1995/576/662.

concerned but will not be applied in a particular case in question. The view was thus that diplomatic assurances are not sufficient and should not be given weight when a refugee is returned".[470] For her part, the UN High Commissioner for Human Rights concluded that diplomatic assurances do not provide adequate safeguards for protecting people from torture and ill-treatment and recalled that during all expulsion or deportation procedures States should respect the principle of *non-refoulement* which, she reminded them, ranks as *jus cogens* and must be respected at all times and in all circumstances.[471]

The UN Special Rapporteur on Torture, after examining the use of diplomatic assurances in the context of *refoulement*, concluded that "diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated".[472] He therefore said that "States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return".[473] He said that, in all cases in which someone is returned or handed over to another country, the principle of *non-refoulement* should be fully respected.

The UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism also concluded that "[g]iven the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that *non-refoulement* obligation".[474]

The Commissioner for Human Rights of the Council of Europe has also pointed out that "[t]he weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains".[475] The Parliamentary Assembly of the Council

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470 *Protecting human rights and fundamental freedoms while countering terrorism – Report of the Secretary General*, A/60/374, 22 September 2005, para. 21.

471 E/CN.4/2006/94, 16 February 2006, paras. 10 and following and 34.

472 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/60/316, 30 August 2005, para. 51.

473 *Ibid*., para. 51.

474 *Report of Robert K. Goldman, Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism*, E/CN.4/2005/103, 7 February 2005, para. 61.

475 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Sweden, 21- 23 April 2004,* Strasbourg, 8 July 2004, Council of Europe document CommDH(2004)13, para. 19.

of Europe has called upon the member States of the Council of Europe to "ensure that unlawful inter-state transfers of detainees will not be permitted and take effective measures to prevent renditions and rendition flights through member States' territory and airspace".[476] The Parliamentary Assembly has called on the United States of America, which is an observer State to the Council of Europe to "prohibit the 'extra-legal' transfer of persons suspected of involvement in terrorist organizations and all forcible transfers of persons from any country to countries that practise torture or that fail to guarantee the right to a fair trial, regardless of any assurances received".[477] It is relevant to underline that the attempt to legalize the system of "extraordinary renditions" was rejected by the Steering Committee for Human Rights of the Council of Europe. Indeed, in 2006, the Steering Committee considered that work should not be undertaken to expand the use of diplomatic assurances and "rejected the drafting of a legal instrument on minimum requirements/standards for the use of diplomatic assurances in the context of expulsion procedures, in cases where there is a risk of torture or inhuman or degrading treatment or punishment".[478]

The European Committee for the Prevention of Torture (CPT) has pointed out that "[t]his practice [rendition with diplomatic assurances] is far from new, but has come under the spotlight in recent years as States have increasingly sought to remove from their territory persons deemed to endanger national security. Fears are growing that the use of diplomatic assurances is in fact circumventing the prohibition of torture and ill-treatment".[479] The CPT raised two fundamental questions:

> *"[…] if in fact there would appear to be a risk of ill-treatment, can diplomatic assurances received from the authorities of a country where torture and ill-treatment is widely practised ever offer sufficient protection against that risk? It has been advanced with some cogency that even assuming those authorities do exercise effective control over the agencies that might take the person concerned into their custody (which may not always be the case), there can be no guarantee that assurances given will be respected in practice. If these*

476 Resolution 1507 (2006), *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member States*, adopted on 27 June 2006, para. 19.1. See also Resolution 1562 (2007), *Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report*, adopted on 27 June 2007, para. 18.1.

477 Resolution 1507 (2006), *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member States*, adopted on 27 June 2006, para. 20.4.

478 Steering Committee for Human Rights, CM Documents, CM(2006)64 13 April 2006, para. 13.

479 European Committee for the Prevention of Torture (CPT), 15th *General Report on the CPT's activities covering the period 1 August 2004 to 31 July 2005,* CPT/Inf (2005) 17, Strasbourg, 22 September 2005, para. 38.

> *countries fail to respect their obligations under international human rights treaties ratified by them, so the argument runs, why should one be confident that they will respect assurances given on a bilateral basis in a particular case?"*[480]

The CPT "has yet to see convincing proposals for an effective and workable mechanism" for the post-return monitoring of the treatment of a deported person. The CPT has pointed out that:

> *"to have any chance of being effective, such a mechanism would certainly need to incorporate some key guarantees, including the right of independent and suitably qualified persons to visit the individual concerned at any time, without prior notice, and to interview him/her in private in a place of their choosing. The mechanism would also have to offer means of ensuring that immediate remedial action is taken, in the event of it coming to light that assurances given were not being respected. [...] prior to return, any deportation procedure involving diplomatic assurances must be open to challenge before an independent authority, and any such challenge must have a suspensive effect on the carrying out of the deportation. This is the only way of ensuring rigorous and timely scrutiny of the safety of the arrangements envisaged in a given case."*[481]

Although treaties and agreements on extradition and/or terrorism[482] stipulate that terrorist acts are not deemed political for the purposes of extradition, meaning that those who commit them can be extradited, they also contain provisions on *non-refoulement*. However, it cannot be argued that the principle of *non-refoulement* could lead to impunity because, while conventions on terrorism do not establish an absolute obligation to extradite, they do incorporate the principle of *aut dedere aut judicare* (extradite or prosecute). Therefore, the alleged perpetrator of a terrorist act who is in the territory of a third State, but whose extradition could put him at serious risk of torture or other serious human rights violations, can be prosecuted by the courts of that State.

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480 *Ibid.*, para. 39.

481 *Ibid.*, paras. 40 and 41.

482 The *International Convention against the Taking of Hostages* (Article 9), the *European Convention on Extradition* (Article 3), the *European Convention on the Suppression of Terrorism* (Article 5) and the *Inter-American Convention on Extradition* (Article 4.5) all contain a general clause on *non-refoulement*. See also the UN *Model Treaty on Extradition* adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Article 3) and the European arrest warrant (*"Council Framework Decision on the European arrest warrant and the surrender procedures between Member States"*), para. 12 of the preamble.

# Principle 11 – Complementarity of humanitarian law

*During times of armed conflict and situations of occupation States must apply and respect the rules and principles of both international humanitarian law and human rights law. These legal regimes are complementary and mutually reinforcing.*

# Commentary

## 1. Unlawful State practices

After "9/11", a new discourse emerged which saw the global "war on terror" or "war against terrorism" as a new kind of war against transnational terrorist networks that essentially requires a military response, but in a way that seeks to escape the application of both international humanitarian law and international human rights law applicable during armed conflict.

States sometimes argue that international humanitarian law and international human rights law are obstacles in the "war against terrorism". They invoke the justness of the resorting to armed force as a reason for rejecting the full range of international humanitarian law norms in situations where that body of rules undoubtedly applies. Some States have proposed drafting new international legislation, in disregard of existing applicable law. Other States have selectively chosen from existing international humanitarian law the aspects they wish to apply to their adversaries, rather than risk becoming ensnarled in what would surely be a contentious and protracted process of drafting new legal rules. They apply international humanitarian law in a discriminatory or selective way, denying the full application of fundamental rules, such as the principle of immunity of civilians, or distorting or misapplying legal concepts, such as the notion of an "unprivileged" combatant.

Some States mistakenly assimilate acts of terror to acts of war and automatically equate any kind of terrorist action with armed conflict. After the declaration of a global "war on terror" in the wake of "9/11", several States that were at that time engaged in internal armed conflicts, in effect announced that the ongoing hostilities had ceased being armed conflicts regulated by international humanitarian law and had instead become part of that same "global war".

## 2. International legal framework

As has been pointed out by the International Committee of the Red Cross (ICRC),[483] the years since "9/11" have seen an erosion of existing international standards for

483 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report prepared by the International Committee of the Red Cross*, ICRC

protecting the individual, including the protection guaranteed under international humanitarian law.

Terrorism is not a new phenomenon.[484] Terrorist acts have been carried out both at the domestic and international levels for centuries, resulting in a series of international conventions criminalizing specific acts of terrorism and/or obliging States to cooperate in their prevention and punishment.[485] However, terrorism is not the same as armed conflict.

As has been pointed out by the Inter-American Commission on Human Rights, "the determination as to the existence and nature of an armed conflict is an objective one, based upon the nature and degree of hostilities, irrespective of the purpose or motivation underlying the conflict or the qualification by Parties to the conflict".[486] Indeed, international humanitarian law sets out objective criteria to determine when an international armed conflict exists. The decision as to whether violence constitutes an internal armed conflict does not depend on whether or not a State is

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doc. 03/IC/09, Geneva, September 2003, p.6.

484 See *inter alia*, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op.cit*. 32, para. 10, and International Commission of Jurists, *Terrorism and Human Rights,* Occasional papers N° 2, Geneva, 2002.

485 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963); Convention on the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (Vienna, 1980); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1991); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005); Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005); and International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in April 2005. Regional treaties: Arab Convention on the Suppression of Terrorism (Cairo, 1998); Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); European Convention on the Suppression of Terrorism (1977); European Convention on Cyber-crime (2001); Additional Protocol to the Convention on cyber-crime (2002); Convention of the Organization of American States to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance (1971); Inter-American Convention Against Terrorism (2002); the Organization of African Unity's *Convention on the Prevention and Combating of Terrorism* (1999); SAARC Regional Convention on Suppression of Terrorism (Kathmandu, 1987); Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (Minsk, 1999); and Shanghai Convention on Combating Terrorism, Separatism and Extremism (Shanghai Cooperation Organisation, 2001).

486 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit*. 32, para. 59. One narrow exception to his rule is prescribed in Article 1(4) of the Additional Protocol I to the Geneva Conventions, which incorporates within the classes of conflicts governed by the Protocol "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".

democratic or whether or not an armed opposition group has legitimacy. Objective criteria are used to determine the existence of an internal armed conflict.[487]

It is both legally and conceptually a mistake to conflate acts of terrorism with acts of war. An act of terrorism may or may not occur during an armed conflict, depending on the facts and their legal characterization. As has been pointed out by the UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman:

> *"[…] it is both legally and conceptually important that acts of terrorism not be invariably conflated with acts of war. For example, attacks against civilians, the taking of hostages and the seizure and destruction of civilian aircraft are accepted by the international community to be forms of terrorism. But these acts can take place during peacetime, emergency situations or situations of armed conflict. If committed during an armed conflict, such acts may constitute war crimes. However, when such acts take place during peacetime or an emergency not involving hostilities, as is frequently the case, they simply do not constitute war crimes, and their perpetrators should not be labelled, tried or targeted as combatants. Such situations are governed not by international humanitarian law, but by international human rights law, domestic law and, perhaps, international criminal law".* [488]

Similarly, the ICRC has underlined that "[t]he fact that persons or groups can now aim their violence across international borders or create transnational networks does not, in itself, justify qualifying this essentially criminal phenomenon as armed conflict". [489]

### i) International human rights law and international humanitarian law both apply during the "war against terrorism"

The declaration of the so-called "war against terrorism" does not allow States to ignore international human rights law and international humanitarian law.[490] International human rights law and international humanitarian law continue to apply (see Principle 1, *Berlin Declaration*).

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487 See Common Article 3 of the Geneva Conventions; ICRC Commentary on Article 3 of the IV Geneva Convention (http://www.cicr.org/ihl.nsf/COM/380-600006?OpenDocument); Article 1 of the *Protocol Additional to the Geneva Conventions, and Relating to the Victims of Non-International Armed Conflicts* (Protocol II); and ICRC Commentary on Article 1 of the Additional Protocol II of the Geneva Conventions (http://www.cicr.org/ihl.nsf/COM/475-760004?OpenDocument).

488 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, UN document E/CN.4/2005/103, 7 February 2005, para. 17.

489 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report prepared by the International Committee of the Red Cross*, ICRC document 03/IC/09, Geneva, September 2003, page 17.

490 *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, and *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, 7 February 2005, paras. 16 *et seq.*

If there is no threat to the life of the nation justifying a state of emergency – and terrorist acts do not *per se* constitute a threat to the life of the nation – all rights guaranteed by international human rights law apply in full[491] (see Principle 1, *Berlin Declaration*). When the nature, volume, intensity and persistence of terrorist acts constitute a threat to the life of the nation and a state of emergency has been legally declared, international human rights law continues to apply, although certain rights and freedoms may be suspended or limited under strict material and procedural conditions established under international law (see Principle 4, *Berlin Declaration*).

When terrorist acts give rise to, or occur in the context of, the use of armed force between States or armed violence between governmental authorities and organized armed groups or between such groups within a State, international human rights law and international humanitarian law still apply. Which provisions of international humanitarian law apply depends on whether the conflict is international or internal. Indeed, as the UN Independent Expert, Robert Goldman, has underlined:

> *"Human rights law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with international humanitarian law. [...] [W]hen an armed conflict constitutes a genuine emergency, a State may restrict and even derogate from certain human rights. But it can never suspend rights that are non-derogable under human rights law even when the emergency is due to armed conflict. Despite their different origins, international human rights law and international humanitarian law share a common purpose of upholding human life and dignity".*[492]

### ii) International human rights law and international humanitarian law complement each other

Human rights are inherent to all human beings and stem from human dignity. Human rights law therefore applies to all persons at all times. International human rights law provides extensive guarantees in relation to the fundamental rights of all human beings. In addition, international humanitarian law, as set forth in the four *Geneva Conventions* of 1949 and their protocols, governs the treatment of combatants and civilians in time of international and internal armed conflict.

International humanitarian law is special law (*lex specialis*) that relates to armed conflict and applies solely in time of armed conflict. In both international or non-international armed conflict, individuals enjoy dual legal protection from both international human rights law and international humanitarian law. Indeed, the

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491 Without prejudice to certain types of restrictions or limitations on the exercise of some rights and freedoms as permitted under international law, such as legitimate restrictions on the right to freedom of expression permitted under Article 19 of the ICCPR.

492 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, *op. cit.* 490, para. 23.

International Court of Justice has stated that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[493]

The President of the ICRC has explained the complementary relationship of the two bodies of law by referring to their underlying rationale: "International humanitarian and human rights law are distinct bodies of law but complementary. Their complementarity is evidenced, among other things, by their common underlying purpose, which is to protect the life, health and dignity of the individual. [...] [T]he guiding principle is that, because they are human, individuals have the right to be protected from arbitrary action and abuse".[494] As the International Criminal Tribunal for the Former Yugoslavia has stated, "[t]he general principle of respect for human dignity is [...] the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".[495]

Although both strands of law have historically developed along different paths, they share common values and have increasingly become intermeshed, especially since Resolution XXIII on *Human Rights in Armed Conflict* adopted by the International Conference on Human Rights in Teheran in 1968. Recent treaties, such as the *Convention on the Rights of the Child*, its *Optional Protocol on the Participation of Children in Armed Conflict* and the *Rome Statute of the International Criminal Court*, include provisions from both bodies of law. International human rights instruments prohibit certain kinds of human rights violations and protect certain rights even in time of war (see Principles 4 and 5, *Berlin Declaration*). The *Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts* (Protocol I) implicitly accepts the applicability of human rights in armed conflict since its Article 72 refers to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict". And in Article 75, human rights standards are incorporated as minimum standards for armed conflict.[496]

In addition, numerous regional and universal human rights bodies, such as the UN Human Rights Committee[497], the UN Committee on Economic, Social and Cultural

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493 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories,* Advisory Opinion of 9 July 2004, para. 106. See also: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1986, para. 25

494 Statement by the President of the ICRC to the 60th Annual Session of the UN Commission on Human Rights, Geneva, 17 March 2004, available at http://www.icrc.org.

495 Trial Chamber, Judgment of 10 December 1998, *Prosecutor v. Anto Furundizija*, case N° IT/95-17/I-T, para. 183.

496 See *ICRC Commentary to the Additional Protocols (*Martinus Nijhoff Publishers, Geneva 1986), paras. 3033, 3064, 3092 and 3107.

497 Human Rights Committee, *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 26 May 2004, HRI/GEN/1/Rev.7, para. 8; and its *Concluding Observations*

Rights [498], the Special Procedures of the former UN Commission on Human Rights, the European Court of Human Rights [499], the Inter-American Commission on Human Rights [500] and the African Commission on Human and Peoples' Rights [501], have reaffirmed the *complementarity* and *mutual reinforcement* of human rights and humanitarian law. Resolutions passed by both the UN General Assembly and the Security Council in relation to humanitarian law and human rights law in situations of armed conflict have implicitly reaffirmed their complementary application.[502]

While all human rights continue to apply in time of armed conflict, their relationship with international humanitarian law is primarily informed by the notion of derogability. Whereas some human rights are derogable in times of emergency (and armed conflict), others, such as the right to life, the prohibition on torture and cruel, inhuman or degrading treatment or punishment and enforced disappearance and the right to *habeas corpus*, are non-derogable (see Principle 4, *Berlin Declaration*). The International Court of Justice considers that:

> *"As regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as* lex specialis*, international humanitarian law".* [503]

### iii) International humanitarian law as *lex specialis*

International humanitarian law constitutes a *lex specialis* when it relates to other areas of law, such as human rights law or criminal law. According to the *lex specialis derogat legi generali* rule, this means that whenever international humanitarian law provides a specific rule for the extraordinary situation of an armed conflict, it

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on: *Israel*, 21 August 2003, CCPR/CO/78/ISR, para. 11; *Israel*, 18 August 1998, CCPR/C/79/Add.93, para. 10; *Germany*, 4 May 2004, CCPR/CO/80/DEU, para. 11; and *Belgium*, 12 August 2004, CCPR/CO/81/BEL, para. 6.

498 *Concluding Observations on Israel,* 28 June 2003, E/C.12/1/Add.90, para. 15.

499 *Case of Loizidou v. Turkey (Preliminary Objections)*, Judgment of 23 March 1995, Series A N° 310, para. 60.

500 *Precautionary Measures in Guantánamo Bay, Cuba,* 13 March 2002, Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1, 7 March 2003, para. 80; and *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

501 *Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples Rights*, adopted on 10 December 1993.

502 See General Assembly Resolution 2675 (XXV) of 1970, on *"Basic principles for the protection of civilian populations in armed conflicts"* and recent Security Council resolutions, including Resolution 1577 (2004) on *"The situation in Burundi"*; Resolution 1574 (2004) on *"Reports of the Secretary-General on the Sudan"*; Resolution 1572 (2004) on *The situation in Côte d'Ivoire* and Resolution 1565 (2004) on *"The situation concerning the Democratic Republic of the Congo"*.

503 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, International Court of Justice Report 2004, p. 178, para. 106.

informs or prevails over other rules of law that are generally applicable but are not suited to an armed conflict. The classic example is the law governing use of force and the right to life: the right to life continues to apply in a time of armed conflict as a non-derogable human right but, as the International Court of Justice said, "[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[504]

The relationship between international humanitarian law and international human rights law has specific implications in the context of anti-terrorist measures adopted since 11 September 2001 and wars fought in the name of fighting terrorism. Beyond the protection of the right to life and the absolute prohibition on extrajudicial, summary and arbitrary executions, the prohibition on torture and cruel, inhuman or degrading treatment or punishment continues to apply during an armed conflict. It is a peremptory norm of international law for which no exception is allowed, either in time of peace or in time of armed conflict, under international human rights law or international humanitarian law[505] (see Principles 4 and 5, *Berlin Declaration*).

### iv) Combatant and enemy, illegal or unprivileged combatant

Under international humanitarian law, the term "combatant" only has legal meaning in the context of an armed conflict. The legal status of a combatant differs depending on whether the conflict is an international or non-international armed conflict.

Neither the *Geneva Conventions*, nor its 1977 Protocols, mention the terms "privileged" or "unprivileged" combatants. However, the concept of "privileged combatant" and its legal implications are deeply rooted in the customary law of

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504 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1986, International Court of Justice Reports 1986, p.240, para. 25. See also *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/2005/7, 22 December 2004, paras. 46-51.

505 See the *Universal Declaration of Human Rights* (Article 5); the ICCPR (Articles 4, 7 and 10); the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 3); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2); the *Convention on the Rights of the Child* (Article 37); the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 1); the *European Convention on Human Rights* (Article 3); the *American Convention on Human Rights* (Articles 5 and 27); the *Inter-American Convention for the Prevention and Punishment of Torture* (Article 1); the *African Charter on Human and Peoples' Rights* (Article 5); the *Arab Charter on Human Rights* (Articles 4(b), 8 and 9); Article 3 Common to the Geneva Conventions; Articles 12 and 50 of *Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field*; Articles 12 and 51 of *Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*; Articles 13, 14 and 130 of *Geneva Convention III Relative to the Treatment of Prisoners of War*; Articles 27, 32 and 147 of *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*; Article 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts* (Protocol I); Article 4 of *Protocol Additional to the Geneva Conventions, and Relating to the Victims of Non-International Armed Conflicts* (Protocol II). See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment of the Trial Chamber of 10 December 1998, paras. 134-146; and *Prosecutor v. Kunarac et al*, IT-96-22 and IT-96-23/1, Judgment of the Trial Chamber of 22 February 2001, paras. 465 and following.

armed conflict and were recognized and applied by various war crimes tribunals after World War II.[506] Historically, combatants involved in international armed conflicts have been classified as either "privileged" (lawful) or "unprivileged" (unlawful). A privileged combatant is "a person authorized by a party to an international armed conflict to directly engage in hostilities and, as such, must be accorded POW (prisoner of war) status upon capture and enjoys immunity from prosecution for his hostile acts that do not violate the laws and customs of war".[507] However, a POW does not enjoy immunity from prosecution for war crimes.[508] The "combatant's privilege" is in essence a license to kill or wound enemy combatants, destroy other enemy military assets and cause legitimate collateral damage.

Members of the regular armed forces of States involved in international hostilities, as well as associated militia who fulfil certain criteria, are generally considered to be privileged combatants who are entitled to POW status on capture.[509] These combatants are subject to direct attack until they are captured or rendered *hors de combat*.

In contrast, an unprivileged combatant, sometimes called an "illegal" or "unlawful" combatant refers to a person who, without official sanction and thus lacking the combatant's privilege, nevertheless directly participates in hostilities. "Such combatants include, *inter alia*, civilians, as well as non-combatant members of armed forces, who, in violation of their protected status, directly engage in hostilities. The term has also been used to describe irregular combatants, such as guerrillas, partisans and members of resistance movements, who either fail to distinguish themselves from the civilian population at all times while on active duty, or otherwise do not fulfil the requirements for privileged combatant status".[510]

Importantly, unlike privileged combatants, unprivileged combatants upon capture can be tried and punished under the domestic laws of the detaining power for engaging in hostilities, even if their hostile acts complied with the law of war. They can also be prosecuted for war crimes. However, as the UN Independent Expert, Robert K. Goldman, pointed out, "[i]t is important to emphasize that fundamental due process protections under international humanitarian law apply not only to POWs and civilians, but also to unprivileged combatants who, for whatever reason,

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506 See *inter alia*: *United States v. List (The Hostage Case)*, reported in *Trials of War Criminals Before The Nuremberg Military Tribunal* (1950), pp. 1228 and 1238.

507 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, *op. cit.* 490. See also Article 4 of the III Geneva Convention and Articles 43 and 44 of the Additional Protocol I of the Geneva Conventions.

508 See Articles 85 and 99-108 of the III Geneva Convention and ICRC Commentary on Article 85 of the III Geneva Convention (http://www.cicr.org/ihl.nsf/COM/375-590104?OpenDocument).

509 Articles 4 and 5 of the III Geneva Convention.

510 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, *op. cit.* 490.

are denied protection under the Third or Fourth *Geneva Convention*".[511] Indeed, persons who are classified as unprivileged combatants in international hostilities and for whatever reasons are denied *de jure* protection under either the Third or Fourth *Geneva Conventions* are entitled to the minimum customary law guarantees enshrined in Common Article 3 and Article 75 of *Additional Protocol I*. Both privileged and unprivileged combatants may lawfully be detained for the duration of the hostilities and interrogated by the detaining power. However, they must always be treated humanely.

The concept of privileged combatant and POW status are only recognized under customary and conventional international law in situations of international armed conflict. Thus, dissident armed groups involved in a non-international armed conflict are not privileged combatants and upon capture are not legally entitled to POW status. Accordingly, they can be detained during the hostilities and tried for treason, sedition and similar offences, as well as for their hostile acts, even if they complied with applicable international humanitarian law. There is, however, no rule of international law that prohibits a government from according members of such groups POW or equivalent status. Moreover, the members of such groups are entitled to the minimum customary law guarantees of humane treatment and due process set forth in Common Article 3 to the *Geneva Conventions* and Articles 4 and 6 of *Additional Protocol II*, as well as applicable international human rights law. The UN Independent Expert, Robert K. Goldman, pointed out that:

> *"Trials related to non-international conflicts must also conform to the standards in Common Article 3, as supplemented by the customary international law principles enshrined in Article 6 of Additional Protocol II. These provisions' guarantees are non-derogable and therefore constitute minimum standards that may never be suspended. Further, the non-derogable status of these protections under humanitarian law blocks any derogations that might otherwise be authorized under applicable human rights instruments insofar as they relate to charges arising out of the hostilities. Accordingly, during armed conflicts, States may not invoke derogations under the ICCPR or other human rights instruments to justify not affording any person, however classified, minimum due process and fair trial protections. This precept is particularly important in capital cases".*[512]

One consequence of the global "war on terror" has been to label as "enemy combatants" the perpetrators of terrorist acts and members of, or persons associated with, terrorist groups *outside* of situations of armed conflict. In this way an act that might amount to a criminal act under domestic law is transformed into an unlawful act of war but in circumstances where there is no armed conflict. Further, the designation

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511 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, *op. cit.* 490

512 *Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism*, *op. cit*. 490

of that person as a combatant – even though under international humanitarian law they could not be said to be directly participating in hostilities – would mean that the person could be subject to direct (military) attack. This designation effectively blurs, if not utterly destroys, any meaningful distinction between civilians and combatants in warfare, which is a fundamental precept of international humanitarian law.

When individuals who commit terrorist acts or who are suspected of terrorist links are captured or detained by a government outside of an armed conflict, they cannot under international humanitarian law be labelled, tried or, much less, targeted as combatants. Such persons should be treated in accordance with international human rights law and any trial must be in accordance with international human rights law.

### v) Detention and internment

International humanitarian law contains numerous special rules relating to detention in time of an international armed conflict. It regulates the detention of prisoners of war, who can be interned to keep them away from the battlefield for the duration of the war, though they must be held under a special regime that is different to that used for criminals.[513] Civilians can only be placed in 'internment' on security grounds under the strict conditions established in the *Fourth Geneva Convention*[514] and subject to the specific rules on internment.[515] For non-international armed conflict, there are no such precise rules, which means that customary international humanitarian law and human rights law apply[516] (see Principle 6, *Berlin Declaration*).

Under international human rights law, on the other hand, the right to have the legality of one's detention reviewed by a court (by means of *habeas corpus* or other similar such judicial remedy) is non-derogable.[517] In addition, the Human Rights Committee has said that States may not invoke states of exception to justify the arbitrary deprivation of liberty.[518] It has also held that in order to prevent torture or ill-treatment and enforced disappearance, provisions should be made against incommunicado detention.[519] In order to prevent arbitrary detention and torture or ill-treatment, the right to an effective remedy is considered by the Human Rights Committee as a non-derogable right under international law.[520] While States may

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513 See Articles 24 and following of the III Geneva Convention.

514 Article 79 of the Geneva IV Convention.

515 Articles 41 *et seq.*, Articles 79 *et seq.*, and Article 126 of the IV Geneva Convention.

516 Additional Protocol II talks in general terms about deprivation of liberty, be it internment or detention. See Article 5 (1) and (3) and Article 6 (5).

517 Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, HRI/GEN/1/Rev.7, para. 16.

518 *Ibid*., para. 11.

519 Human Rights Committee, *General Comment 20 on Article 7*, 30 March 1992, HRI/GEN/1/Rev.7, para. 11.

520 Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, HRI/GEN/1/Rev.7, para. 14.

make certain amendments to the practical functioning of their procedures relating to judicial or other remedies, these must comply with the fundamental right to an effective remedy and procedural safeguards can never be curtailed in a way that would result in derogation from non-derogable rights.[521]

The two strands of law lead to a regime of detention in time of armed conflict in which the strict rules of legal review set out in human rights law are modified by the special rules of international humanitarian law. These, in turn, are informed by the guarantees providing safeguards against arbitrariness and abuse that are contained in human rights law.

In an international armed conflict, combatants can therefore be detained as prisoners of war until the end of hostilities. If there is any doubt about their status, this must be determined by a 'competent tribunal'.[522] However, States are free to recognize further rights. Thus, the United States Supreme Court decided, in the case of *Hamdi*, that the writ of *habeas corpus* remained available to every individual detained by the United States as long as it was not suspended, and that detainees must receive notice of the factual basis for their classification, must be given a fair opportunity to rebut the government's assertion before a neutral decision maker, and are entitled to be heard by the tribunal at a meaningful time and in a meaningful manner.[523]

Administrative detention or internment of civilians during an international armed conflict is regulated by international humanitarian law as an exceptional measure to be applied particularly when other less restrictive measures of control are inadequate. Civilians who are interned have the right of appeal to a court or administrative board and their internment must be reviewed at least every six months.[524] The ICRC has commented that administrative boards must offer "the necessary guarantees of independence and impartiality".[525] Interned civilians shall be informed promptly, in a language which they understand, of the reasons for their internment.[526] Indeed, in the case of aliens, administrative internment can take place if other less restrictive measures of control are inadequate, but only if the security of the State makes it absolutely necessary.[527] The ICRC has said that the State:

> *"may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by*

521 *Ibid.*, para. 15.

522 Article 5 (2) of III Geneva Convention and Article 45 (1) of Additional Protocol I.

523 *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, Supreme Court Judgment, 28 June 2004.

524 Articles 43 and 78 of the IV Geneva Convention.

525 *ICRC Commentary to IV Geneva Convention* (ed. by Jean Pictet, ICRC, Geneva 1960), p. 260.

526 Article 75 (3) of Additional Protocol I and Article 99 of the IV Geneva Convention.

527 Articles 41 and 42 of the IV Geneva Convention.

> *other means, such as sabotage or espionage […][T]he mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security".*[528]

In the case of occupied territories, the administrative detention or internment of civilians can only proceed "for imperative reasons of security".[529] The ICRC has pointed out that "[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately".[530] The ICRC also specifies that "they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself. In any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved".[531]

In non-international armed conflict, there are very general rules of international humanitarian law governing deprivation of liberty (detention and internment) [532]. It must be noted that preambular paragraph 2 of *Additional Protocol II*, by stating that "international instruments relating to human rights offer a basic protection to the human person", establishes the link between the Protocol and human rights law. The ICRC Commentary on the *Additional Protocol II* specifies that the reference to international instruments includes treaties adopted by the UN, such as the ICCPR and the *Convention against Torture*, as well as regional human rights treaties.[533] Human rights law therefore applies, especially the non-derogable right to have the lawfulness of one's detention determined by a court of law (see Principle 6, *Berlin Declaration*). The minimum guarantees against arbitrary detention, such as the right to be informed, in a language which one understands, of the reasons for the

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528 ICRC, Commentary on Article 42 of the IV Geneva Convention (http://www.icrc.org/ihl.nsf/ b466ed681ddfcfd2412567390003e6368/39da992c377a08aec12563cd0042c131?OpenDocument).

529 Article 78 of the IV Geneva Convention.

530 ICRC, Commentary on Article 78 of the IV Geneva Convention (http://www.icrc.org/ihl.nsf/ b466ed681ddfcfd2412567390003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument).

531 *Ibid*.

532 Common Article 3 of the Geneva Conventions and Articles 5 and 6 of the Additional Protocol II of the Geneva Conventions.

533 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, paras. 4428 – 4430. See also, Jelena Pejic, "*Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*", in *International Review of the Red Cross*, Volume 87 Number 858, June 2005, pages 378-379.

deprivation of liberty[534], the right to legal review of the detention[535] and the right to legal assistance[536], must be ensured.

### vi) Fair trial rights

The fundamental requirements of the right to a fair trial are non-derogable under human rights law[537] (see Principle 7, *Berlin Declaration*). This is consistent with the minimum rights of fair trial applicable under international humanitarian law, as enshrined in Article 75 (4) of the First Additional Protocol and Article 6 of Additional Protocol II. These provisions reflect a norm of customary international law and are based on Article 14 of the ICCPR[538], illustrating the convergence of the two bodies of law. Indeed, the ICRC has considered that the essential judicial guarantees listed in Article 75 (4) of *Additional Protocol I*, "even more than common Article 3 of the 1949 Conventions, which was called a 'mini Convention', constitutes a sort of 'summary of the law' particularly in the very complex field of judicial guarantees".[539]

Other provisions of international humanitarian law also contain fair trial guarantees. Prisoners of war suspected of having committed a crime have the right to be tried in a court which offers the essential guarantees of independence and impartiality as generally recognized[540] and have basic fair trial rights.[541] Civilians tried in criminal proceedings are entitled to a fair trial under the *Fourth Geneva Convention*[542], Article 75 *of the Additional Protocol I* and Article 6 of *Additional Protocol II*. This right is also guaranteed to people who are suspected of engaging in activities that are hostile to the security of the state, such as spies or saboteurs, who are sometimes referred to as 'unprivileged belligerents'.[543]

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534 Article 9 (2) of the ICCPR and Principles 10 and 14 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

535 Article 9 (4) of the ICCPR; Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, HRI/GEN/1/Rev.7, paras. 14 and 16; and Principle 32 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

536 Principle 11 (1) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Human Rights Committee, *Concluding observations on Poland*, 2 December 2004, CCPR/CO/82/POL, para. 14.

537 Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, HRI/GEN/1/Rev.7, para. 16.

538 ICRC, *Commentary on Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, para. 3092.

539 ICRC, *Commentary on Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, para. 3007.

540 Article 84 of the III Geneva Convention.

541 Articles 86, 87, 99, 105 and 106 of the III Geneva Convention.

542 Article 71 *et seq.* of the IV Geneva Convention.

543 Article 5 of the IV Geneva Convention and Articles 45 (3) and 75 of Additional Protocol I.