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Working Group on Arbitrary Detention

Draft Principles and Guidelines on remedies and procedures on:

The right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court without delay, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

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A. Introduction

1. The right of anyone deprived of his or her liberty to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is widely recognized in international and regional human rights instruments,¹ the jurisprudence of the International Court of Justice and international human rights mechanisms, including the reports and country visits of treaty bodies and special procedure mandate holders, regional human rights mechanisms, in the domestic law of States and the jurisprudence of national courts.² It is viewed as an essential component of due process rights necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment.³

2. The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation.⁴ It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary detention by means of ensuring the right of anyone deprived of liberty to take proceedings before a court, in order that that court may determine without delay the arbitrariness or lawfulness of the detention and the release of the detainee be ordered where the detention is found to be arbitrary or unlawful. It is also a means of determining the whereabouts or state of health of such a person and identifying the authority ordering or carrying out the deprivation of liberty.

3. Ensuring that the detainee is not exclusively at the mercy of the detaining authority, the exercise of the right to court review of detention acts as a fundamental safeguard against detention, torture or other cruel, inhuman or degrading treatment or punishment and plays an important role in clarifying the situation of involuntary or enforced disappearances.⁵ The protection is among those judicial remedies that are essential to preserve legality in a democratic society.⁶ The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in appropriate remedies which will be an entitlement to release and the provision of an enforceable right to compensation upon a successful challenge, must necessarily be guaranteed by the State in law and in practice.

4. The national laws of many countries fail to provide sufficient protection to all persons deprived of their liberty in all situations due to the absence of a legal framework to ensure the effective and real exercise of the right, without exception, to take proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy.⁷ Several international and regional human rights bodies and instruments have articulated a strong position on the non-derogability in any circumstance of the right to take proceedings before a court. The Working Group on Arbitrary Detention urges all States to incorporate this position into their national laws.⁸

5. The Human Rights Council requested the Working Group on Arbitrary Detention to prepare and present to it before the end of 2015, draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court without delay, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.⁹ The Working Group was directed to seek the views of States, United Nations agencies, intergovernmental organizations, treaty bodies, in particular,

the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders. In 2013, the Working Group distributed a questionnaire to the aforementioned group of stakeholders requesting details on the treatment of the right to bring such proceedings before a court in the respective legal frameworks.

6. The Working Group submitted a thematic report to the 27th session of the Human Rights Council with a compilation of the international, regional and national legal frameworks on the right to challenge the lawfulness and arbitrariness of detention before court, based on the information submitted by stakeholders and additional research.¹⁰ The thematic report documents general practice accepted as law, and further best practice in applying the requirements of international law.

7. On 1 and 2 September 2014, the Working Group convened a global consultation in Geneva, Switzerland to bring together thematic and regional experts to elaborate on the scope and content of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy, and allow stakeholders to contribute to the development of the draft principles and guidelines. The Working Group produced a background paper for the consultation which drew from Council report (A/HRC/27/47) to set out the substantive and procedural obligations on States to ensure the meaningful exercise of the right to bring proceedings before a court in practice. The background paper gives an overview of current State practice in implementing each of the obligations, highlighting several examples of good practice. The observations on State practice are based on the responses provided by the 44 States to the Working Group's questionnaire, and other stakeholder submissions. The latter source not only demonstrates general practice accepted as law but also assists in identifying protection gaps and in proposing good practices to ensure effective coverage for persons deprived of their liberty to effectively exercise this procedural safeguard. The 44 responding States represent all global regions and diverse legal traditions.

8. The Working Group on Arbitrary Detention's draft Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy, which are drawn from international standards and recognized good practices by States, aim to provide guidance to States on the fundamental principles on which the laws and procedures regulating this right should be based and to outline specific elements required for its effective exercise.

9. For the purposes of the draft Principles and Guidelines, the terms "everyone" or "anyone" means every human being without discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights. It particularly includes, but is not limited to: women (especially pregnant and breastfeeding women) and men; girls and boys; soldiers¹¹; persons with disabilities; including psychosocial disabilities; lesbian, gay, bisexual, transgender and intersex persons; non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, internally displaced persons; persons accused or convicted of a crime; persons who have or are suspected to have engaged in terrorist activity;¹² problematic drug consumers; dementia sufferers; human rights defenders; older persons; persons living with HIV/AIDS

and serious contagious diseases; indigenous people; sex workers; and racial or religious minorities.

10. For the purposes of the draft Principles and Guidelines, the term “deprivation of liberty” includes the period of detention, arrest, pre-trial and post-trial detention.¹³ This also includes placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance, such as house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for migrants or asylum seekers, psychiatric facilities and international or transit zones in ports or international airports, gathering centres or hospitals, as this may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.¹⁴ It further includes other forms of preventive security detention, including: during armed conflicts and emergency situations; administrative detention for security reasons; and detention of individuals considered as civilian internees under international humanitarian law.

11. For the purposes of the draft Principles and Guidelines, deprivation of liberty is regarded as “arbitrary” in the following cases: (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee); (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights; (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character; (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; or, (e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.¹⁵

12. In its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law¹⁶, the Working Group restated its constant jurisprudence on the prohibition of all forms of arbitrary deprivation of liberty, and demonstrated that it is general practice accepted as law, constituting customary international law and a peremptory norm (*jus cogens*). In its 2013 annual report to the Human Rights Council¹⁷ the Working Group restated that the prohibition of arbitrariness in the deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty, which can arise at any stage of legal proceedings. In the interactive dialogue at the twenty-second session of the Human Rights Council, States gave general support for the conclusions of the deliberation.¹⁸

13. For the purposes of the draft Principles and Guidelines, deprivation of liberty is regarded as “unlawful” when it is not on such grounds and in accordance with such procedure as are established by law.¹⁹ It is used to refer to both detention that violates domestic law and detention that is incompatible with the Universal Declaration of Human Rights, general principles of international

law, customary international law,²⁰ International Humanitarian Law,²¹ IHL, as well as the relevant international instruments accepted by the States concerned. It also includes detention that may have been lawful at its inception but has become unlawful because the individual has completed serving a sentence of imprisonment or because the circumstances that justify the detention have changed.²²

14. It should be noted that States employ different models to regulate the exercise of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and obtain appropriate remedies. The draft Principles and Guidelines do not endorse any specific model but encourage States to guarantee this right in law and practice.

15. The draft Principles and Guidelines are based on the recognition that States should undertake a series of measures to establish and/or reinforce the procedural safeguards provided to persons deprived of their liberty. The goal of such measures is to improve access to justice and to prevent arbitrary or unlawful detention.

16. Recognizing that certain groups are entitled to additional protection or are more vulnerable when deprived of their liberty, the draft Principles and Guidelines also provide specific provisions for women, children, persons with disabilities and non-nationals, including migrants regardless of their migration status, refugees and asylum seekers and other groups with special needs.

17. The draft Principles and Guidelines are primarily concerned with the right of anyone who is deprived of his or her liberty by arrest or detention to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention, and to be released where it is found unlawful. This is distinct from the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other judicial authority and tried within a reasonable time or be released. Nothing in these draft Principles and Guidelines should be interpreted as providing a lesser degree of protection than that provided under existing national laws and regulations and international and regional human rights conventions or covenants applicable to the liberty and security of the person. However, this should not be interpreted as meaning that States are bound by international and regional instruments that they have not ratified or acceded to.

B. Principles

Principle 1. Right to be free from arbitrary or unlawful deprivation of liberty

18. Recognizing that everyone has the right to be free from arbitrary²³ or unlawful deprivation of liberty,²⁴ everyone is guaranteed the right to take proceedings before a court without delay, in order that that court may decide on the arbitrariness or lawfulness of the detention, and obtain appropriate remedies and this should be provided for in their national legal systems at the highest possible level, including, where applicable, in the constitution.²⁵

Principle 2. Responsibilities of the State and Others

19. Specific legislation²⁶ and regulations must be enacted to guarantee the right to take proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy. A comprehensive set of applicable procedures shall be put in place to ensure the right is accessible to all

persons in all situations of deprivation of liberty and is effective.²⁷ Consequently, the necessary human and financial resources shall be allocated to the administration of justice system.²⁸ The right to bring proceedings before a court must also be protected in private relationships such that the duties apply to international organisations and under certain circumstances to non-State actors.

Principle 3. Scope of application of the right to bring proceedings before a court

20. Any individual who is deprived of liberty in any situation,²⁹ by or on behalf of a governmental authority at any level, has the right to take proceedings before a court without delay in that State's jurisdiction to challenge the arbitrariness and lawfulness of his or her deprivation of liberty and receive appropriate remedy.³⁰ Any form of detention will constitute the effective control making the individual subject to the State's jurisdiction. Participation in detention will give the State the duty to ensure the individual's right to bring proceedings before a court.³¹

Principle 4. Non-derogability of the right to take proceedings before a court

21. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and obtain appropriate remedies is not derogable under international law.³² It must not be suspended, rendered impracticable, restricted, or abolished under any circumstances,³³ even in times of war, armed conflict, or public emergency which threatens the life of the nation and the existence of which is officially proclaimed.³⁴

Principle 5. Non-discrimination

22. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy may be exercised by anyone. This includes all persons regardless of age; race; colour; gender; sexual orientation and gender identity; language; religion or belief; political or other opinion; national or social origin; property; citizenship or domicile; birth; and, education, social or other status.³⁵

Principle 6. The court as reviewing body

23. A court of law shall review the arbitrariness and lawfulness of the deprivation of liberty. Such a court shall bear the full characteristics of a competent, independent and impartial tribunal capable of exercising recognizable judicial powers and be established by law.³⁶

Principle 7. Right to be informed

24. Anyone deprived of liberty shall be informed about their rights and obligations under law through appropriate means. Among other procedural safeguards, this includes the right to be informed, in a language the detained person understands, of the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty³⁷ and the right to bring proceedings before the court without delay and obtain appropriate remedies.³⁸ Further, such persons shall be enabled with the means to bring forth such a challenge.

25. Information on rights during any deprivation of liberty shall be made freely available and accessible to the public.

Principle 8. Timeframe for the exercise of the right to bring proceedings before the court

26. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and obtain appropriate remedies applies in principle from the moment of arrest or detention³⁹ and ends with the release of the detainee. The right to claim remedies after release must not be rendered ineffective by statutes of limitation.⁴⁰

Principle 9. Prompt and effective legal assistance

27. Anyone deprived of his or her liberty shall have prompt and regular access to an independent legal representative of his or her choosing at any time during his or her detention, including immediately after arrest or detention.⁴¹

28. If, in extraordinary circumstances, an individual does not defend himself or herself personally or engage his or her counsel of choice within the time period established by law or does not have or cannot afford to pay for counsel of choice, the individual shall be informed of his or her right to legal representation of their own choosing and immediate access shall be ensured to another independent and suitably qualified legal representative provided by the State with no costs under certain circumstances provided by law.⁴²

29. Legal representatives shall be able to carry out their functions effectively and independently, free from fear of reprisals, interference, intimidation, hindrance or harassment.⁴³ Authorities shall respect the privacy and confidentiality of legal representative-detainee communications.⁴⁴

30. Proceedings, and legal assistance in the proceedings, shall be at no cost for a detained person, or his or her representative, without adequate means.⁴⁵

31. Effective legal aid shall be provided promptly at all stages of the detention. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare the defence.

32. Persons deprived of liberty shall be accorded adequate time and facilities and means to prepare their defence and to communicate with counsel of their own choosing.⁴⁶

Principle 10. Persons able to bring proceedings before a court

33. Procedures shall allow anyone to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and obtain appropriate remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee.⁴⁷

34. No restrictions may be imposed on the detainee's ability to contact his or her legal representative, family members or other interested parties.

Principle 11. Appearance of the detainee before the court

35. The physical appearance of the detainee before the court shall be guaranteed,⁴⁸ at the first hearing of the challenge to the arbitrariness and

lawfulness of the deprivation of liberty, and every time that the person deprived of liberty requests to appear physically before the court.

Principle 12. Equality before the courts

36. The proceedings shall be fair and effective in practice and the parties to the proceedings in question shall be ensured the right to equal access, to present a full defence, equality of arms and be treated without any discrimination before the courts.⁴⁹

37. This includes that no individual shall be deprived *de iure* or *de facto*, in procedural terms, of his or her right to equal access (including to his or her case file presented to the court by the prosecution or security apparatus) and equality of arms, and the requirement that the same procedural rights be provided to all parties, subject only to any distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.⁵⁰

Principle 13. Burden of proof

38. In every instance of detention the burden of establishing the legal basis, as well as the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention.⁵¹

Principle 14. Standard of review

39. No limitation may be imposed on the court's authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty.

40. The court shall consider all available evidence that has a bearing on the arbitrariness and lawfulness of detention, that is, the grounds justifying the detention, its necessity and proportionality to the aim sought, and not merely to its reasonableness or other lower standards of review.

41. In order to determine that a deprivation of liberty is non-arbitrary and lawful, the court shall be satisfied that the detention was carried out under grounds and according to procedures prescribed by national law, and that it was and remains non-arbitrary and lawful under both national and international law.⁵²

Principle 15. Remedies and Reparations

42. Any person arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations,⁵³ capable of providing restitution, compensation,⁵⁴ rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be adequate, effective and prompt.⁵⁵

43. Where a court determines that the deprivation of liberty is arbitrary or unlawful the court shall order the conditional or unconditional release from detention.⁵⁶ Relevant authorities shall give immediate effect any order for release.⁵⁷

44. The right to reparation cannot be rendered ineffective by amnesties, immunities, statutes of limitations, or other defences of States.

Principle 16. Exercise of the right to bring proceedings before a court without delay to challenge the lawfulness and arbitrariness of the detention in situations of armed conflict, public danger or other emergency that threatens the independence or security of a State

45. All detained persons in a situation of armed conflict, as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, are guaranteed the exercise of the right of to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive appropriate remedy.⁵⁸ This right and corresponding procedural guarantees complement and mutually reinforce the rules of international humanitarian law.⁵⁹

46. Domestic legislative frameworks should not allow for any restrictions on the safeguards of persons deprived of their liberty under counter-terrorism, emergency legislation or drug-related policies, concerning the right to bring proceedings before a court to challenge the lawfulness and arbitrariness of detention and receive appropriate remedy.⁶⁰

47. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, some procedural elements of the right to challenge the lawfulness and arbitrariness of the detention may be derogated from to the extent strictly required by the exigencies of the situation in the sense that the state may take practical measures to accommodate practical constraints.⁶¹

48. Any measures taken to suspend or restrict derogable fundamental rights and freedoms, under states of emergency, must pursue a legitimate goal, be necessary and appropriate to the goal to be achieved.⁶² Possible derogations from any application of the right to bring proceedings before a court without delay to secure a judicial determination of the non-arbitrariness and lawfulness of a detention and receive appropriate remedy will depend upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the derogations.⁶³ Such derogations must not, in their adoption, represent any misuse or abuse of power.⁶⁴

49. Any derogation from any application of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy is permitted only to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are consistent with the State's other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.⁶⁵

50. Where counter-terrorism measures require the adoption of specific measures limiting certain rights and guarantees in a very limited manner, including those relating to the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy, they must remain consistent with the norms of international law.⁶⁶

51. A State which detains a person in a situation of armed conflict, as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, by definition has that person within its effective control, and thus within its jurisdiction, has the duty under international law to guarantee the exercise of the right of the detainee to bring proceedings before a court without delay to challenge the arbitrariness or lawfulness of the deprivation of liberty and receive

appropriate remedy.⁶⁷ This right, and corresponding procedural guarantees complements and mutually reinforces the rules of international humanitarian law.⁶⁸ Reconsideration, appeal or periodic review of decisions to intern or place in assigned residence alien civilians⁶⁹ in the territory of a party to an international armed conflict, or civilians⁷⁰ in an occupied territory, shall comply with these draft Principles and Guidelines, including the draft Principle on ‘The court as reviewing body’.⁷¹

52. Prisoners of war should be entitled to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and receive appropriate remedy where the detainee: (a) challenges his or her status as a prisoner of war;⁷² (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or seriously sick;⁷³ or (c) claims not to have been released or repatriated without delay following the cessation of active hostilities.⁷⁴

53. Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.⁷⁵ Any consequent deviation from procedural elements of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and receive appropriate remedy must be in conformity with these draft Principles and Guidelines, including the draft Principles on ‘Non-derogability’; ‘Right to be informed’; ‘The court as reviewing body’; ‘Equality of arms’; and ‘Burden of proof’.⁷⁶

Principle 17. Special obligations to guarantee access to the right to bring proceedings before a court

54. Special measures are required under international law to ensure meaningful access to the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy by certain groups of detainees including, but not limited to: children; women (especially pregnant and breastfeeding women); older persons; persons detained in solitary confinement or other forms of incommunicado detention of restricted regimes of confinement; persons with disabilities, including psychosocial disabilities; persons living with HIV/AIDS and serious contagious diseases; dementia sufferers; drug users; indigenous people; sex workers; on the basis of gender identity; racial or religious minorities; non-nationals, including migrants regardless of their migration status; asylum-seekers and refugees; and, internally displaced persons.

Principle 18. Specific measures for children

55. In all situations of children⁷⁷ exceptionally deprived of their liberty, the best interests of the child shall be the primary consideration.

56. The ability to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized⁷⁸ and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

57. The authorities ordering the detention of children shall *ex officio* request courts to review the arbitrariness and lawfulness of their detention. This does not exclude the right of others to bring proceedings before court to challenge the arbitrariness and lawfulness of the detention of these children.

Principle 19. Specific measures for women

58. Applicable, appropriate and gender-sensitive measures shall be taken to ensure the ability of women to exercise their right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy, including introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure gender equality and equal and fair access to justice.

Principle 20. Specific measures for persons with disabilities

59. The Courts, while reviewing the legality of the deprivation of liberty of persons with disabilities, shall comply with the State's obligation to prohibit involuntary committal or internment on the grounds of disability or perceived disability,⁷⁹ particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as their obligation to design and implement de-institutionalization strategies.

60. The arrest or detention of a person with a disability, including physical, mental, intellectual or sensory disabilities, is required to be in conformity with the law, including international law, and consistent with the right to humane treatment and the inherent dignity of the person.

61. Persons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of their disability.⁸⁰

62. Any deprivation of liberty must be re-evaluated at systematic intervals with regards to its arbitrariness and lawfulness.⁸¹

63. Persons with a disability must receive individualized and appropriate support to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.

Principle 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers and refugees

64. Non-nationals, including migrants regardless of their status, asylum seekers and refugees, in any situation of deprivation of liberty, shall be informed⁸² of the reasons for their detention and their rights in connection with the detention order, including the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of their detention and receive appropriate remedy⁸³ including the right to legal assistance in accordance with draft Principle 9 on "Prompt and effective provision of legal assistance",⁸⁴ in a language they use and in terms they understand.⁸⁵ Anyone has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

65. Such detainees shall promptly be brought before a judicial authority⁸⁶ and have access to regular periodic reviews⁸⁷ of detention to ensure their detention remains lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court.

66. Irrespective of the body responsible for their detention order, administrative or other, non-nationals, including migrants regardless of their migration status, asylum seekers and refugees deprived of their liberty shall be guaranteed access

to a court of law,⁸⁸ empowered to order immediate release or be able to vary the conditions of release.

67. The deprivation of liberty as a penalty or punitive sanction in the area of immigration control is prohibited.⁸⁹

68. The deprivation of liberty of an unaccompanied or separated migrant child is prohibited.⁹⁰

C. Guidelines

Guideline 1. Scope of application

69. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy applies:

(a) to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including military detention, security detention, counter-terrorism detention,⁹¹ involuntary hospitalization, immigration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes and other forms of administrative detention.⁹²

(b) irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary. The requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context, and the procedural guarantee is not susceptible to abrogation.

Guideline 2. Prescription in national law

70. A strict legality requirement applies, and both to the form of the legal base and the procedure for its adoption. The legal framework that establishes the process to challenge the arbitrariness and lawfulness of detention shall have a sufficient degree of precision, be drafted in clear and unambiguous language, realistically accessible, and ensure that the exact meaning of the relevant provisions and the consequences of its application are foreseeable to a degree reasonable for the circumstances.

71. Any restriction to liberty shall be based on national laws. Restrictions to liberty can be based on the Constitution or in the common law. Legislative acts are to be drafted in accordance with the procedural provisions related to the Constitution.

Guideline 3. Non-derogability

72. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, States may take practical measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings before a court without delay to challenge the

arbitrariness and lawfulness of detention and obtain appropriate remedies only to the extent strictly required by the exigencies of the situation,⁹³ provided that:

(a) the court's authority to decide without delay on the arbitrariness and lawfulness of detention, and to order immediate release if the detention is not lawful, is not itself diminished;⁹⁴

(b) the duty of relevant authorities to give immediate effect to an order for release is not diminished;

(c) such measures are prescribed by law, necessary in the exigencies of the situation (including by virtue of the fact that less restrictive measures are unable to achieve the same purpose), proportionate and non-discriminatory;

(d) such measures are consistent with ensuring fair, effective and adversarial proceedings; and

(e) such measures are not otherwise inconsistent with international law.

Guideline 4. Characteristics of the court and procedural guidelines for the review of the arbitrariness and lawfulness of the detention

73. In order to guarantee that any deprivation of liberty shall be ordered by and be subject to the effective control of a judicial authority,⁹⁵ the following shall be ensured:

(a) The court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered and implemented the deprivation of liberty;⁹⁶

(b) The court shall be competent, independent and impartial, capable of exercising recognizable judicial powers and established by law. No procedures or rules of selection and appointment of judges should undermine these requirements;

(c) The court shall consider the application as a matter of urgency. Adjudication of the case, including time for preparation of the hearing, shall take place as expeditiously as possible;⁹⁷

(d) The court must render its decision on the arbitrariness and lawfulness of the detention within established deadlines;

(e) Adjudication of the case cannot be slowed because of insufficiency of evidence. Delays attributable to the person detained or their legal representative do not count as judicial delay;⁹⁸

(f) The court shall ensure the appearance of the detainee regardless of whether he or she has asked to appear;⁹⁹

(g) The court shall have the power to determine the arbitrariness and lawfulness of the detention and to order immediate release if the detention is arbitrary or unlawful.¹⁰⁰ If further restrictions on the liberty of the individual are under consideration, this shall be dealt with in compliance with the principles of international law;

(h) Any court order of release shall be respected and promptly implemented by the State authorities;¹⁰¹

(i) The court shall have the power to take measures against the State authorities in control of the detention where the deprivation of liberty is

determined to be arbitrary or unlawful and/or the treatment during the deprivation of liberty was abusive;

(i) Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay.¹⁰² In addition to being reasoned and particularized,¹⁰³ the court's decision should be clear, precise, complete and sufficient, the contents of which should be made understood in a language that the detainee understands;

(k) Upon an unsuccessful challenge, the court's decision must provide reason for why the individual should remain in detention in light of the principle that liberty should be the rule and detention the exception.

74. Exceptionally, for some forms of detention, States may enact legislation regulating proceedings before a specialized tribunal, which must be established by law affording equivalent guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature.¹⁰⁴ A tribunal managed entirely within the government department responsible for enforcing detention regulations and/or detention facilities fails to meet the abovementioned standards.

75. Specialized tribunals can only be considered as legitimate and legally valid if reasonable and objective criteria justify their existence, that is, there exists a special legal condition and/or vulnerability of the person that requires special protection through a specialized tribunal, such as indigenous peoples and children.¹⁰⁵ The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination¹⁰⁶ on the contrary it could be tantamount to a violation of the right to equality before tribunals and to be judged by a competent tribunal with due process guarantees.¹⁰⁷

76. Military tribunals are not competent to review the lawfulness of the detention of civilians as military judges and military prosecutors cannot meet the fundamental requirements of independence and impartiality.¹⁰⁸

Guideline 5. Right to be informed

77. To ensure that an individual is informed of the basis for his or her detention and the ability to challenge the arbitrariness and lawfulness of the detention, the following shall be ensured:

(a) The factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay and so as to provide adequate time to prepare the challenge. This includes a copy of the detention order, access to and copy of his or her case file, in addition to disclosure of any material in its possession, or to which it may gain access, relating to the reasons for the arrest and detention;¹⁰⁹

(b) Persons deprived of liberty are informed not merely of their entitlement to take proceedings challenging the arbitrariness and lawfulness of the deprivation of liberty, but also to receive a reasoned and individualized decision without delay. This includes how to commence the procedure, as well as of the potential consequences of voluntarily waiving those rights. Such information should be widely published and made accessible to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means;

(c) Information is communicated orally and in writing, and in a language and format that is accessible and is understood by the person deprived of his or her liberty, taking into account augmentative and alternative means of communications for persons with mental or physical impairments. Translation services should be provided to all detainees who cannot understand the language of the information provided concerning his or her rights;

(d) Information is made available to geographically isolated groups and groups marginalized as a result of discriminatory practices. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following changes to the law or specific issues affecting a community;

(e) Detaining authorities in any facility where persons deprived of their liberty must inform detainees of their right to challenge the arbitrariness and lawfulness of their detention and of other procedural safeguards;

(f) Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities, indigenous peoples, migrants, refugees, asylum seekers and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity;

(g) Means of verification that a person has actually been informed shall be put in place. This may include documentation of the person having been informed by way of printed record, audiotape, videotape or witnesses.

Guideline 6. Registers and record keeping within prisons and other facilities of detained persons

78. To ensure the accuracy and completeness of registers and adequate case management, and to ensure that State authorities know who is held in their custody or detention facilities, including prisons and any other place of deprivation of liberty, at all times, the following measures shall be taken:

(a) All records must contain, at a minimum, the following information, which shall be disaggregated by sex and age of the detainee:¹¹⁰

- (i) The identity of the person deprived of liberty;
- (ii) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (iii) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (iv) The authority responsible for supervising the deprivation of liberty;
- (v) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (vi) Elements relating to the state of health of the person deprived of liberty;
- (vii) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;

(viii) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer;

(b) The registers and/or records of persons deprived of liberty, shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law;

(c) There must exist known procedures in place to immediately release a detainee upon discovery that he or she is continuing to be detained despite having completed serving a sentence or detention order;

(d) In cases of non-compliance with such requirements sanctions against the State authorities responsible are necessary.

Guideline 7. Timeframe for exercise of the right to bring proceedings before a court

79. To ensure that an individual shall not be deprived of his or her liberty without being given an effective opportunity to be heard without delay by a court of law, no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention. Authorities are in this context obliged to facilitate the right to bring proceedings before a court and to facilitate the detained person to have immediate access to his or her legal representative to prepare their defence.

80. In order not to unnecessarily prolong an arbitrary or unlawful detention, measures shall be taken to guarantee the following:

(a) Recognizing that as circumstances change so does the possibility that a previous legal justification for a detention is no longer applicable, the detainee has the right to challenge the arbitrariness and lawfulness of his or her detention multiple times;

(b) After the court has held that the circumstances justify the detention, the individual is entitled to take proceedings again on similar grounds after an appropriate period of time has passed, depending on the nature of the relevant circumstances;¹¹¹

(c) There shall be no substantial waiting period between each application and no waiting period in cases of: alleged torture or other ill-treatment, or risk thereof; incommunicado detention, or where the life, health or legal situation of the detainee may be irreversibly damaged;

(d) The initiation of the challenge multiple times does not relieve authorities of the obligation to ensure the regular, periodic judicial or other review of the necessity and proportionality of continuing detention,¹¹² nor exclude the possibility of periodic review by the court, *proprio motu*;

(e) Where a decision upholding the arbitrariness and lawfulness of detention is subject to appeal in accordance with national legislation, it should be adjudicated upon expeditiously.¹¹³ Any appeals filed by the State must take place within legally defined limits and circumstances.

Guideline 8. Legal assistance

81. To ensure the full realization of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive appropriate

remedy. Access to legal counsel by all persons in all situations of deprivation of liberty shall be facilitated through implementing the following measures:

(a) Access without delay to lawyers and other legal assistance providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the period of detention. This includes providing detainees with the means to contact a lawyer or other legal service provider of their choice;

(b) Where the services of a lawyer are not available, every effort shall be made to ensure that services available from suitably qualified legal assistance providers can be accessed by detainees under conditions that guarantee the full respect of the rights of the detainees as set out in international law and standards. Depending on the system in place this includes other legal advisors, legal assistants, paralegals and those running legal clinics that possess the requisite skills and training as required under national law for the provision of legal assistance and services;

(c) Effective legal aid shall be provided promptly from the moment of deprivation of liberty in order to ensure that the unaffordable cost of legal assistance does not present a barrier to individuals deprived of their liberty to bring proceedings before a court;

(d) Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence;

(e) Respect for the confidentiality of communication, including meetings, correspondence, telephone calls and other forms of communications with legal counsel and other legal assistance providers. Such communications may take place within the sight of officials, providing that they are conducted out of the hearing of officials. If this confidentiality is broken any information obtained shall be inadmissible as evidence;

(f) Access to lawyers or other legal assistance providers should not be unlawfully or unreasonably restricted. If access to legal assistance is delayed or denied, or detained persons are not adequately informed of their right to access providers of legal assistance in a timely manner, then a range of remedies shall be available, in accordance with these draft Principles and Guidelines.

Guideline 9. Persons able to bring proceedings before the court

82. To ensure the right to challenge the arbitrariness and lawfulness of detention before court is practical and effective, the broadest possible scope for persons to commence proceedings before a court shall be ensured through implementing the following measures:

(a) Empowering a wider group of individuals with legitimate interest in the case to initiate such proceedings, including family members of the detained person, legal guardian, State authorities independent from the detaining authority, the ombudsman or national human rights institution, a non-governmental organization, or the employer or co-workers;

(b) Ensuring an informal, cost-free and simplified process to commencing a claim challenging the legality of detention before court, offering even the ability to dispense with any requirement for the challenge to be submitted in writing.¹¹⁴

Guideline 10. Appearance before the court

83. To ensure the effectiveness and fairness of the proceedings, as well as to reinforce the protection of the detainee from other violations such as torture or other ill-treatment,¹¹⁵ the physical presence of the detainee before the court shall be guaranteed at the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty, and every time that the person deprived of liberty requests to appear physically before the court. This shall be ensured through implementation of the following measures:

(a) Any person deprived of their liberty, and not only persons charged with a criminal offence, shall enjoy the right to appear promptly, and no more than a few days from the time of arrest, before a court in order to challenge the arrest and detention as well as the conditions of detention, including acts of torture and ill-treatment;

(b) The court shall ensure that the detainee can communicate with the judge without the presence of any official involved in his or her deprivation of liberty;

(c) State authorities having control over the detainee who fail in their obligation to produce without unreasonable delay the detained person before the court, on demand of that person or by Court Order, should be sanctioned as a matter of criminal and administrative law.

Guideline 11. Equality of arms

84. To ensure the procedure is guided by the adversarial principle and equality of arms, it shall be guaranteed in all proceedings, of a criminal and all other forms of non-criminal nature:

(a) Full and complete access by detainees and their legal counsel to their legal files as well as a complete copy of them;¹¹⁶

(b) Ability of the detainee to challenge any documents relating to his or her case file, including all the arguments and material elements adduced by the authorities to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention.¹¹⁷

Guideline 12. Admissibility of evidence obtained by torture

85. Any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.¹¹⁸

Guideline 13. Disclosure of information

86. To ensure effective judicial oversight over the arbitrariness and lawfulness of detention and to guarantee the detainee an effective opportunity to bring proceedings before court without delay to challenge the arbitrariness and lawfulness of detention and obtain appropriate remedies, the following measures shall be implemented:

(a) All the relevant information shall be provided by the detaining authorities to the judge, the detainee or his or her lawyer;

(b) Disclosure must include exculpatory information, which includes not only information that establishes an accused's innocence, but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply;

(c) Sanctions, including criminal penalties, shall be imposed on officials who withhold or refuse to disclose information relevant to the proceedings or who otherwise delay or obstruct proceedings.

87. The disclosure of information may be restricted only if the court concludes that:¹¹⁹

(a) this is demonstrated to be necessary to pursue a legitimate aim such as protecting national security; respecting the rights or reputation of another individual; or protecting public order, health or morals¹²⁰; and

(b) it is demonstrated that less restrictive measures are unable to achieve the same purpose, such as providing redacted summaries of information that clearly point to the factual basis for the detention.

88. Any proposed restriction on the disclosure of information must be proportionate. An assessment of proportionality requires a balance to be struck between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this has on the ability of the person to respond to the case or to pursue a challenge to the arbitrariness and lawfulness of detention. This means that if a less restrictive measure can achieve the legitimate aim, such as providing redacted summaries of information, ex parte or in camera review of the information for example, then that measure should be applied.

89. If the authorities refuse to make the disclosure, and the court does not have the authority to compel such disclosure, then the court must order that the person be released.

Guideline 14. Burden of proof

90. The authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case.¹²¹

91. This burden of proof must be met in a manner that is known in detail to the detainee, including those who are defendants in security-related cases.

Guideline 15. Standard of review

92. In reviewing detention, the court shall be guaranteed the ability:

(a) to examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, as well as basic principles of reasonableness, proportionality and necessity, when reviewing the arbitrariness and lawfulness of the detention;

(b) to consider whether detention remains justified in all the changing circumstances of the detained individual's case, including: health; family life; protection claims; or other attempts to regularize one's status;;

(c) to consider and pronounce on whether alternatives to detention have been considered.

93. An examination of the necessity and proportionality of the detention, as well as alternatives to detention shall take into account details such as age, gender, and marginalized groups.

94. When assessing whether the measures taken are in compliance with international standards, the needs of specific persons affected and any vulnerability must be taken into consideration as the arbitrariness and unlawfulness of detention may include the unsuitability of detention for such persons.

Guideline 16. Remedies and Reparations

95. When a judicial order of release becomes operative, it must be complied with immediately, as continued detention would be considered arbitrary.

96. A copy of the decision finding the detention arbitrary or unlawful will be transmitted to the person concerned, with notification of the procedures for obtaining reparations.

97. These persons have the right to full compensation for material harm, elimination of the consequences of material harm and restoration of all rights that were either denied or infringed.

98. In the event of a person's death, the right to compensation in line with established procedures falls to their heirs.

99. Comprehensive legislation shall be developed to regulate the enforceable right to receive compensation for anyone determined to have been arbitrarily or unlawfully detained and for any harm suffered by a person as a result of unlawful deprivation of liberty, irrespective of whether the detaining authorities were responsible for such harm.¹²² Compensation shall also be made available to persons wrongly subjected to criminal charges that were subsequently dropped.

100. Compensation out of the public treasury of the State, federal entity or municipality for material damage suffered by a victim of arbitrary or unlawful detention may include: earnings, pensions, social benefits and other monies lost as a result of the criminal prosecution; any property of the victim that was seized or otherwise appropriated by the State on the basis of a conviction or court ruling; fines and trial costs that the person had to bear as a result of the enforcement of the conviction; the victim's legal costs; and other costs.¹²³

101. Release from detention and compensation may not, on their own, be sufficient to provide the victim of an arbitrary or unlawful detention with full and effective remedy. The individual shall have an enforceable right before the competent domestic authority to prompt and adequate:

(a) Restitution: this should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property;¹²⁴

(b) Rehabilitation: this should include medical and psychological care as well as legal and social services;¹²⁵

(c) Satisfaction: this should include, where applicable, any or all of the following:¹²⁶

- (i) Effective measures aimed at the cessation of continuing violations;
- (ii) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (iii) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (iv) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (v) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (vi) Judicial and administrative sanctions against persons liable for the violations;
- (vii) Commemorations and tributes to the victims;
- (viii) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

(d) Guarantees of non-repetition: this should include, where applicable, any or all of the following measures, which will also contribute to prevention:¹²⁷

- (i) Ensuring effective civilian control of military and security forces;
- (ii) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (iii) Strengthening the independence of the judiciary;
- (iv) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (v) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (vii) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (viii) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Guideline 17. Exercise of the right to bring proceedings before a court without delay to challenge the lawfulness and arbitrariness of detention in situations of armed conflict, public danger or other emergency that threatens the independence or security of a State

102. Where persons accused of acts of terrorism are deprived of their liberty:¹²⁸

(i) They shall be immediately informed of the charges against them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(ii) They shall enjoy the effective right to judicial determination of the arbitrariness and lawfulness of their detention;

(iii) The exercise of the right to judicial oversight of their detention does not impede on the obligation of the law enforcement authority responsible for the decision to detain or to maintain the detention, to present the detainee before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(iv) In the development of judgements against them, they shall have a right to enjoy the necessary guarantees of a fair trial, access to legal assistance and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process.

103. Where civilians are detained in the context of an international armed conflict, the following must be ensured:

(a) Reconsideration of a decision to intern or place a civilian in assigned residence¹²⁹, or appeal in the case of internment or assigned residence¹³⁰, must be undertaken “as soon as possible”¹³¹ or “with the least possible delay”¹³². While the meaning of these expressions must be determined on a case-by-case basis, delays in bringing a person before the court must not exceed a few days and must be proportional in the particular context;

(b) Although the particular procedures for reconsideration or appeal are for determination by the Detaining or Occupying Power, such proceedings must always be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and its processes must include and respect fundamental procedural safeguards;

(c) Where decisions to intern or place a civilian in assigned residence are maintained following the latter proceedings, internment or residential assignment must be periodically reviewed, at least twice each year;

(d) The latter periodic review must also be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards.

104. The right of persons detained as prisoners of war in the context of an international armed conflict¹³³ to bring proceedings before court without to delay

to challenge the arbitrariness and lawfulness of their detention and receive appropriate remedy shall be respected in order to:

(a) Determine whether a person does indeed fall within the category of prisoner of war¹³⁴, noting that the implications of this are very serious for the person concerned given that this can mean a very lengthy period of detention until the cessation of active hostilities;

(b) Act as a check to ensure that a seriously injured or seriously sick prisoner of war is repatriated or transferred to a neutral State;¹³⁵ and/or

(c) Act as a check to ensure that prisoners of war are released and repatriated without delay after cessation of active hostilities;¹³⁶

105. In regard to detention in the context of a non-international armed conflict:

(a) Administrative detention or internment may only be permitted in the exceptional circumstance where a public emergency is invoked to justify such detention. In such cases, the detaining State must show that:

i). The emergency rises to the level to justify derogation;

ii). The administrative detention is on the basis of grounds and procedures prescribed by law of the State in which the detention occurs and consistent with international law;

iii). The administrative detention of each person is necessary, proportionate and non-discriminatory, and the threat posed by that individual cannot be addressed by alternative measures short of administrative detention; and

(b) A person subject to administrative detention in a non-international armed conflict has the right to bring proceedings before a court that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards, including disclosure of the reasons for the detention and the right to defend oneself including through legal representation;

(c) Where an internment regime is established, it shall be consistent with international human rights law and international humanitarian law applicable to non-international armed conflict, to allow full compliance with the right to bring proceedings before a court.¹³⁷

Guideline 18. Specific measures for children

106. The use of alternative measures and sanctions to the deprivation of liberty, where appropriate, must be provided for and given priority, to ensure that children have the right to legal assistance and other appropriate assistance so that deprivation of liberty is a measure of last resort and for the shortest appropriate period of time.

107. Every child deprived of his or her liberty shall be provided with a safe, child-sensitive environment and be treated with dignity and respect, and in a manner that takes into account any situation of vulnerability, in particular with regard to girls; younger children; children with disabilities; non-nationals, including migrants regardless of their migration status, refugees and asylum seeking children; children from minority, ethnic or indigenous groups; and LGBTI children.

108. If there is uncertainty regarding the age of the person deprived of his or her liberty, effective mechanisms shall be in place to verify the age of children. The assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.

109. To ensure children's prompt and effective access to an independent and child-sensitive process¹³⁸ to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of their detention and receive appropriate remedy,¹³⁹ the following specific measures shall be enacted:

(a) All legislation, policies and practices related to children deprived of liberty and their right to bring proceedings before a court are guided by the right of the child to have his or her best interests taken as a primary consideration;

(b) Legal or other appropriate assistance, including interpretation, is provided to children free of charge in all proceedings;

(c) Children who are deprived of their liberty for any reason are able to contact their parents or guardians immediately and are able to consult freely and in full confidentiality with them. It is prohibited to interview a child in the absence of his or her lawyer or other legal aid provider, and parent or guardian, when available;

(d) Information on rights is provided in a manner appropriate for the child's age and maturity, in a language that the child can understand and in a manner that is gender- and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition, and not an alternative, to communicating information to the child;

(e) Any child deprived of his or her liberty has the right to bring a complaint in his or her own name or through a representative or an appropriate body if it is in his or her best interests. Children must be allowed to be heard either directly or through a representative or an appropriate body in any proceedings. Wherever possible, children should have the opportunity to be heard directly. If children choose to be heard through a representative, it must be ensured that children's views are transmitted correctly to the competent body and they should be aware that they represent exclusively the interests of the child;

(f) The child has the right to have the matter determined in the presence of his or her parents or legal guardian, unless it is not considered to be in the best interests of the child. In cases of conflict of interest, courts and other relevant complaint mechanisms should be empowered to exclude parents and/or legal representatives from proceedings and appoint an *ad hoc* legal guardian to represent a child's interest;

(g) Each case from the outset must be handled expeditiously, without any unnecessary delay.¹⁴⁰ A decision must be rendered as soon as possible, and not later than two weeks after the challenge is made;¹⁴¹

(h) The privacy and personal data of a child who is or who has been involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law. This generally implies that no information or personal data may be made available or published, particularly in the media, that could reveal or indirectly enable the disclosure of the child's identity, including images of the child, detailed

descriptions of the child or the child's family, names or addresses of the child's family members and audio and video records.

Guideline 19. Specific measures for women

110. Applicable and appropriate measures shall be taken to ensure the right of women to equal and fair access of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy. These shall include:

(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices that are designed to protect the rights and specific status and distinct needs of women and girls who are subject to the deprivation of their liberty;

(b) Taking active steps to ensure that, where possible, persons trained in women's right are available to provide legal aid, advice and court support services in all legal proceedings to female detainees;

111. The practice of of keeping girls and women in detention for the purpose of protecting them from risks of serious violence (protective custody) should be eliminated and replaced with alternative measures that ensure the protection of women and girls without jeopardizing their liberty.¹⁴²

Guideline 20. Specific measures for persons with disabilities

112. The involuntary committal or internment on the grounds of disability or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is prohibited.

113. Where persons with disabilities are deprived of their liberty through any process,¹⁴³ they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of the person.

114. A mechanism shall be established, replete with due process of law guarantees, to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent.¹⁴⁴

115. Measures shall be taken to ensure the provision of reasonable accommodation, procedural and substantive due process, including the following guarantees:

(a) Every person with a physical, mental, intellectual or sensory disability deprived of his or her liberty is treated with humanity and respect, and in a manner that takes into account their needs, including by provision of reasonable accommodation;

(b) This includes persons with disabilities who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. It also includes anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental impairment, including persons which have been declared exempt from criminal responsibility;

(c) All mental health services are provided based on the free and informed consent of the person. The denial of legal capacity of persons with disabilities and

detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty in violation of international law;

(d) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity, including through the provision of interpreters, information in accessible formats and/or independent third parties who are not employed by the law enforcement authority and who are appropriately qualified;¹⁴⁵

(e) Any form of support must always take place in respect of the will and preference of the rights-holder;

(f) Persons with disabilities can access, on an equal basis with other persons subject to detention, the physical environment, information and communications, and other facilities provided by the detaining authority;

(g) Accessibility should also take into account the gender and age of persons with disability, and equal access should be provided regardless of the type of impairment, legal status, social condition, gender and age of the detainee;

(h) Persons with psychosocial disabilities must be given the opportunity to promptly stand trial, with support and accommodations as may be needed, rather than declaring the person incompetent;

(i) Accommodation must be provided for persons with disabilities, including those with psychosocial and intellectual impairments, deaf, blind and deaf-blind persons, and persons with physical impairments, to appear before the court. This may include physically accessible court facilities, augmentative and alternative means of communication, plain language, and other similar means that allow for understanding and actively act in such circumstances;

(j) Persons with disabilities shall be provided with legal or other appropriate support, including interpretation and peer support mechanisms so detainees can be educated about their rights, and organizations may act on behalf of those detained against their will;

(k) Individuals who are currently detained in mental health facilities and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release include injunctive relief;

(l) Such relief should consist of measures such as requiring mental health facilities to unlock their doors and inform people of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and re-entry into the community. Such assistance programs should not be centred on the provision of mental health services or treatment, but free or affordable mental health services and treatment, including alternatives that are free from medical-model diagnosis and interventions, as well as both access to medications and assistance in withdrawing from medications, should be made available for those who desire them;¹⁴⁶

(m) Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity.¹⁴⁷

Guideline 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers and refugees

116. Any restrictions on the freedom of non-nationals, including migrants regardless of their migration status, asylum seekers and refugees, must be justified, necessary and proportionate. To ensure that the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy is not limited to nationals but is also available to all individuals who may find themselves in the territory or subject to the State's jurisdiction, and shall be guaranteed effective and free access to the courts of law and respect for the following guarantees:

(a) Respecting their right to, either personally or through a representative, challenge the arbitrariness and lawfulness of detention before a court of law at any time;

(b) Guaranteeing detainees the right to be informed orally and in writing of the reasons for detention, and on the rights of persons in detention, including the right to challenge the arbitrariness and lawfulness of detention, in a language and in terms the person detained understands.¹⁴⁸ This may require the provision of information through cost-free and qualified interpreters and translators;

(c) Publicizing information regarding the ability to challenge the arbitrariness and lawfulness of detention, including through posters in places of detention;

(d) Allowing monitoring and public reporting to ensure that access to legal provisions for procedural guarantees is effective;

(e) The right to contact, and be contacted by any interested parties that might be able to address their needs and provide them with relevant information or legal assistance. This includes providing facilities to meet with such persons. This is particularly important where migrant detention facilities are located in remote locations far from population centres. In such situations, mobile courts and video conferencing may be used to gain accessibility to a court of law;

(f) Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health;¹⁴⁹

(g) All decisions and actions in relation to migrants below the age of 18, whether accompanied or unaccompanied, shall be consistent with the principle of the best interests of the child, and shall accord with the specific protections afforded to children in these draft Principles and Guidelines;

(h) Reflection in national legislative frameworks and migration policies that the detention of a child because of their or their parent's migration status always constitutes a child rights violation and contravenes the principle of the best interests of the child;¹⁵⁰

(i) Informing unaccompanied migrant children about their legal status to ensure that they fully understand their situation. The provision of public defence services and/or guardians, who are adequately trained to work with children, particularly taking into account the extreme vulnerability and need for care, and speak their native language. Unaccompanied migrant children should not be placed in detention centres or shelters for migrants, but in non-custodial community-based alternatives to detention, where they can receive all services necessary for their protection and recovery, such as adequate nutrition, access to

quality education and leisure, care, physical and psychological medical care and security. Special attention should be given to family reunification;

(j) In the case of migrants in an irregular situation, the scope of the judicial review cannot be confined to a formal assessment of whether the migrant concerned entered the State without a valid entry permit, without the possibility of release if the detention is determined to be unlawful or arbitrary;¹⁵¹

(k) Proceedings to challenges of immigration detention decisions must be suspensive to avoid expulsion prior to the case-by-case examination of migrants, regardless of their status, under administrative detention;¹⁵²

(l) The arbitrariness and lawfulness of detention should be automatically reviewed periodically to ensure that continued detention is justified.

Guideline 22. Implementation measures

117. Legislative, administrative, judicial and other measures, including through the development of common law principles, shall be adopted to give effect to these draft Principles and Guidelines to ensure that the rights and obligations contained in them are always guaranteed in law and practice, also in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.

118. This shall include a review of existing legislative, administrative and other provisions to assess compatibility with the draft Principles and Guidelines. The country visits of the Working Group on Arbitrary Detention present an opportunity to engage in direct dialogue with the Government in question and with representatives of civil society, in order to assist with the implementation of these draft Principles and Guidelines.

119. States are encouraged to provide training to judges, tribunal and legal officers on how to apply customary international law and rules from the International Convention on Civil and Political Rights, as well as relevant international standards. The Working Group on Arbitrary Detention stands ready to assist in fulfilling this duty of States.

120. Legislation shall be enacted to consider as a crime the acts or omissions that impede or restrict the right of anyone deprived of his or her liberty to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy.

121. Violations of the rights enshrined in these draft Principles and Guidelines shall be investigated, prosecuted and punished.

122. These draft Principles and Guidelines shall be widely disseminated, including to justice sector actors, the community, and to National Human Rights Institutions, National Preventative Mechanisms, statutory oversight authorities and other institutions or organisations with a mandate to provide accountability, oversight or inspections to places of deprivation of liberty. The Office of the High Commissioner for Human Rights is respectfully requested to further their wide dissemination.

¹Articles 8, 9 of the Universal Declaration of Human Rights (UDHR); Article 9(4), International Convention on Civil and Political Rights (ICCPR); Article 37(b, d) of the Convention on the Rights of the Child (CRC); Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD); Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearances (ICPPED); Articles 16, 32(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; Principles 4, 11, 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); Rules 7.1, 10.2, 13 of the United Nations Rules for the Protection of Juvenile Deprived of Their Liberty; Guideline 7 of the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (UNCHR Guidelines); Article 7(1)(a) of the African Charter on Human and People's Rights (African Charter); Article 5(h) of the Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014); Sections M, S of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); Article XXV of the American Declaration of the Rights and Duties of Man (1948) (American Declaration); Article 7(6) of the American Convention on Human Rights (American Convention); Principles V, VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008); Article 14(6, 7) of the Arab Charter on Human Rights (Arab Charter); and, Article 5(4, 9) of the European Convention on Human Rights (ECHR).

'Without delay' applies both to the right to get the matter before a court, and to the duty of the court to determine whether the detention is arbitrary or unlawful.

² Report of the Working Group on Arbitrary Detention (WGAD): A compilation of national, regional and international law, regulations and practice on the right to challenge the lawfulness of detention before court (A/HRC/27/47).

³ Subcommittee on Prevention of Torture the right to challenge the lawfulness of detention before court is characterized as a "fundamental safeguard against torture or other cruel, inhuman or degrading treatment or punishment", requiring the senior authorities in the institutions responsible for implementing habeas corpus to take the requisite steps to ensure the effectiveness of that right (CAT/OP/HND/1, para. 137).

Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, Article 13: an investigation should be conducted for as long as the fate of the victim of enforced disappearance remains unknown; The Working Group on Enforced or Involuntary Disappearances has reinforced the importance of guaranteeing the right to challenge the lawfulness of detention before court to clarify past cases of enforced disappearances (A/HRC/4/41/Add.1, paras. 61–63): "habeas corpus procedures that have been suspended in contradiction to the Declaration should be reopened and investigations should be effortlessly continued in order to endeavour to clarify past cases of enforced disappearances" (para. 108).

⁴ Report of the WGAD (A/HRC/19/57, para. 61).

⁶ Inter-American Court of Human Rights, Advisory Opinion, Habeas Corpus in Emergency Situations, OC-8/87 (1987), para. 42;

⁷ WGAD: Persons deprived of their liberty are frequently unable to benefit from legal resources and guarantees that they are entitled to for the conduct of their defence as required by law in any judicial system and by applicable international human rights instruments (A/HRC/10/21, paras. 45–47; A/HRC/19/57, para. 63). The right to challenge the lawfulness of detention is frequently denied in circumstances where a detainee has never been formally charged or brought before a judge, has been held incommunicado or in solitary confinement, or has been denied an effective possibility or remedy to challenge his or her detention (Opinion nos. 33/2012, 38/2012, 19/2012, 22/2012, 08/2011, 14/2011).

⁸ See Principle 4: Non-derogability of the right to bring proceedings before court without delay and to receive appropriate remedy.

⁹ Human Rights Council res. 20/16 (A/HRC/RES/20/16) para. 10.

¹⁰ Report of the WGAD, A/HRC/27/47.

¹¹ See Principle 16 (Exercise of the right to court review in situations of armed conflict, public danger or other emergency that threatens the independence or security of a State).

¹² Human Rights Committee (HRC) General Comment no. 35, paras. 3 and 46; and, Communications: 265/1987, Vuolanne v. Finland, para. 9.3 (military); 1069/2002, Bakhtiyari v. Australia, para. 9.5 (children);

1090/2002, *Rameka v. New Zealand*, paras. 7.2-7.3 (parole); see Concluding observations Ukraine 2013, para. 10 (LGBTI); Switzerland 2001, para. 15 (non-citizens).

¹³ See: Principle 8: Timeframe for exercise of the right to bring proceedings before the court;

WGAD Deliberation no. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 57 (A/HRC/22/44), citing E/CN.4/1997/4, para. 66;

HRC General Comment no. 35, para. 13;

¹⁴ WGAD Deliberation no. 9, paras. 58-59;

HRC General Comment no. 35, paras. 5 and 6;

¹⁵ WGAD Revised methods of work, para. 8 (A/HRC/16/47, Annex);

HRC General Comment no. 35, paras. 11, 12, 14-21;

¹⁶ Report of the Working Group on Arbitrary Detention, A/HRC/22/44.

¹⁷ Report of the Working Group on Arbitrary Detention (A/HRC/27/48), para. 83.

¹⁸ Deliberation No. 9 has been cited as one source on the approach to identification of customary international law by the Special Rapporteur of the International Law Commission on the identification of customary international law, Sir Michael Wood, Sir Michael Wood in his first and second reports on formation and evidence of customary international law submitted to the International Law Commission, see First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/663), para. 53 and Annex of the Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/672), paras 41.8 and 76.6.

¹⁹ HRC General Comment no. 35, paras. 11, 22-23;

²⁰ The Working Group has in its jurisprudence applied the criteria in conformity with the conclusions on the identification of customary international law by the Special Rapporteur of the International Law Commission on the identification of customary international law, Sir Michael Wood, in his first and second reports on formation and evidence of customary international law submitted to the International Law Commission, see First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/663), and Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/672). The basic approach is two constituent elements, a general practice which is accepted as law. In the international law on human rights, it is accepted that general principles of international law have an important role, and interacts with these two constituent elements in the formation of customary law.

²¹ The Working Group regards the work of the Red Cross as complementary in securing the rights of the arbitrarily detained and as highly authoritative on IHL, and has applied the ICRC customary international study as such, see Jan-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005, and likewise the ICRC Customary IHL database.

²² HRC General Comment no. 35, para. 43; and, Communication No. 1090/2002, *Rameka v. New Zealand*, paras. 7.3 and 7.4.

²³ In para. 10, res. 20/16, the HRC states the aim of the draft basic principles and guidelines is to “assist [...] Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with intl human rights law.”

In para. 19 of its Deliberation no. 9, the WGAD stated: “The notion of arbitrary *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary”. Further, the WGAD in its 2011 report to the HRC (A/HRC/19/57) stated, “the absence of a remedy of habeas corpus constitutes, *per se*, a human rights violation by depriving the individual [...] of the human right to protection from arbitrary detention.” Hence, if the Principles are restricted to a discussion of the lawfulness of the detention, not only will the aim of the HRC’s exercise be lost, but it would also severely limit the scope of protection this right could offer to persons deprived of their liberty.

²⁴ UDHR (Article 9).

²⁵ The right to bring such proceedings before court is well enshrined in treaty law and customary international law and constitutes *jus cogens*, as observed by the WGAD in its deliberation No. 9 (2013) concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44).

WGAD Background Paper, para. 15: A review of State practice demonstrates widespread acceptance to be bound by the obligation to ensure the right to court review of detention through its codification in national law. A majority of States have enshrined the protection in their respective Constitutions or Codes of Criminal Procedure, and often times, both. Half the responding States demonstrated the right to court review of detention also features in a diversity of other legislative acts, including human rights acts, administrative offence codes, and civil law procedural codes, among others. A very small number of States demonstrated the existence of the procedural safeguard in laws exclusively regulating the detention of particular vulnerable groups, including laws relating to child detainees, to detained migrants, including asylum seekers, and to persons detained involuntarily on health grounds. An equally small number of States have specialized laws uniquely dealing with the right to challenge the lawfulness of detention before court.

²⁶ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003, section M, details the components necessary in order to ensure exercise of the procedural guarantee, including the necessity for States to enact legislation to ensure the right.

²⁷ Committee against Torture (CAT): a “State party must also adopt the measures necessary to guarantee the right of any person who has been deprived of their liberty to have access to an immediate remedy to challenge the legality of their detention” (CAT/C/CUB/CO/2, para. 8).

European Court of Human Rights: The right to court review of detention in domestic legislation must be effective and real, allowing for accessibility and certainty. *Assandize v. Georgia* (Application no. 71503/01) 8 April 2004; *Aden Ahmed v. Malta* (Application no. 55352/12) 23 July 2013.

²⁸ WGAD: Where due process rights are denied, a State cannot rely on the excuse of lack of administrative capacity (opinion nos. 21/2004 and 46/2006).

²⁹ Body of Principles (Principle 4): “any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority”.

WGAD (A/HRC/13/30/Add.2) and CAT (CAT/C/MRT/CO/1) have called on States parties to provide access to effective judicial remedies to challenge the legality of administrative decisions on detention.

Special Rapporteur on Migrants and human rights: Governments must ensure that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention (A/HRC/20/24, para. 72 (a)).

³⁰ ICCPR (Article 9(4)): “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

African Charter (Article 7(1)(a)): guarantees “the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

African Commission: “the writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and to demand that the authority either release or justify all imprisonment” (143/95-150/96: Constitutional Rights Project and Civil Liberties Organization – Nigeria, para. 23).

American Declaration (Article XXV): “every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released”.

American Convention (Article 7(6)): “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights (2008) (Principle V) (Inter-American Principles): “all persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights”.

Arab Charter on Human Rights (2004) (Article 14(6)): “anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”.

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

Oxford Pro Bono Publico study: In relation to all types of detention governed by civilian (as opposed to military) justice systems, there appears to be a very strong trend toward guaranteeing the right of a detainee to challenge the lawfulness of their detention before a judicial body (p. 100). There is a very strong trend toward requiring that all members of the military detained as a disciplinary measure be guaranteed the right to challenge their detention, although the nature and scope of the right to court review differs (p. 97).

HRC General Comment 31, para. 10;

CAT General Comment 2, para. 7;

³¹ This Principle is not limited to the legal concept of “the writ of habeas corpus”.

³² See: Introduction, paragraph 4, of this report.

Inter-American Court of Human Rights, Advisory Opinion, Judicial Guarantees in States of Emergency (articles 27.2, 25, 8 IAConvention on Human Rights), OC 9/87 (1987), para. 41(1). [source: http://www1.umn.edu/humanrts/iachr/b_11_4i.htm]; Advisory Opinion 8/87 from January 30, 1987 entitled Habeas Corpus under suspension of guarantees (ARTS. 27.2, 25.1 Y 7.6) of the Interamerican Convention on Human Rights. [source: http://www1.umn.edu/humanrts/iachr/b_11_4h.htm]

WGAD, Deliberation No. 9: “the prohibition on arbitrary deprivation of liberty, and the right of anyone deprived of his or her liberty to bring proceedings before court in order to challenge the lawfulness of the detention, are non-derogable, under both treaty law and customary international law” (A/HRC/22/44, para. 47) (UN Doc A/HRC/7/4 (2008), paras. 67, 82(a));

WGAD 2011 Report of the Working Group on Arbitrary Detention, A/HRC/16/47, 19 January 2011, para. 63: “The Working Group is of the view that, in their domestic legislation, States should ensure that the remedy of habeas corpus meets the following minimum requirements in order to comply with international human rights law...Non-derogability: even in cases provided for in article 4 of the Covenant, and in cases of armed conflict – whether between two or more States parties or within the same State party – in conformity with the Geneva Conventions. Provision to that effect has been made by all human rights bodies of the United Nations system (see Commission on Human Rights resolution 1993/36, para. 16, and many others, including resolution 1994/32, which refers to habeas corpus as “a personal right not subject to derogation, including during states of emergency”).”

Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11: The 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. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. 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 by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

Human Rights Committee, General Comment No. 35 of the HRC. Document CCPR/C/21/Rev.1/Add.11, para. 14: “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.” Footnote 9: “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.”

³³ American Convention (Article 7(6): “... In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished.”

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Section M(5)(e)).

- ³⁴ Arab Charter (art. 4 (1 and 2)): The legal protections provided for in article 14 of the Charter cannot be derogated from, not even in times of public emergency;
 Inter-American Convention on Forced Disappearance of Persons (Article X);
 HRC General Comment No 29, para. 16;
 Commission on Human Rights resolution 1992/35, para. 2;
 Joint Study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention, represented by its Vice-Chair Shaheen Sardar Ali; and The Working Group on Enforced or Involuntary Disappearances, represented by its Chair Jeremy Sarkin (A/HRC/13/42), paras. 46-47;
 Report on the visit of the Subcommittee on Prevention of Torture to Honduras, UN Doc CAT/OP/HND/1 (2010), para. 282(a)-(b);
 Report of the WGAD, A/HRC/7/4, para. 64; E/CN.4/1995/31, para. 25 (d).
 Subcommittee on Prevention of Torture: recommends “the effectiveness and absolute non-derogability of habeas corpus be guaranteed in states of emergency” (CAT/OP/HND/1, para. 137).
 Committee on Enforced Disappearances: recommends the adoption of “the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure” (CED/C/ESP/CO/1, para. 26).
- ³⁵ See: para. 9 of this report regarding the definition of “anyone”.
- ³⁶ ICCPR (Article 14(1));
 African Commission, Constitutional Rights Project v Nigeria, No 153/96, 13th Activity Report (15 November 1999) paras 15-18.
 Body of Principles (Principle 11): “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. ... 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 HRC Communications Nos. 1090/2002, Rameka v. New Zealand, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court) and 291/1988, Torres v. Finland, para. 7.2 (finding review by Minister of the Interior insufficient); and general comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), paras 19- 24. “A “court” must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature”; Vuolanne v Finland, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), paras 7.2 and 9.6 .
 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003, entrusts judicial bodies to, at all times, hear and act upon petitions for habeas corpus, amparo or similar procedures, and states that no circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures. These are defined as “a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body” (section S (m), Principles A(4) and A(5)).
 Inter-American Court of Human Rights, Chaparro Álvarez and Lapo Íñiguez v Ecuador, Series C No 170 (21 November 2007), paras 128-130. The authority which decides on the legality of an arrest or detention must be a judge or court; article 7(6) of the Convention is therefore ensuring judicial control over the deprivation of liberty”. Vélez Loo v. Ecuador, para. 126 [complete citation]: “The review by a judge or a court is a fundamental requirement to guarantee adequate control and scrutiny of the administrative acts which affect fundamental rights”.
 European Court of Human Rights (Grand Chamber), D.N. v Switzerland, App No 27154/95 (29 March 2001), para 42. The procedure ... requires a hearing of the detainee before the judicial organ, a body independent of the executive, with a guarantee of impartiality and the force to implement its decisions.
- ³⁷ ICCPR (Article 9(2)).
 African Commission Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014) (Article 5(h)): upon arrest, persons must be informed of the right to challenge their detention.
- ³⁸ HRC General Comment no. 35, paras. 25 and 46; and, Concluding observations: Switzerland (1996), para. 111; and Benin (2004), para. 16.

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- ³⁹ HRC Communication No. 291/1988, *Torres v. Finland*, para. 7.2 (seven days); *Paul Kelly v Jamaica*, UN Doc CCPR/C/41/D/253/1987 (8 April 1991), para 5.6 (one month); HRC, *Akhadov v. Kyrgyzstan*, UN Doc CCPR/C/101/D/1503/2006 (25 March 2011), para. 7.4 (two weeks); Concluding observations: *Suriname*, UN Doc CCPR/CO/80/SUR (2004), para 14; *Sri Lanka* (1995) (one year).
- ⁴⁰ See para. 10 of this report regarding the term “deprivation of liberty”.
- Body of Principles (Principle 32): “1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.”
- ⁴¹ Body of Principles (Principle 11): “1. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”
- HRC General Comment no. 35, para. 46; Communications; *Umarova v Uzbekistan*, UN Doc CCPR/C/100/D/1449/2006 (19 October 2010), para. 8.5; *Bousroual v Algeria*, UN Doc CCPR/C/86/992/2001 (30 March 2006), para 9.7. See also: Concluding Observations: *Benin* (2004), para. 16; *Belgium*, UN Doc CCPR/C/BEL/CO/5 (2010), para 17; *Portugal*, UN Doc CCPR/C/PRT/CO/4 (2012); *Turkey*, CCPR/C/TUR/CO/1 (13 November 2012), para 17; *Czech Republic*, CCPR/CO/72/CZE (27 August 2001), para 17; *The Netherlands*, CCPR/C/NLD/CO/4 (25 August 2009), para 11; *Spain*, UN Doc CCPR/C/ESP/CO/5 (2008), para 14.
- UN Basic Principles on the Role of Lawyers, unanimously endorsed by the General Assembly in resolution 45/166 of 18 December 1990, Principle 7;
- Inter-American Court of Human Rights, *Vélez Loor v Ecuador*, Series C No 218 (23 November 2010), para 139.
- Inter-American Principles, Principle V (4): “The detainee must have an “opportunity to be represented by counsel or some other representative”.”
- African Commission on Human and Peoples Rights, *Liesbeth Zegveld and Messie Ephrem v Eritrea*, No 250/2002, 17th Activity Report (November 2003), para 55;
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles M(2)(b), (e), and (f).
- European Court of Human Rights, *Castravet v Moldova* App No 23393/05 (13 March 2007) paras 47-50; *Singh v the United Kingdom* (App No 23389/94) ECHR1996-I (21 February 1996), para 68; *Soysal v Turkey* App No 50091/99 (3 May 2007) paras 77-81.
- ⁴² Body of Principles (Principle 17).
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in resolution 67/187 of 20 December 2012, paras 43(a), (b) and (d).
- Inter American Convention on Human Rights, article 8(e): the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;” Also article 14.3.d) establishes the right to: “(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;”
- HRC, *Komarovski v Turkmenistan*, UN Doc CCPR/C/93/D/1450/2006 (24 July 2008), paras 2.7, 3.4, 7.4.
- ⁴³ UN Basic Principles on the Role of Lawyers, Principle 16.
- ⁴⁴ UN Basic Principles on the Role of Lawyers, Principles 8 and 22;
- UN Principles and Guidelines on Access to Legal Aid, para 43(d);
- UN Body of Principles (Principles 18(3) and (4)).
- HRC, *Austria*, UN Doc CCPR/C/AUT/CO/4 (2007), para 16.
- European Court of Human Rights, *Castravet v Moldova* App No 23393/05 (13 March 2007), paras 51-55, 58-60; *Istratii and Others v Moldova* App No 8721/05 (27 March 2007) paras 91-95, 98-100; *Modarca v Moldova* App No 14437/05 (10 May 2007) paras 89-93, 96-98; *Musuc v Moldova* App No 42440/06 (6 November 2007) para. 57; *Rybacki v Poland*, App no 52479/99 (13 January 2009), paras 56-62.
- Inter-American Principles, Principle V, fourth para;
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(c).
- ⁴⁵ Body of Principles (Principle 32(2)).
- ⁴⁶ ICCPR, article 14.3. (b)
- IACHR, article 8.2.c.
- ⁴⁷ International Convention for the Protection of All Persons from Enforced Disappearance (Article 17 (2)(f)): State parties must “guarantee that ... any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to

take proceedings 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";

HRC General Comment no. 35, para. 46;

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section M (Principle M(5)(b) and (c)): "anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty".

American Convention (Article 7(6)): "... The interested party or another person in his behalf is entitled to seek these remedies."

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle V, fifth paragraph, and Principle VII, first paragraph): "This right may be exercised by third parties or organizations, in accordance with the law".

Body of Principles (Principle 32(1)).

WGAD Background paper, para. 44: The responses of States to the Working Group's questionnaire show widespread practice in guaranteeing the detainee the right to initiate proceedings to challenge the lawfulness of detention, him or herself, or to be represented by counsel of choice. A number of States have empowered a wider group of individuals to initiate such proceedings, including a legal guardian, a state authority such as the prosecutor or state-appointed health professional, the ombudsman or national human rights institution, a non-governmental organization, or the employer or co-workers.

⁴⁸ Body of Principles (Principle 32): "2. ... The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority."

HRC General Comment no. 35, para. 42: "The detainee has the right to appear in person before the court, and the court must have the power to order the detainee to be brought before it."

Inter-American Court of Human Rights, in advisory opinion OC-8/87 (30 January 1987) on habeas corpus in emergency situations, para. 33: the protection is "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered."

⁴⁹ Paragraph 8 of General Comment 32 of the HRC.

EctHR, *Wloch v Poland* (2000) ECHR 504, paras. 125-131; *A and Others v United Kingdom* (2008) ECHR 113, paras. 202-204;

⁵⁰ HRC, General Comment No 32, para 13.

⁵¹ EctHR, *Hutchinson Reid v. the United Kingdom*, Appl. No. 50272/99, Judgment (Third Section), 20 February 2003, para. 74; *Ilijkov v. Bulgaria*, Appl. No. 33977/96, Judgment (Fourth Section), 26 July 2001, para. 87.

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (2012) (para. 47 (v)).

WGAD: *Azharul Islam et al. v. Bangladesh*, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/66 7, August 2013, paras. 52-58.

⁵² HRC Communication nos. *A v Australia*, Communication 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) para. 9.5; *1255/2004 et al.*, *Shams et al. v. Australia*, para. 7.3;

European Court of Human Rights, *A and Others v United Kingdom* (2008) ECHR 113, para. 202.

⁵³ Article 8, UDHR;

HRC General Comment no. 35, para. 52.

Article 9.5 ICCPR (Spanish and French versions for reparations);

UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly in resolution 60/147 of 16 December 2005, paras 18-23

⁵⁴ ICCPR, Article 9(5).

UN Basic Principles on Remedy and Reparation, para 20.

International Convention on the Protection of the Rights of All Migrant Workers (Article 16(9)): Where it has been determined that migrant workers and members of their families have been victims of unlawful arrest or detention, the Convention guarantees an enforceable right to compensation. A claim for compensation may be made where the arrest or detention is found unlawful under national or

international law and States parties must ensure that the right to compensation can be effectively enforced before the competent domestic authority (CMW/C/GC/2, para. 35).

Arab Charter (art. 14 (7)): Any victim of unlawful arrest or detention is entitled to compensation.

European Convention (Article 5(5)): Victims of unlawful arrest or detention have an enforceable right to compensation.

Rome Statute of the International Criminal Court (Article 85(1)).

Inter-American Court of Human Rights, *Loayza Tamayo v. Peru* (1998), para 129;

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M(1)(h));

African Commission, *Embaga Mekongo Louis v. Cameroon*, Communication 59/91, decided 22 March 1995 at the 17th Ordinary Session.

Permanent Court of International Justice, *Factory at Chorzów (Merits), Germany v Poland* 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), p.29.

Oxford Pro Bono Publico study: There is a consistent trend toward guaranteeing the right of persons whose detention is found to have been unlawful to obtain monetary compensation (p. 100). There is a strong trend toward making compensation available to an individual found to be unlawfully held in preventive detention and a strong trend toward requiring that monetary compensation be available to persons whose administrative detention for counter-terrorism, national security, or intelligence-gathering purposes is found to have been unlawful as well as to all members of the military whose detention under the military justice system is found to have been unlawful (p. 97-98). A weaker, but nonetheless significant, trend has been identified in the practice of States towards persons detained for migration-related reasons and persons detained for mental health reasons ensuring they be awarded compensation where their detention is found unlawful (p. 99).

⁵⁵ Inter-American Court of Human Rights, *Juan Humberto Sánchez v Honduras*, Series C No. 99 (7 June 2003), para. 121; *Bámaca Velásquez v Guatemala*, Series C No. 70 (25 November 2000), para 191;

ICJ, *The right to a remedy and to reparation for gross human rights violations – Practitioners Guide no. 2* (2006), Chapter 3, available at: <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>.

⁵⁶ HRC General Comment no. 35, para. 41 ; and, communications: *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), at para 9.5; *Shams et al. v Australia*, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007), para 7.3.

WGAD Background paper, para. 34: The great majority of responding States to the Working Group’s questionnaire report the existence of specific legal provisions empowering the reviewing body to order the immediate release of the detainee upon a successful challenge to the lawfulness of detention.

⁵⁷ ICCPR (Article 2(3)(c));

American Convention, article 25(2)(c);

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles C(c)(4) and M(2)(h).

European Court of Human Rights, *Assanidze v Georgia*, App no 71503/01 (8 Apr 2004), paras 173 and 185-187.

⁵⁸ International Committee of the Red Cross (ICRC): the ICCPR is one of three instruments binding the States that are Parties to them (ICRC commentaries to Protocol I, para. 2928). See also A/HRC/16/47, para. 46. Protocol I Article 75(4) reproduces most of the fair trial guarantees provided for in international human rights instruments. As noted in ICRC’s commentaries, in each of these treaties there is a clause permitting derogations from the articles in question in times of war (Ibid., para. 3092). Article 75 is not subject to any possibility of derogation or suspension and these provisions will play an important role in armed conflict (A/HRC/16/47, para. 48). In Protocol II, it is emphasized in the preamble that “international instruments relating to human rights offer a basic protection to the human person”. ICRC notes that this provision establishes the link between Protocol II and the international instruments on human rights (ICRC commentaries to Protocol II, para. 4427. See also A/HRC/16/47, para. 49).

⁵⁹ WGAD: International human rights law, and the rights related to liberty and security of the person in particular, apply everywhere and at all times, both in peace and in armed conflict, at home and abroad. There is agreement that the norms of international human rights instruments and customary international law protecting individuals against arbitrary detention shall be complied with by Governments in situations of armed conflict (A/HRC/16/47, para. 51).

ICRC commentaries to Protocol II, para. 4429, referring to United Nations General Assembly resolution 2675 (XXV), and resolution 2675 (XXV) as cited in A/HRC/16/47, para. 45.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep, §106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep, §216); Legality of the Threat or Use of Nuclear Weapons, §25; In its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice affirmed the applicability of the International Covenant on Civil and Political Rights during armed conflicts, save through the effect of provisions for derogation of any kind to be found in article 4 of the Covenant.

HRC General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13, para. 11); A/HRC/16/47, paras. 39 and 40.

Mohammed v Ministry of Defence (2014) ECWH 1369 (QB), §§ 288-290.

Judgement of the ECtHR Grand Chamber in Hassan v. the United Kingdom [GC], no. 29750/09, 16 September 2014: “[I]n relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. ., if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the “competent body” should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness.”

⁶⁰ Joint study on global practices in relation to secret detention in the context of countering terrorism by a group of Special Procedures mandate holders (A/HRC/13/42, para. 292(b)).

⁶¹ American Convention (Article 27(1));

European Court of Human Rights, Al-Jedda v UK (2011) ECHR 1092.

⁶² Report of the Working Group on Arbitrary Detention, A/HRC/7/4, 10 January 2008), para. 22.

⁶³ The Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987)., para. 22.

⁶⁴ IACHR Advisory Opinion OC-8/87, para. 39.

⁶⁵ American Charter s. 27(1).

⁶⁶ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, para. 50.

⁶⁹ HRC General Comment 31, para. 10;

CAT General Comment 2, para. CAT/C/GC/2, 24 January 2008, para. 7, para. 7;

European Court of Human Rights, Al-Jedda v UK (2011) ECHR 1092.

⁷⁰ WGAD: International human rights law, and the rights related to liberty and security of the person in particular, apply everywhere and at all times, both in peace and in armed conflict, at home and abroad. There is agreement that the norms of international human rights instruments and customary international law protecting individuals against arbitrary detention shall be complied with by Governments in situations of armed conflict (A/HRC/16/47, para. 51).

ICRC commentaries to Protocol II, para. 4429, referring to United Nations General Assembly resolution 2675 (XXV), and resolution 2675 (XXV) as cited in A/HRC/16/47, para. 45.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep, §106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep, §216); Legality of the Threat or Use of Nuclear Weapons, §25; In its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice affirmed the applicability of the International Covenant on Civil and Political Rights during armed conflicts, save through the effect of provisions for derogation of any kind to be found in article 4 of the Covenant.

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Mohammed v Ministry of Defence (2014) ECWH 1369 (QB), §§ 288-290. [cite]

⁶⁹ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section II: The detention of alien civilians in the territory of a party to the conflict may be ordered “only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary”, or if the civilian voluntarily demands this and his or her situation “renders this steps necessary” (article 42). In this case, Article 43 governs the procedure for review, entitling a civilian who has been interned or placed in assigned residence “to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power

for that purpose”. If the internment or assigned residence is maintained, “...the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit”. This reflects the rationale behind Rule 128(B) of the ICRC’s catalogue of rules of customary IHL, which provides that: “Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities”.

⁷⁰ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section III: The Occupying Power may, at the most, subject civilians to internment or assigned residence within the frontiers of the occupied country “if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons” (article 78). “Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay...” If a decision to intern or place in assigned residence is upheld, this “...shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power”.

Inter-American Commission, *Coard et al v United States* (Case 10.951 (1999)): “This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention” (para. 57).

⁷¹ The ICRC Commentary emphasises that both internment and assigned residence are of an exceptional character and represent the most severe measures that a Detaining or Occupying Power may resort to with respect to protected persons (pp.256 and 368). The right to appeal against a decision regarding residential assignment or internment does not expressly state the nature of the body that is to consider the appeal. The ICRC Commentary explains that it is for the Occupying Power to decide on the procedure to be adopted under Article 78, but notes that it must observe the stipulations in Article 43 (p.368), which requires decisions by a body that offers the necessary guarantees of independence and impartiality (p.260). In the decision of the IACoMHR in *Coard et al v United States*, the Commission considered that the decision to detain must “not be left to the sole discretion of the state agent(s) responsible for carrying it out” (paras. 55 and 59). It expressed this requirement to be fundamental and reflecting the rationale of the right to habeas corpus, such that it is not capable of being overlooked in any context (para. 55). The Commission noted that compliance with this requirement did not have to be through recourse to the Grenadian court system but could have been accomplished through the establishment of an expeditious judicial or quasi-judicial review process (para. 58). It emphasised that the appeal mechanism must have the authority to order release where warranted (para. 60).

⁷² Third Geneva Convention relative to the Treatment of Prisoners of War: Persons may be held as prisoners of war if they “have fallen into the power of the enemy” and if they fall within one of the categories specified in Article 4, including members of armed forces of a party to the IAC (4(1)), members of other armed forces who profess allegiance to a party to the IAC (4(3)), members of militias fulfilling certain conditions (4(2)), persons who accompany the armed forces, such as civilian contractors and war correspondents (4(4)).

⁷³ POWs may be subject to internment in a POW camp, or to close confinement if this is necessary to safeguard their health, and then only so long as the circumstances that make such confinement necessary continue (Article 21). Confinement to a cell or room may otherwise only be permitted in execution of penal or disciplinary sanctions (Part III, Section VI, Chapter III). POWs who are seriously wounded or seriously sick must be sent back to their own country, after having been cared for until fit to travel, unless such repatriation during hostilities is against the will of the POW (Article 109).

⁷⁴ POWs must be released and repatriated without delay after the cessation of active hostilities (Article 118; Additional Protocol I, Article 75(3); and Rule 128(A) of the ICRC’s catalogue of rules of customary IHL)

⁷⁵ Rule 128(C) of the ICRC’s catalogue of rules of customary IHL: “Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist”.

HRC Concluding Observations: Israel, UN Doc CCPR/C/79/Add.93 (1998) paras. 11, 12.

Report of the Special Rapporteur on counter-terrorism, Mission to Israel, UN Doc A/HRC/6/17/Add.4 (2007) para. 10.

⁷⁶ WGAD: The treaty provisions relating to armed conflict that are applicable in such conflicts are minimal, and international human rights law provides important additional protections.

⁷⁷ “Child” shall mean any person under 18 years of age, in line with the Convention on the Rights of the Child.

⁷⁸ Convention on the Rights of the Child (Article 37 (b)): “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. Article 37 (d) guarantees to every child deprived of his or her liberty “the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Rule 13): “juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.”

Rule 7.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) calls for the guarantee of basic procedural safeguards at all stages of the proceedings, including the right to appeal to a higher authority.

⁷⁹ Committee on the Rights of Persons with Disabilities: CRPD/C/SLV/CO/1, paras. 31 and 32; CRPD/C/PER/CO/1, paras. 28 and 29.

HRC, General Comment no. 35, para. 19.

⁸⁰ Convention on the Rights of Persons with Disabilities (article 14): States Parties must “ensure that persons with disabilities ... are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law ... If persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law”. Involuntary committal or institutionalization on the grounds of disability, or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is not in compliance with the Convention, and the Committee has called upon States to amend laws and to adopt measures to prohibit involuntary committal or internment, and to design and implement de-institutionalization strategies (CRPD/C/ARG/CO/1/ para. 23; CRPD/C/CHN/CO/1 paras. 25 and 26).

⁸¹ WGAD: all persons deprived of their liberty on health grounds must have judicial means of challenging their detention (E/CN.4/2004/3, para. 87). WGAD deliberation No. 7 on issues related to psychiatric detention: preventing mentally disabled persons from leaving may, in principle, amount to deprivation of liberty (E/CN.4/2005/6, para. 51). When assessing whether the measures taken are in compliance with international standards, the vulnerable position of persons affected by (alleged) illness has to be duly taken into consideration (E/CN.4/2005/6, para. 57). The Working Group applies the following criteria: ICCPR (Article 9(4)) shall be applied to anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder. In addition, the necessity whether to hold the patient further in a psychiatric institution shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ, and the patient released if the grounds for his detention do not exist any longer. In the review proceedings, his vulnerable position and the need for appropriate representation must be taken into consideration (E/CN.4/2005/6, para. 58 (e)).

⁸² WGAD deliberation no. 5 (1999) concerning the situation of immigrants and asylum seekers: In the case of absence, violation, circumvention or non-implementation of the following procedural guarantees, the WGAD may conclude that the custody is arbitrary: notification of the custodial measure in writing, in a language understood by the asylum seeker or immigrant, stating the grounds for the measure, and setting out the conditions under which the asylum seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned (E/CN.4/2000/4, principle 8).

⁸³ Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers sets out the right to liberty and security of person for migrant workers and members of their families and the right not to be subjected individually or collectively to arbitrary arrest or detention (paras. 1 and 4). Migrant workers and members of their families who are deprived of their liberty by arrest or detention are

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- entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (para. 8).
- UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (Guideline 7): respect for the detainee's right, either personally or through a representative, to challenge the lawfulness of detention before a court of law at any time.
- HRC: the 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. General comments No. 35 (2014) on Article 9 : the right to liberty and security of persons, paras. 3, 7; No. 15 (1986) on the position of aliens under the Covenant, and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (HRI/GEN/1/Rev.9 (Vol. I) p. 189, para. 2; and p. 245, para. 10).
- ⁸⁴ Committee on Migrant Workers, General Comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention, and have timely access to effective legal remedies (para. 33);
- ⁸⁵ Special Rapporteur on the human rights of migrants (A/HRC/20/24, para. ?): Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings.
- International Convention on the Protection of the Rights of All Migrant Workers (Article 16): In attending such proceedings, they are entitled to have cost-free assistance to an interpreter if they cannot understand or speak the language used (para. 8).
- ⁸⁶ WGAD: Detention must be ordered or approved by a judge or a body affording equivalent guarantees of competence, independence and impartiality (E/CN.4/1999/63, para. 69).
- ⁸⁷ WGAD: The procedural guarantee of article 9(4), ICCPR, requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. There should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. A maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released (A/HRC/13/30, para. 61).
- HRC: "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed" (CCPR/C/59/D/560/1993, para. 9.4).
- Special Rapporteur on the human rights of migrants, in his 2012 annual report on the detention of migrants in an irregular situation (A/HRC/20/24), recalled the statement of the WGAD that there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, and that review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review (para. 23).
- Committee on Migrant Workers, General Comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power (para. 32).
- ⁸⁸ Convention relating to the Status of Refugees (arts. 16 and 32 (2)): basic minimum standards for the treatment of refugees, including free access to the courts of law on the territory of States parties and the ability to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.
- ⁸⁹ IACHR: "147. [...] deprivation of liberty as a penalty or a punitive sanction in the area of immigration control is outside the scope of the question and, in accordance with the jurisprudence of this Court, must be regarded arbitrary and thus contrary to the Convention and American Declaration; footnote 271: Cf. Case of Vélez Loor v. Panama, supra, para. 169. Special Rapporteur of the United Nations on the Human Rights of Migrants, Ms. Gabriela Rodríguez Pizarro: "[d]etention of migrants on the ground of their irregular status should under no circumstance be of punitive nature". Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, para. 73.
- Working Group on Arbitrary Detention: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention." UN Doc. A/HRC/7/4, 10 January 2008, para. 53.
- Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, UN Doc. A/HRC/11/7, May 14, 2009, para. 65.

Inter American Court on Human Rights. Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21]

⁹⁰ Inter American Court on Human Rights, Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21: “157. Based on the preceding considerations, the Court finds that, in light of international human rights law, deprivation of liberty is inappropriate when children are unaccompanied or separated from their family, because in this situation, the State is obliged to give priority to facilitating the measures of special protection based on the principle of the best interest of the child, assuming its position as guarantor with the greatest care and responsibility. See Article 20(1) of the Convention on the Rights of the Child: “[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Cf. *Case of Furlan and family members v. Argentina*, supra, para. 126. [see also para. 160]

Committee on the Rights of the Child. General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, supra, para. 61: “In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. [...] In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.

Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, Specific Groups and Individuals: Migrant Workers, pursuant to Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, para. 75(a).

⁹¹ WGAD: all circumstances deprivation of liberty, including detention as a counter-terrorism measure, must remain consistent with the norms of international law (E/CN.4/2004/3, para. 84). The right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention is a personal right, which must “in all circumstances be guaranteed by the jurisdiction of the ordinary courts” (ibid., para. 85). The Working Group has adopted a list of principles based on articles 9 and 10 of the Universal Declaration of Human Rights and on articles 9 and 14 of the International Covenant on Civil and Political Rights (A/HRC/10/21, para. 53). These principles guarantee that persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention. “Any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations to this right should be viewed with utmost concern” (report on the situation of detainees at Guantánamo Bay, E/CN.4/2006/120).

WGAD Background paper, para. 19: A stakeholder submission comprising of a comparative study of relevant domestic law governing detention across 21 jurisdictions as well as the jurisprudence of the European Court of Human Rights, has identified a very strong trend toward requiring that persons administratively detained for counter-terrorism, national security, or intelligence-gathering purposes be entitled to appeal their detention to, or have their detention reviewed by, a judicial body (Submission from Oxford Pro Bono Publico, University of Oxford, “Remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court: a comparative and analytical review of State practice” (April 2014), p. 96)

Joint study on global practices in relation to secret detention in the context of countering terrorism: “No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus (A/HRC/13/42) cited in A/HRC/16/47, para. 54). “Effective habeas corpus reviews by independent judicial bodies” are central to ensuring respect for the right to personal liberty (para. 292 (b)). “Domestic legislative frameworks should not allow for any exceptions from habeas corpus, operating independently from the detaining authority and from the place and form of deprivation of liberty ... The law should foresee penalties for officials who refuse to disclose relevant information during habeas corpus proceedings” (ibid.).

⁹² HRC General Comment no. 35, para. 40; and, Communications Nos. 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2 (military detention); 1051/2002, *Ahani v. Canada*, para. 10.2 (counter-terrorism); 1061/2002, *Fijalkowska v. Poland*, para 8.4 (involuntary committal to psychiatric institution); 560/1993, *A. v. Australia*, para. 9.5 (immigration detention); 291/1988, *Torres v. Finland*, para. 7.4 (extradition); 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5 (presidential fiat) and 265/1987,

Vuolanne v. Finland, para. 9.5 (solitary confinement). Concluding observations: India (1997), para. 438; Israel (1998), para. 317 (security detention); United Kingdom (2008), para. 17 (counter-terrorism); Rwanda (2009), para. 16 (recommending abolition of detention for vagrancy); Cameroon (1994), para. 204; Republic of Moldova (2002), para. 11; and Lithuania (2004), para. 13. No category of detainees may be denied taking such proceedings: Communications Nos. R.1/4, Torres Ramírez v. Uruguay, para. 18 (military); and 1449/2006, Umarov v. Uzbekistan, para. 8.6.

⁹³ WGAD: “The remedy of habeas corpus... must not be suspended or rendered impracticable in states of emergency” (A/HRC/7/4, para. 64; E/CN.4/1995/31, para. 25 (d)). WGAD adopted the legal analysis in the HRC’s general comment No. 29 (2001) on states of emergency (article 4), paras. 11 and 16. In addition to those rights enumerated in Article 4(2), ICCPR, certain other rights are non-derogable even during a state of emergency, including the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention. These non-derogable guarantees are customary international law binding on States that are not parties to the Covenant, and are also peremptory norms of international law.

Subcommittee on Prevention of Torture: “the effectiveness and absolute non-derogability of habeas corpus be guaranteed in states of emergency” (CAT/OP/HND/1, para. 137).

Committee on Enforced Disappearances: recommends the adoption of “the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure” (CED/C/ESP/CO/1, para. 26).

Joint report on the situation of detainees at Guantánamo Bay: “procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”, it determined that the main elements of article 9 of the Covenant, such as habeas corpus, must be fully respected even during states of emergency (E/CN.4/2006/120, para. 14).

⁹⁴ Human Rights Committee General Comment 2, para. 16.

⁹⁵ Human Rights Committee, General Comment No.32, UN Doc CCPR/C/GC/32 (2007), para. 18.

⁹⁶ Subcommittee on Prevention of Torture: “judicial intervention during the period of confinement, by judges other than those who determined the criminal charges, goes hand in hand with due process” (CAT/OP/2, para. 14).

Inter-American Commission: a judicial authority or a “quasi-judicial” board that decides petitions ... must be impartial and different from the authority ordering and implementing the detention. [cite]

⁹⁷ ICCPR (Article 9(4));

African Principles, Principle M(4).

European Convention on Human Rights (Article 5(4)).

American Convention (Article 7(6));

Inter-American Court has held nine days to be incompatible with the term “promptly” in article 7(6) of the American Convention: Chaparro Álvarez and Lapo Íñiguez v Ecuador, Series C No 170 (21 November 2007), para 135; see also Tibi v Ecuador, Series C No. 114 (7 September 2004), para 134 (21 days after filing of the application was “clearly an excessive time”).

Body of Principles (Principle 32): “2. The proceedings ... shall be simple and expeditious and at no cost for detained persons without adequate means.”

HRC General Comment no. 35, para. 47; and, communication nos. 291/1988, Torres v. Finland, para. 7.3. “The adjudication of the case should take place as expeditiously as possible.”; 1051/2002, Ahani v. Canada, para. 10.3;

⁹⁸ HRC General Comment no. 35, para. 47;

⁹⁹ HRC General Comment no. 35, para. 42;

¹⁰⁰ HRC General Comment no. 35, para. 41; Communication nos. 1324/2004, Shafiq v. Australia, para. 7.4; 1460/2006, Yklymova v. Turkmenistan, para. 7.4; 1751/2008, Aboussedra v. Libyan Arab Jamahiriya, para. 7.6.

¹⁰¹ HRC General Comment no. 35, para. 41; communication no. 856/1999, Chambala v. Zambia, para. 7.2 (continued detention after release order amounted to arbitrary detention in violation of article 9, paragraph 1); Concluding observations India 1997.

¹⁰² HRC General Comment no. 35, para. 47; Communications Nos. 248/1987, Campbell v. Jamaica, para. 6.4;

¹⁰³ Inter-American Commission, Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas (2008), Principle IV;

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- European Court of Human Rights: *Patsuria v Georgia* (2007) ECHR 893, para. 62; and *Aleksanyan v Russia* (2008) ECHR 1903, para. 179.
- ¹⁰⁴ HRC General Comments no. 35, para. 45, and No. 32, paras. 18-22; communication nos. 1090/2002, *Rameka v. New Zealand*, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); 291/1988, *Torres v. Finland*, para. 7.2 (finding review by the Minister of the Interior insufficient);
- ¹⁰⁵ 169 ILO Convention (articles 9-10);
Vienna Declaration and Programme (Part I, para. 20);
Convention on the Rights of the Child (art. 40, para. 3);
Beijing Rules; y Riad Directives;
HRC General Comment N° 17 (art. 24 of the ICCPR), parrs. 1 and 2;
CRC, *General Comment N° 10*, para. 10;
IAHRC, Advisory Opinion AO-17/2002, 28 august 2002, para. 109.
- ¹⁰⁶ HRC communication N° 172/1984, *Broeks vs The Netherlands*, Communication N° 182/1984, *Zwaan-de-Vries vs. The Netherlands*, Communication N° 196/1985, *Ibrahima Gueye and others vs. France*; Communication N° 819/1998, *Joseph Kavanagh vs. Ireland*; Communication N° 516/1992, *Alina Simunek vs. Check Republic*.
- ¹⁰⁷ HRC Communication N° 819/1998, *Joseph Kavanagh vs. Ireland*.
- ¹⁰⁸ Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, para. 70(c); “Category III: Military judges and military prosecutors often do not meet the fundamental requirements of independence and impartiality; military procedures applied by military courts often do not respect the basic guarantees for a fair trial;”
- Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Issue of the administration of justice through military tribunals, E/CN.4/2006/58, paras 20-21: “Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts”;
- Human Rights Committee, HRC General Comment No. 13 on , Article 14, para. 4; “4. The provisions of article 14 of the ICCPR, para. 4: “[noting] apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special tribunals courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14”.. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.”.
- ¹⁰⁹ UN Basic Principles on the Role of Lawyers, Principle 21;
European Court of Human Rights, *Lamy v Belgium*, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), *Nikolova v Bulgaria*, App no 31195/96 (25 March 1999), para 63 and (Grand Chamber), *Mooren v Germany*, App no 11364/03 (9 July 2009), paras 121-125.
- ¹¹⁰ International Convention for the Protection of All Persons from Enforced Disappearance (2006), Article 17(3).
Declaration on the Protection of All Persons from Enforced Disappearance (1992), A/RES/47/133, Article 10.
- ¹¹¹ HRC General Comment no. 35, para. 43; and communication nos. 1090/2002, *Rameka v. New Zealand*, para 7.3 (annual review of post-conviction preventive detention); 754/1997, *A. v. New Zealand*, para. 7.3 (regular review of involuntary hospitalization); 291/1988, *Torres v. Finland*, para. 7.4 (review every two weeks of detention for extradition).
- ¹¹² WGAD Opinion no. 34/2006, *Ali Saleh Kahlah Al-Marri v. USA*, UN Doc A/HRC/7/4/Add. 1 (2008), paras. 36-37.

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- ¹¹³ WGAD Background paper, para. 81: Although there is no obligation for States to provide for a right to appeal under international law, a quarter of responding States demonstrated legal provisions guaranteeing the right of appeal of an unsuccessful challenge to the lawfulness of the detention.
- Oxford Pro Bono Publico study: There is a very strong trend in the practice of States toward guaranteeing the right to appeal to a higher court against an order of preventive detention (p. 97).
- ¹¹⁴ WGAD Background paper, para. 44: The Working Group observes that the majority of States support an informal, cost-free and simplified process to bringing a claim challenging the legality of detention before court, offering even the ability to dispense with any requirement for the challenge to be submitted in writing.
- ¹¹⁵ Subcommittee on Prevention of Torture: “States parties should consider effective judicial review and due process during the detention of individuals in criminal proceedings as a prerequisite for the prevention of ill-treatment or torture of persons deprived of their liberty and as a means of conferring legitimacy on the exercise of criminal justice” (para. 19).
- ¹¹⁶ UN Basic Principles on the Role of Lawyers, Principle 21;
- ¹¹⁷ European Court of Human Rights, *Lamy v Belgium*, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), *Nikolova v Bulgaria*, App no 31195/96 (25 March 1999), para 63; (Grand Chamber), *Mooren v Germany*, App no 11364/03 (9 July 2009), paras 121-125.
- HRC, General Comment No 32, para 13, citing *Jansen-Gielen v The Netherlands*, UN Doc CCPR/C/71/D/846/1999 (3 April 2001), para 8.2 and *Äärelä and Näkkäläjärvi v Finland*, UN Doc CCPR/C/73/D/779/1997 (24 October 2001), para 7.4.
- ¹¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.
- ¹¹⁹ Joint Study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), para. 292(b);
- International Convention for the Protection of All Persons from Enforced Disappearance (Article 22).
- ¹²⁰ ICCPR, article 19(3).
- ¹²¹ UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (2012), Guideline 7 (v)
- Committee on Migrant Workers General Comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: The burden of proof rests on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced (para. 32).
- ¹²² IACHR Article 10. Right to Compensation. Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.
- ¹²³ UN Basic Principles on Remedy and Reparation (Principle 20).
- ¹²⁴ UN Basic Principles on Remedy and Reparation (Principle 19).
- ¹²⁵ UN Basic Principles on Remedy and Reparation (Principle. 21).
- ¹²⁶ UN Basic Principles on Remedy and Reparation (Principle. 22).
- ¹²⁷ UN Basic Principles on Remedy and Reparation (Principle. 23)
- ¹²⁸ WGAD Report, A/HRC/10/21, paras. 54 (d – g)
- ¹²⁹ Article 43 of the Fourth Geneva Convention. under Article 43 of the Fourth Geneva Convention: Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit. Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.
- ¹³⁰ Article 78 of the Fourth Geneva Convention: If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall

be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 [Link] of the present Convention.

¹³¹ Article 43 of the Fourth Geneva Convention

¹³² Article 78 of the Fourth Geneva Convention

¹³³ Third Geneva Convention relative to the Treatment of Prisoners of War.

¹³⁴ Article 4 of the Third Geneva Convention.

¹³⁵ Article 109 of the Third Geneva Convention: “Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.”

¹³⁶ Article 118 of the Third Geneva Convention: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph. In either case, the measures adopted shall be brought to the knowledge of the prisoners of war. The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.”

¹³⁷ See: Principle 3: Scope of application of the right to bring proceedings before court and receive appropriate remedy

¹³⁸ Committee on the Rights of the Child regularly stresses the need for effective complaint procedures in general, and calls for the establishment of an “independent, child-sensitive and accessible complaint system for children” within the context of the administration of juvenile justice (CRC/C/15/Add.193, para. 62 (j); CRC/C/15/Add.198, paras. 51 and 53).

¹³⁹ Committee on the Rights of the Child, General Comment No. 10 (2007) (para. 51, 53, 62), on children’s rights in juvenile justice: the right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision.

¹⁴⁰ Beijing Rules (Rule 10.2): The issue of release is to be considered by a judge or other competent official or body without delay. In the commentary to the Beijing Rules, “other competent official or body” is defined as any person or institution in the broadest sense of the term, including community boards or police authorities having the power to release an arrested person. Rule 20.1: “each case shall from the outset be handled expeditiously, without any unnecessary delay”. The commentary highlights as a paramount concern “the speedy conduct of formal proceedings in juvenile cases”.

¹⁴¹ Committee on the Rights of the Child, General Comment No. 10: “The right to a prompt decision means that a decision must be rendered as soon as possible, within or not later than two weeks after the challenge is made” (para. 84).

¹⁴² Report of the Working Group, A/HRC/27/48, paras. 78-79, 91. Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, paras. 78-79, 91. 78. The present section addresses the practice of keeping girls and women in detention for the purpose of protecting them from risks of serious violence. The Working Group has previously addressed in its annual report protective custody of women and girls who may be detained for life. That form of deprivation of liberty is highly gendered in its reach, remit and application. In some countries, women and girls are placed in custody due to the risk of gender-based violence, such as honour crimes, and their release may be conditional upon the consent of a male relative and/or a guarantor (see A/HRC/20/16/Add.1).

79. There will typically be no legal basis for the detention, procedural guarantees will not be observed, and the detention will constitute discrimination. The Working Group recalls the views of the United Nations treaty bodies and the Special Rapporteur on violence against women, its causes and consequences, that the practice of protective custody should be eliminated and replaced with alternative measures ensuring the protection of women without jeopardizing their liberty.

¹⁴³ Committee on the Rights of Persons with Disabilities: States need to provide due process of law guarantees and appropriate judicial review to persons with disabilities deprived of their liberty as a result of a process in which they have been declared exempt from criminal responsibility (CRPD/C/ARG/CO/1, paras. 25 and 26).

¹⁴⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 1 on article 12 of the Convention regarding equal recognition before the law: respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting their right to liberty and security of the person (paras. 40 and 41). The denial of the legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty, violating articles 12 and 14 of the Convention. States must refrain from such practices and establish a mechanism to review cases of placement in a residential setting without specific consent (CRPD/C/AUT/CO/1, paras. 29–31).

¹⁴⁵ HRC General Comment no. 35, para. 18: “The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.”

Oxford Pro Bono Publico study: In regard to preventive detention proceedings, there is a very strong trend toward guaranteeing the right to be heard and to legal representation (p. 97). Further, there is a significant trend in the practice of States toward guaranteeing the right to information and to legal representation to a person with a mental illness during detention proceedings (p. 99).

¹⁴⁶ HRC General Comment no. 35, para. 19: “States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement”.

¹⁴⁷ HRC, General Comment no. 35, para. 19; Concluding observations Bulgaria 2011, para. 10, Germany 2012, para. 14.

Oxford Pro Bono Publico study: In relation to preventive detention and detention of persons with a mental illness – regimes which are unique in being based on personal characteristics (such as ‘dangerousness’) which are liable to change over time – there appears to be a trend in State practice toward requiring automatic periodic review of detention with a view to release if the basis for detention is no longer present (p. 99).

¹⁴⁸ Special Rapporteur on the human rights of migrants: All migrants deprived of their liberty should be informed in a language they understand, if possible in writing, of the reasons for the detention and be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention (A/HRC/20/24, para?).

¹⁴⁹ HRC, General Comment no. 35, para. 18, and communication nos. 1324/2004, *Shafiq v. Australia*, para. 7.3;

¹⁵⁰ HRC, General Comment no. 35, para. 65.

¹⁵¹ Committee on Migrant Workers, General Comment no. 2 (2013): the scope of the judicial review cannot be confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is not established by law (para. 32).

HRC, General Comment no. 35, para. 65: “The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review.”

¹⁵² Committee on Migrant Workers: States parties must ensure that migrant workers and members of their families are not expelled while their claim is being considered (CMW/C/GC/2, para. 35).