

**DIGEST OF JURISPRUDENCE OF  
THE UN AND REGIONAL ORGANIZATIONS  
ON THE PROTECTION OF HUMAN RIGHTS  
WHILE COUNTERING TERRORISM**

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## **Introduction**

This digest is a compilation of findings of judicial and quasi-judicial bodies of the United Nations and regional organizations on the issue of the protection of human rights in the struggle against terrorism. It has been prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR). Its aim is to assist policy makers and other concerned parties in developing a vision of counter-terrorism strategies that are fully respectful of human rights.

No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilise governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights.

Human rights law establishes a framework in which terrorism can be effectively countered without infringing on fundamental freedoms. The need to protect human rights in the struggle against terrorism has been highlighted by the UN Secretary-General, the High Commissioner for Human Rights and other leaders in the international community. The objective of this digest is to enhance the understanding of this framework.

### **Definition of terrorism**

Twelve international conventions related to terrorism have been adopted within the UN context. One gap in these conventions is the lack of a clear and commonly-agreed definition of terrorism. A draft comprehensive convention on terrorism is currently being debated at the General Assembly which is grappling with this issue.

Although terrorism has yet to be authoritatively defined, States have already agreed on some of its core elements. On 9 December 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism, in the annex to resolution 49/60. The Declaration stated that terrorism includes “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes”, and further held that such acts “are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them”.

### **States’ obligations under human rights law**

Human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms. It acknowledges that States must address serious and genuine security concerns, such as terrorism. The balance is reflected in the International Covenant on Civil and Political Rights (ICCPR), which has been ratified or acceded to by 151 States, as well as in regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human

Rights (ACHR), and the African Charter on Human and Peoples' Rights. The "Guidelines on Human Rights and the Fight against Terrorism", adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, usefully articulate the balances in the context of the European system.

Terrorism may, under very specific conditions that will be considered below, lead to a state of emergency. Human rights law, notably article 4 of the ICCPR, article 15 of the ECHR and article 27 of the ACHR, recognizes that some rights can be derogated from in time of public emergency. (In contrast, the African Charter does not contain a derogation clause). The three conventions, however, mandate that certain rights are not subject to suspension under any circumstances. The three treaties catalogue these non-derogable rights. The list of non-derogable rights contained in the ICCPR includes the right to life; freedom of thought, conscience and religion; freedom from torture and cruel, inhuman or degrading treatment or punishment, and the principles of precision and of non-retroactivity of criminal law (except where a later law imposes a lighter penalty).

Derogation from other rights is only permitted in the special circumstances defined in each of the three treaties. According to the ICCPR and ACHR, any such measures must be of exceptional character, strictly limited in time and to the extent required by the exigencies of the situation, subject to regular review, consistent with other obligations under international law and must not involve discrimination. ECHR requires that such measures be limited to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law. The three treaties further require informing the Secretary-General of the UN or the relevant regional organization of the provisions from which a State has derogated and the reasons for such derogation.

Building on States' other obligations under international law, the UN Human Rights Committee has developed a list of elements that, in addition to the rights specified in article 4, cannot be subject to lawful derogation (see General Comment No. 29 in Annex II, below). These elements include the following: all persons deprived of liberty must be treated with respect for their dignity; hostage-taking, abduction, and unacknowledged detention are prohibited; persons belonging to minorities are to be protected; unlawful deportations or transfers of population are prohibited; and "no declaration of a state of emergency ... may be invoked as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence". The Human Rights Committee is the body established to monitor the implementation by States Party of the ICCPR and its Protocols.

The right to a fair trial during armed conflict is explicitly guaranteed under international humanitarian law. Under the ACHR (article 27), the right to judicial guarantees essential for the protection of non-derogable rights cannot be suspended, even in time of war, public danger, or emergency. According to the Human Rights Committee in General Comment No. 29, the same principle applies in the context of the ICCPR. As the Committee explained, the principles of legality and the rule of law require that fundamental requirements of fair trial be respected during a state of emergency. The Committee stressed that it is inherent in the protection of rights

explicitly recognized as non-derogable that they be secured by procedural guarantees including, often, judicial guarantees.

The provisions of the ICCPR relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. In particular, any trial possibly leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the ICCPR, including those on fair trial. These include the right to equality before the courts and tribunals; the right to a fair hearing by a competent, independent and impartial tribunal; the presumption of innocence; the right of the accused to be informed of the nature and cause of the charge against him or her promptly and in detail in a language which he or she understands; the right to communicate with counsel of choice; the right to examine witnesses and secure the attendance and examination of witnesses on behalf of the accused; and the right not to be compelled to testify against oneself or to confess guilt.

In addition, the ICCPR, ECHR, ACHR, as well as the African Charter require that, in the exceptional circumstances where it is permitted to limit some rights for legitimate and defined purposes other than emergencies, the principles of necessity and proportionality must be applied. The measures taken must be appropriate and the least intrusive possible to achieve their objective. The discretion granted to certain authorities to act must not be unfettered. The principle of non-discrimination must always be respected and special effort made to safeguard the rights of vulnerable groups. Counter-terrorism measures targeting specific ethnic or religious groups are contrary to human rights and would carry the additional risk of an upsurge of discrimination and racism.

### **Recent action by the UN Security Council**

The Security Council has adopted a number of resolutions concerning terrorism. Most were passed in the context of condemning specific terrorist acts. The condemned acts include the 11 September 2001 attacks in New York, Washington D.C., and Pennsylvania in the United States of America; the attacks in Bali, Indonesia on 12 October 2002; the hostage-taking acts in Moscow, Russian Federation on 23 October 2002; the bomb attack in Kikambala and the attempted missile attack on an airliner departing Mombassa, Kenya on 28 November 2002; and the bomb attack in Bogotá, Colombia on 7 February 2003.

Two Security Council resolutions also established a collective framework for action. In resolution 1269 (1999), the Security Council expressed its deep concern over the increase in acts of international terrorism which endangered the lives and well-being of individuals worldwide as well as the peace and security of all States. The Council condemned all acts of terrorism, irrespective of motive, wherever and by whomever committed, as criminal and unjustifiable, in particular those which could threaten international peace and security. The Council called upon all States to cooperate with one another, to prevent and suppress terrorist acts, to protect their nationals and other persons against terrorist attacks, and to bring to justice the perpetrators of such acts. It further called upon all States to take appropriate measures, in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts. The Council urged all States to exchange information in accordance with international and domestic law, and to

cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts.

Subsequent resolutions of the Security Council have built on this policy foundation to strengthen the framework for international and national action, particularly following the 11 September 2001 attacks. Resolution 1373 was adopted on 28 September 2001 under Chapter VII of the UN Charter. It established new international legal obligations on States to take measures and to cooperate against terrorism. The measures include criminalizing the collection of funds for terrorist acts and freezing the assets of terrorists; refraining from providing any support to entities or individuals involved in terrorist acts; preventing terrorist acts through early warning and exchange of information with other States; denying safe haven to terrorists; preventing the State's territory from being used by terrorists or supporters of terrorists; criminalizing terrorist acts and prosecuting supporters of terrorism; assisting other States in prosecuting terrorism and the financing of terrorist acts; preventing the movement of terrorists through effective border controls and effective issuance of identity documents, including measures to prevent their forgery; intensifying and accelerating the exchange of operational information concerning terrorists; and ensuring that refugee status is not abused by terrorists.

Resolution 1373 established a Committee of the Security Council, consisting of all the Council members, known as the Counter-Terrorism Committee (CTC). The Committee is tasked with monitoring implementation of resolution 1373. All States were called upon to report to the Committee on the steps they have taken to implement this resolution.

OHCHR carried out a preliminary review of some of these reports and noted several common tendencies. A large number of reports focus mainly on the legal framework to counter-terrorism, but do not address how these measures operate in practice. Some measures may appear benign but could have a negative impact on the enjoyment of human rights. For instance, some States include in their domestic definition of terrorism certain non-violent activities. Several States have granted law enforcement agents additional search, arrest and detention powers and added limitations on legal representation. The distinction between minors and adults is not always clear. Some laws place severe and unwarranted restrictions on the right to seek asylum, which may violate the non-refoulement right of refugees.

OHCHR has exchanged views with the CTC, briefing it three times since its inception in 2001. In September 2002, the High Commissioner for Human Rights submitted a "Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures", in which general principles of law were set out to help guide States in protecting human rights in the context of their efforts to eradicate terrorism (*see* <http://www.un.org/Docs/sc/committees/1373/> , Briefings, 24 September 2002). A briefing was also arranged by CTC to the Human Rights Committee in Geneva on 27 March 2003, followed by a briefing of the CTC by a member of the Human Rights Committee on 19 June 2003 in New York.

### **Recent action by the UN General Assembly**

The issue of combating terrorism has been on the agenda of the UN General Assembly for decades. The General Assembly passed numerous resolutions on the

issue of human rights and terrorism. The first such resolution was adopted on 14 February 1994. It unequivocally condemned all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed, as activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences on the economic and social development of States. It called upon States, in accordance with international standards of human rights, to take all necessary and effective measures to prevent, combat and eliminate terrorism. Resolutions with similar approaches have been adopted in the General Assembly and the Commission on Human Rights since then.

A resolution specifically focusing on the need to protect human rights and fundamental freedoms while countering terrorism was adopted for the first time by the General Assembly on 18 December 2002 (A/RES/57/219). It affirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. The resolution requests the High Commissioner for Human Rights to take a number of actions, including examining the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources; making general recommendations concerning the obligation of States to promote and protect human rights while countering terrorism; and providing assistance to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism. A resolution with similar approach was adopted on 25 April 2003 by the Commission on Human Rights at its 59<sup>th</sup> session (E/CN.4/RES/2003/68).

### **Recent action by UN Human Rights Mechanisms**

Human rights bodies, whether at the international or regional level, have for many years recognized the legitimate security concerns of States and their duty to protect their citizens from terrorist acts. The focus has been on how this could be done while respecting States' human rights obligations. An analysis of the issue of human rights and terrorism is contained in the reports of Professor Kalliopi Koufa, the Special Rapporteur on Terrorism and Human Rights of the UN Sub-Commission on the Promotion and Protection of Human Rights.

On 22 November 2001, the UN Committee against Torture issued a statement (CAT/C/XXVII/Misc.7) reminding States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. Condemning utterly the terrorist attacks of 11 September and expressing "profound condolences to the victims, who were nationals of some 80 countries, including many States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", the Committee highlighted the obligations contained in article 2 (prohibition of torture under all circumstances), article 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and article 16 (prohibiting cruel, inhuman or degrading treatment or punishment). The Committee stated that such provisions must be observed in all circumstances, and expressed its confidence that "whatever responses to the threat of international terrorism are adopted by States parties, such responses

will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture”.

On 10 December 2001, on the occasion of Human Rights Day, 17 special rapporteurs and independent experts of the UN Commission on Human Rights issued a joint statement reminding States of their obligations under international law to uphold human rights and fundamental freedoms in the context of the aftermath of the tragic events of 11 September 2001. The special rapporteurs and experts expressed their deep concern over anti-terrorist and national security legislation and other measures adopted or contemplated that might infringe upon the enjoyment by all of their human rights and fundamental freedoms. They warned against human rights violations and measures that have targeted particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. They addressed their concerns to the relevant authorities, requesting them to take appropriate action to guarantee respect for human rights and fundamental freedoms. The special rapporteurs and experts particularly reminded States of the fundamental principle of non-discrimination under which everyone is entitled to all rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Since then, several Special Rapporteurs intervened on individual cases of concern. These include the Special Rapporteur against Torture, the Special Representative on Human Rights Defenders, and the Special Rapporteur on the Independence of Judges and Lawyers, in addition to special rapporteurs with country-specific mandates who have raised relevant concerns.

On 8 March 2002, the UN Committee on the Elimination of Racial Discrimination issued a statement recalling that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted, and requesting States and international organizations to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin. The Committee insisted that the principle of non-discrimination must be observed in all areas, in particular in matters concerning liberty, security and dignity of the person, equality before tribunals and due process of law, as well as international cooperation in judicial and police matters in these fields.

The Human Rights Committee systematically raises questions during its examination of State reports regarding the compatibility of measures taken by States to counter terrorism with States’ obligations under the ICCPR. Many of the Committee’s concluding observations on this issue are contained in this digest.

### **The Report of the Policy Working Group on the United Nations and Terrorism**

In October 2001, the UN Secretary-General established the Policy Working Group on the United Nations and Terrorism. The aim of the Working Group was to identify the longer-term implications and broad policy dimensions of terrorism for the United Nations and to formulate recommendations on steps that the United Nations system might take to address the issue. On 6 August 2002, the Secretary-General submitted the report of the Policy Working Group to the General Assembly and the Security Council (A/57/273 – S/2002/875).



The report observed that the United Nations must ensure that the protection of human rights is conceived as an essential concern. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful of international human rights obligations. The report contained the following four human rights-related recommendations:

- All relevant parts of the United Nations system should emphasize that key human rights must always be protected and may never be derogated from. The independence of the judiciary and the existence of legal remedies are essential elements for the protection of fundamental human rights in all situations involving counter-terrorism measures.
- The Department of Public Information should be requested, in consultation with the Office of the UN High Commissioner for Human Rights, to publish a digest of the core jurisprudence of international and regional human rights bodies on the protection of human rights in the struggle against terrorism. Governments and human rights organizations could find such a compilation of direct use in the development of counter-terrorism policies.
- The High Commissioner for Human Rights should convene a consultation of international, regional and sub-regional organizations and non-governmental organizations on the protection of human rights in the struggle against terrorism. Smaller, regional gatherings should also be considered. The Office of the High Commissioner should also make maximum use of its field presences and its regional experts, as well as the findings of the human rights treaty bodies and special rapporteurs.
- Together with the High Commissioner for Human Rights, a dialogue should be maintained with the Counter-Terrorism Committee on the importance of ensuring respect for human rights in the implementation of legislation, policies and practices to combat terrorism.

### **The Digest**

This digest is prepared in implementation of the recommendation of the report of the Policy Working Group on the United Nations and Terrorism mentioned above. It contains a selection of relevant observations and decisions of international and regional human rights bodies on issues related to human rights and terrorism.

The digest is divided into three chapters: general observations, states of emergency, and specific rights. Each section starts with a short introduction, followed by some of the relevant principles developed by the United Nations system. Illustrative jurisprudence from regional systems then follows. The cases selected from the regional systems represent the most recent cases. Citations of previous judgments are omitted. The digest does not claim to be comprehensive.

The digest is followed by two annexes. The first contains the text of relevant provisions of international instruments that are mentioned in the digest. The second contains the full text of General Comment 29 of the UN Human Rights Committee, because of its high relevance to this discussion.

OHCHR hopes that this publication will help policy makers, including government officials, parliamentarians, judges, lawyers and human rights defenders, in developing counter-terrorism strategies that are fully respectful of human rights.

## I. GENERAL CONSIDERATIONS

### A. State duty to protect

Both the universal and regional systems emphasize that States have a duty to protect those living within their jurisdictions from terrorism, while cautioning that this does not imply an absence of limits to the exercise of State power.

#### *United Nations*

In the case *Delgado Paez v. Colombia*, in which the author of a petition to the Human Rights Committee had received death threats, the Committee considered the question of States' duty to protect persons under their jurisdiction:

Although in the [International Covenant on Civil and Political Rights] (*hereafter, the Covenant*), the only reference to the right of security of person is to be found in article 9, there is no evidence that [this] was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty.... States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

--*Delgado Paez v. Colombia*, Case No. 195/1985, Views adopted on 12 July 1990.

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The Committee [on the Elimination of Discrimination Against Women] calls upon the Government to protect women in accordance with the provision of the Constitution that states that the State is responsible for the safety of persons and property. The Committee recommends that better care be taken of all women and girls who are victims of terrorist violence.

-- A/54/38, para. 78 (1995).

#### *European Court of Human Rights*

The Court recalls that the first sentence of Article 2 § 1 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] (*hereafter, the Convention*) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.... This involves a primary duty on the State to secure the right to life by putting in place effective criminal-

law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual....

--*Kiliç v. Turkey*, ECHR, 28 March 2000 (para. 62).

### ***Inter-American System***

[W]ithout question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.

--*Neira Alegría Case*, I/A Court H.R., Judgment of January 19, 1995 (para. 75).

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The State's national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty, but only the guilty. The State must function within the rule of law....

--*Case 11.182, Report N° 49/00, Asencios Lindo et al.*, Annual Report of the IACHR 1999 (para. 58).

## **B. Compatibility of counter-terrorism measures with human rights obligations**

Universal and regional systems frequently observe that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.

### *United Nations*

The Human Rights Committee has stressed that legislation enacted pursuant to Security Council resolution 1373 must be in conformity with the International Covenant on Civil and Political Rights:

The Committee is concerned that the relatively broad definition of the crime of terrorism and of membership of a terrorist group under the State party's Criminal Code may have adverse consequences for the protection of rights under article 15 of the Covenant, a provision which significantly is non-derogable under article 4, paragraph 2. The State party is requested to ensure that counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant.

--CCPR/CO/77/EST, para. 8 (2003).

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The State party is under an obligation to ensure that measures taken to implement Security Council resolution 1373 (2001) are in full conformity with the Covenant. The State party is requested to ensure that the definition of terrorism does not lead to abuse and is in conformity with the Covenant.

--CCPR/CO/75/NZL, para. 11 (2002).

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While understanding the security requirements associated with efforts to combat terrorism, the Committee voices concern at their effects on the human rights situation..., particularly in relation to articles 6, 7, 9 and 14 of the Covenant.... The State party must ensure that steps taken in the campaign against terrorism are fully in accordance with the Covenant. It should ensure that legitimate action against terrorism does not become a source of violations of the Covenant.

--CCPR/CO/76/EGY, para. 16 (2002).

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The Committee expresses its concern that ... the State party indicated that no study had been undertaken to ensure that legislative and other measures in pursuance of Security Council resolution 1373 (2001) were in compliance with its obligations under the Covenant. The State party is under an obligation to ensure that counter-terrorism measures taken under Security Council resolution 1373 (2001) are in full conformity with the Covenant.

--CCPR/CO/75/MDA, para. 8 (2002).

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While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern ... at the attitude of the security forces, including Political Security, which arrests and detains anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (art. 9). The State party should ensure that the measures taken in the name of the campaign against terrorism are within the limits of Security Council resolution 1373 (2001) and fully consistent with the provisions of the Covenant. It is requested to ensure that the fear of terrorism does not become a source of abuse.

--CCPR/CO/75/YEM, para. 18 (2002).

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The Committee notes with concern that the State party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Security Council resolution 1373 (2001), is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant and which, in the State party's view, may require derogations from human rights obligations. The State party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.

--CCPR/CO/73/UK, para. 6 (2001).

### ***European Court of Human Rights***

[T]he Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it,

affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

--*Klass and Others v. Germany*, ECHR, 6 September 1978 (para. 49).

### ***Inter-American System***

[T]he Commission has often heard the argument that human rights violations are inevitable because they are the consequence of the "war" created by armed groups, who are generally portrayed as terrorists. Thus, human rights violations are being justified as a necessary byproduct of an armed conflict that the authorities and security forces do not admit to having provoked. In the Commission's judgment, this is an invalid argument; consequently, it has repeatedly asserted that unqualified respect for human rights must be a fundamental part of any anti-subversive strategies when such strategies have to be implemented.

--*Annual Report of the IACHR 1990-91, Ch. V, Part II, at 512.*

### **C. Relation of human rights and international humanitarian law in their application to counter-terrorism measures**

Both the UN Human Rights Committee and, more recently, the Inter-American Commission on Human Rights have affirmed that human rights and international humanitarian law complement each other in this area. The test for evaluating respect for a particular right in a situation of armed conflict may be distinct from that applicable in time of peace.

#### ***United Nations***

In its General Comment No. 29 on article 4 of the Covenant, the Human Rights Committee stressed that international humanitarian law remains relevant, even if States party take steps to derogate from certain provisions of the Covenant:

[A]rticle 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law.

[...]

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, 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.

--*General Comment 29, CCPR/C/21/Rev.1/Add.11, paras. 9, 11 (2001).*

#### ***Inter-American System***

The Inter-American Commission on Human Rights has emphasized the relevance of international humanitarian law to analysing counter-terrorism measures taken by States in certain circumstances:

[I]n situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.



--“*Precautionary Measures in Guantanamo Bay, Cuba*”, *Inter-American Commission on Human Rights, March 13, 2002.*

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[B]oth Common Article 3 [of the Geneva Conventions] and Article 4 of the American Convention protect the right to life and, thus, prohibit, inter alia, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.

--*Case 11.137, Report N° 5/97, Abella case, Annual Report of the IACHR 1997 (para. 161).*

## II. STATES OF EMERGENCY

### A. Rules concerning derogation measures and other aspects of states of emergency

As previously noted, terrorism may, under very specific conditions, lead to a state of emergency. Elaborate rules have been developed which govern different aspects of states of emergency. The most comprehensive discussion of this issue in connection with the United Nations system is contained in General Comment No. 29 of the UN Human Rights Committee, attached hereto as Annex II.

States may suspend certain rights during an emergency that threatens the life of the nation. However, the UN and the regional systems impose strict limitations as well as procedural requirements with respect to such suspensions, or “derogations”. They also establish lists of rights that cannot be suspended under any circumstances.

The rights which are specified as non-derogable in universal and regional instruments are not identical. The American Convention on Human Rights, for example, expressly includes “judicial guarantees essential for the protection of [non-derogable] rights” on the list of non-derogable rights, while the International Covenant on Civil and Political Rights does not. However, General Comment No. 29 takes the position that judicial oversight may be inferred to be non-derogable, taking into account other provisions of international law.

#### *United Nations*

The Human Rights Committee has frequently emphasized, not only in General Comment No. 29 but in its review of State reports and individual cases, that declarations of states of emergency and any accompanying derogations taken pursuant to article 4 of the Covenant must meet certain strict requirements.

#### Necessity

The Committee ... expresses its concern that the resort to declarations of states of emergency is still frequent and seldom in conformity with article 4, paragraph 1, of the Covenant, which provides that such declaration may be made only when the life and existence of the nation is threatened.

--CCPR/C/79/Add.76, para. 25 (1997).

#### Duration

The Committee is disturbed by the fact that the state of emergency proclaimed ... in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since. The State party should consider reviewing the need to maintain the state of emergency.

--CCPR/CO/76/EGY, para. 6 (2002).

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The Committee is concerned at the fact that Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force ever since that date, placing the territory of the [State party] under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4 of the Covenant. It also regrets that the delegation did not provide details of the application of the state of emergency in actual situations and cases.

While noting the information given by the State party's delegation that the state of emergency is rarely put into effect, the Committee recommends that it be formally lifted as soon as possible.

--CCPR/CO/71/SYR, para. 6 (2001).

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The Committee expresses its deep concern at the continued state of emergency..., which has been in effect since independence. It recommends that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights.

--CCPR/C/79/Add.93, para. 11 (1998).

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The Committee regretted that some parts of [the country] have remained subject to declaration as disturbed areas over many years -- for example, the Armed Forces (Special Powers) Act has been applied throughout ... since 1980 and in some areas of that state for much longer -- and that in those areas, the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant.

--CCPR/C/79/Add. 81, para. 19 (1997).

### Precision

The Committee deplores the lack of clarity of the legal provisions governing the introduction and administration of the state of emergency ... which would permit derogations contravening the State party's obligations under article 4, paragraph 2, of the Covenant.

--CCPR/C/79/Add.42, para. 9 (1995); see also CCPR/C/79/Add.62, para. 11 (1996); CCPR/C/79/Add.90, para. 8 (1998).

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The Committee is concerned about the wide variety of possible states of emergency listed in the Constitution. The possibility of suspending article 5 of the Constitution during states of exception does not appear to be compatible with the Covenant, since it suspends in general terms the right of the individual to do what the law does not prohibit and not to be compelled to obey illegal orders. Likewise, the Committee is concerned that the state of exception declared in June 2001 has not been duly notified to the other States parties through the intermediary of the Secretary-General of the United Nations.

The State party should ensure that its constitutional provisions for emergency situations are compatible with article 4 of the Covenant. It should also comply with the obligation to notify the other States parties through the intermediary of the Secretary-General of the United Nations in all cases when an emergency situation is declared and to inform them of the provisions from which it has derogated and of the reasons for the derogation.

--CCPR/CO/72/GTM, para. 11 (2001).

\*\*\*\*\*

[T]he Committee notes with concern that the circumstances under which a state of emergency may be proclaimed and enforced ... are excessively broad and may be used to restrict the exercise of basic rights in an unjustifiable manner.

--CCPR/C/79/Add.78, para. 10 (1997).

\*\*\*\*\*

[I]n its note of 28 June 1979 to the Secretary-General of the United Nations..., the Government of Uruguay has made reference to an emergency situation in the country which was legally acknowledged in a number of "Institutional Acts". However, no factual details were given at that time. The note confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge"; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary. Instead, the Government of Uruguay declared that more information would be provided in connection with the submission of the country's report under article 40 of the Covenant.... Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in

the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant.

--*Landinelli Silva v. Uruguay, Case No. 34/1978, Views adopted on 8 April 1981 (para. 8.2).*

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In the specific context of [this] communication there is no information to show that article 14(5) was derogated from in accordance with article 4 of the Covenant; therefore the Committee is of the view that the State party, by merely invoking the existence or a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is on duty bound, when it invokes article 4 (1) of the covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned.

--*Salgar de Montejo v. Colombia, Case No. 64/1979, Views adopted on 24 March 1985 (para. 10.3).*

#### Non-derogable rights

The Committee is concerned that the Law on Public Emergency in the ... Republic does not specifically restrict the power of derogation from specific Covenant provisions, as stipulated in article 4 of the Covenant. The State party should take measures to bring its Law on Public Emergency into compliance with article 4 of the Covenant.

--*CCPR/CO/69/KGZ, para. 12 (2000).*

\*\*\*\*\*

The Committee reiterates its concern over the constitutional provisions relating to the declaration of a state of emergency. In particular, the Committee notes that the grounds for declaring an emergency are too broad and that the range of rights which may be derogated from does not conform with article 4 of the Covenant. Additionally, the Constitution fails to make reference to non-derogable rights. The Committee reiterates its observations on [the State party's] third periodic report, that the State party restrict its provisions relating to the possibilities of declaring a state of emergency, and constitutionally specify those Covenant rights which are non-derogable.

--CCPR/C/79/Add.90, para. 8 (1998).

\*\*\*\*\*

The Committee regrets that temporary decrees adversely affecting the implementation of certain Covenant rights have recently been enacted by the Revolutionary Command Council. In addition, the Committee expresses its concern that certain provisions of these decrees, which the State party has sought to justify on the ground that they are provisional, are incompatible with certain non-derogable Covenant rights, such as the right to life, the prohibition of torture and the principle of non-retroactivity of criminal laws. Therefore, [t]he Committee recommends that a thorough review of existing temporary laws and decrees be undertaken with a view to ensuring their compliance with the provisions of the Covenant. In this regard, the Committee stresses that Covenant rights may be derogated from only in accordance with article 4 of the Covenant.

--CCPR/C/79/Add.100, para. 7 (1997).

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With reference to the specific situation ..., the Committee expresses concern that article 4 of the Covenant, which specifies the provisions that are non-derogable even in times of public emergency, has not been complied with. It maintains that this article is applicable to the situation ..., where the use of weapons by combatants has led to the loss of life and deprivation of freedom of large numbers of persons, regardless of the fact that a state of emergency has not been formally declared.

--CCPR/C/79/Add.54, para. 27 (1995).

\*\*\*\*\*

The Committee is concerned that the State Security Court continues to exercise special jurisdiction and that, in accordance with articles 124 and 125 of the Constitution and under the new Defence Act, ordinary law can be suspended in emergency situations, contrary to the provisions of article 4 of the Covenant, which prohibit derogation from some categories of human rights.

--CCPR/C/79/Add.35, para. 6 (1994).

#### Judicial control

Constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the courts.

--CCPR/C/79/Add.76, para. 38 (1997).

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[The Human Rights Committee] is ... concerned that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency.

--CCPR/C/79/Add.56, para. 13 (1995).

### ***European Court of Human Rights***

#### Necessity

The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency....

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation.

--*Brannigan and McBride v. The United Kingdom*, ECHR, 26 May 1993 (para. 43).

#### Non-derogable rights

Article 15 paragraph 2 states that no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made.

Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted.

--*Orhan v. Turkey*, ECHR, 18 June 2002 (para. 325).

\*\*\*\*\*

Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention..., Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

--Aksoy v. Turkey, ECHR, 18 December 1996 (para. 62).

### ***Inter-American System***

#### Non-derogable rights

It is clear that no right guaranteed in the [American Convention on Human Rights] may be suspended unless very strict conditions -- those laid down in Article 27(1) -- are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.

--*I/A Court H.R., Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations, January 30, 1987 (para. 21).*

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#### Specific requirements

The requirements for declaring a state of emergency are as follows:

- Need: Pursuant to Article 27 of the Convention, in order to consider that there is a real emergency, there must be an extremely grave situation, such as war, public danger, or other emergency that threatens the independence or security of the State party. The Commission has established that measures related to a state of emergency "can only find a justification in the face of real threats to public order or state security."
- Time: This requirement refers to the duration of the suspension, which, as established in Article 27(1) of the Convention, should be only for the time strictly limited to the exigencies of the situation. The Commission has warned that it is even more serious to decree states of emergency for indefinite or prolonged periods, especially when they allow broad powers to be concentrated in the head of state, including the judicial



branch abstaining with respect to the measures decreed by the Executive, which in certain cases may lead to the exact opposite of the rule of law.

- Proportionality: Article 27(1) of the Convention provides that the suspension may only be effectuated to the extent strictly limited to the exigencies of the situation. This requirement refers to the prohibition on the unnecessary suspension of certain rights, imposing restrictions more severe than necessary, and unnecessarily extending the suspension to areas not affected by the emergency.
- Non-discrimination: As established in Article 27(1) of the Convention, consistent with Articles 1 and 24, the suspension of rights must not entail any kind of discrimination against any individual or group.
- Compatibility with other international obligations: The suspension of certain rights must be compatible with all other obligations established in other international instruments....
- Reporting: Pursuant to Article 27(3) of the Convention, the declaration of a state of emergency should be reported immediately to all other States parties to the Convention, through the Secretary General of the OAS.

--*OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000 (para. 70 – The Civilian Jurisdiction: The Anti-Terrorist Legislation).*

### ***African Commission on Human and Peoples' Rights***

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest."

The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

--*Media Rights Agenda and Constitutional Rights Project case, Comm. No. 105/93, 128/94, 130/94, 152/96, 12<sup>th</sup> Annual Activity report 1998 – 1999, (paras. 67-70).*

## B. Procedural aspects

Strict requirements also govern procedural aspects of declarations of states of emergency.

### *United Nations*

The [Human Rights] Committee ... deplores that the State party has failed to observe its duties under article 4, paragraph 3, of the Covenant to notify the Secretary-General of the United Nations and through him other States parties to the Covenant of the proclamation of a state of emergency.

*--CCPR/C/79/Add.78, para. 10 (1997).*

\*\*\*\*\*

The Committee observes that, although a state of emergency has not been proclaimed in areas in conflict, the population has been subjected to derogations from its rights corresponding to a state of emergency, such as control points impeding freedom of movement. All necessary derogations from the rights guaranteed by the Covenant must comply with the conditions laid down in article 4 of the Covenant.

*--CCPR/C/79/Add.109, para. 12 (1999).*

\*\*\*\*\*

The Committee regrets that the proclamation of a state of emergency in March 1993 was not notified to the Secretary-General in accordance with article 4, paragraph 3, of the Covenant.

*--CCPR/C/79/Add.62, para. 11 (1996).*

\*\*\*\*\*

The Committee regrets the fact that the proclamation of a state of emergency at the time of the events that took place in the country's Nord-Ouest province in 1992 was not notified in the correct manner to the Secretary-General of the United Nations in accordance with the requirements of article 4 of the Covenant.

*--CCPR/C/79/Add.33, para. 7 (1994).*

### III. SPECIFIC RIGHTS

#### A. Right to life

The right not to be arbitrarily deprived of life is non-derogable in both the international and regional systems.

##### *United Nations*

The right to life is protected by article 6 of the Covenant and is one of the non-derogable rights mentioned in article 4, paragraph 2:

With reference to the specific situation in ..., the [Human Rights] Committee expresses concern that article 4 of the Covenant, which specifies the provisions that are non-derogable even in times of public emergency, has not been complied with. It maintains that this article is applicable to the situation ... where the use of weapons by combatants has led to the loss of life and deprivation of freedom of large numbers of persons, regardless of the fact that a state of emergency has not been formally declared.

--CCPR/C/79/Add.54, para. 27 (1995).

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The number of [persons] who have been killed by the security forces, as well as all persons who have been the victims of terrorist attacks, is of concern. The use of rubber-coated metal bullets by the security forces in the occupied territories in dispersing demonstrations is reported to have killed many [persons], including children. The State party is urged to enforce rigorously the strict limitations on the operational rules as to the use of firearms and the use of rubber bullets against unarmed civilians.

--CCPR/C/79/Add.93, para. 17 (1998).

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In *Suarez de Guerrero v. Colombia*, the Human Rights Committee examined a case in which the alleged victim and six other persons were killed during a raid by police because they were suspected, as members of a guerrilla organization, of having kidnapped a former ambassador:

The right enshrined in [article 6] is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life

mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

[...]

In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.

For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6 (1) of the International Covenant on Civil and Political Rights. Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6 (1).

--*Suarez de Guerrero v. Colombia*, Case No. 45/1979, Views adopted on 31 March 1982 (paras. 12.2, 13.1 - 13.3).

### ***European Court of Human Rights***

[P]aragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The use of the term “absolutely necessary” suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination....

[...]

In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.

--*Ergi v. Turkey*, ECHR, 28 July 1998 (para. 79).

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The Court recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.... This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.

--*Semse Onen v. Turkey*, ECHR, 14 May 2002 (para. 87).

\*\*\*\*\*

Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated inter alia by the submissions made by the applicant concerning the alleged shoot-to-kill policy.

--*McKerr v. the United Kingdom*, ECHR, 4 May 2001 (para. 160).

\*\*\*\*\*

Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that "Everyone's right to life shall be protected by law". An arbitrary act cannot be lawful under the Convention....

It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the “execution of a sentence of a court”, that the “court” which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law ... and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided.... Lastly, the requirement in Article 2 § 1 that the penalty be “provided by law” means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be “accessible” and “foreseeable” as those terms are understood in the case-law of the Court ....

[...]

In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.

--*Ocalan v. Turkey*, ECHR, 12 March 2003 (paras. 202-203, 207).

### ***Inter-American System***

[I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats ... and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury ... or to otherwise maintain law and order where strictly necessary and proportionate. The Court has explained that, in such circumstances, states have the right to use force, “even if this implies depriving people of their lives.... There is an abundance of reflections in philosophy and history as to how the death of individuals in these circumstances generates no responsibility whatsoever against the State or its officials.”

[...]

The means that can be used by the state while protecting its security or that of its citizens are not unlimited, however. To the contrary, as specified by the Court, “regardless of the seriousness of certain actions and the culpability of

the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends.”

--*Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002) (paras. 87, 89), citing Neira Alegría Case, I/A Court H.R., Judgment of January 19, 1995 (paras. 74-75).*

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Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.

--*I/A Court H.R., Advisory Opinion OC-16/99, The right to information on consular assistance, in the framework of the guarantees of the due process of law, October 1, 1999 (para. 136).*

\*\*\*\*\*

[T]he Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation. The Commission has recognized previously that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether death is the appropriate punishment in a given case.... Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life."

--*Case 12.243, Report N° 52/01, Garza case, Annual Report of the IACHR 2000 (par. 100).*

## B. Prohibition of torture or cruel, inhuman or degrading treatment

The right to freedom from torture and from cruel, inhuman or degrading treatment is, under both the universal and regional systems, absolute and non-derogable under all circumstances.

### *United Nations*

In its General Comment No. 20 on article 7 of the Covenant, the Human Rights Committee underlined the non-derogable nature of this provision:

The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

*--General Comment No. 20, 10/3/1992 (para 3).*

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The Committee is aware of the difficulties that the State Party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose.

*--CCPR/CO/76/EGY, para. 4 (2002).*

\*\*\*\*\*

The Committee is deeply concerned that under the guidelines for the conduct of interrogation of suspected terrorists authority may be given to the security service to use "moderate physical pressure" to obtain information considered crucial to the "protection of life". The Committee notes that the part of the report of the Landau Commission that lists and describes authorized methods of applying pressure remains classified. The Committee notes also the admission by the State party delegation that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances.... If legislation is to be enacted for the purpose of authorizing interrogation



techniques, such a law should explicitly prohibit all forms of treatment prohibited by article 7.

[...]

A specific concern of the Committee is that at least some of the persons kept in administrative detention for reasons of State security ... do not personally threaten State security but are kept as "bargaining chips" in order to promote negotiations with other parties on releasing detained ... soldiers or the bodies of deceased soldiers. The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency.

--CCPR/C/79/Add.93, paras. 19, 21 (1998).

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The Committee against Torture has also referred to the non-derogable nature of the right to freedom from torture:

[A] State party to the Convention [against Torture] ... is precluded from raising before [the] Committee [against Torture] exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention.

-- A/52/44, para. 258 (1997).

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[U]nder article 2, paragraph 2, of the Convention [against Torture], no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.

--A/51/44, paras.180-222 (1997), *Inquiry under Article 20*.

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The Human Rights Committee observed, in its General Comment No. 20, that prolonged solitary confinement in itself may constitute a violation of the right to freedom from torture and from cruel, inhuman or degrading treatment:

[T]he Committee notes that prisoners may be segregated [in the State party] as a preventive measure for the protection of security, the maintenance of order or to

guarantee the safety of the prisoner. Noting that segregation involves substantial isolation and may be extended over long periods of time, the Committee recalls its General Comment 20 in which it noted that prolonged solitary confinement of a detained or imprisoned person may violate article 7.

--CCPR/C/79/Add.93, para. 20 (1998).

### ***European Court of Human Rights***

Article 3 ... enshrines one of the most fundamental values of democratic society.... The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4..., Article 3 ... makes no provision for exceptions and no derogation from it is permissible under Article 15 ... even in the event of a public emergency threatening the life of the nation....

--Chahal v. the United Kingdom, ECHR, 15 November 1996 (para. 79).

\*\*\*\*\*

The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.

--Tomasi v. France, ECHR, 27 August 1992 (para. 115).

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The five techniques [wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink] were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3.... The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

--Ireland v. the United Kingdom, 18 January 1978 (para. 167).

### *Inter-American System*

An essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations erga omnes....

--*IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000 (para. 118).*

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The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.... That situation is exacerbated by the vulnerability of a person who is unlawfully detained.... Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person..., in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.

--*Loayza Tamayo Case, I/A Court H.R., Judgment of September 17, 1997 (para. 57).*

### C. Conditions of detention

The question of conditions of detention has been a matter of concern for both the UN and regional systems. They have considered it with respect both to the right to freedom from torture and other cruel, inhuman or degrading treatment, and the right to respect for the inherent dignity of the human person.

#### *United Nations*

Although article 10 of the Covenant is not specified as non-derogable in article 4 of the same treaty, the Human Rights Committee has taken the view that the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person is nevertheless not subject to derogation:

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4, [such as:]

- (a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights..., the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10....

--*General Comment No. 29, CCPR/C/21/Rev.1/Add.11, para. 13 (2001).*

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In *Polay Campos v. Peru*, the Human Rights Committee examined a case where the victim had been detained in relation to alleged terrorist activities:

Victor Polay Campos was detained incommunicado from the time of his arrival at the prison in Yanamayo until his transfer to the Callao Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of article 10, paragraph 1, of the Covenant.

As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence. The latter information is corroborated by a letter dated 14 September 1993 from the International Committee of the Red Cross to the

author, which indicates that letters from Mr. Polay Campos' family could not be delivered by Red Cross delegates during a visit to him on 22 July 1993, since delivery and exchange of correspondence were still prohibited. In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

As to Mr. Polay Campos' general conditions of detention at Callao, the Committee has noted the State party's detailed information about the medical treatment Mr. Polay Campos has received and continues to receive, as well as his entitlements to recreation and sanitation, personal hygiene, access to reading material and ability to correspond with relatives. No information has been provided by the State party on the claim that Mr. Polay Campos continues to be kept in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day. The Committee expresses serious concern over the latter aspects of Mr. Polay Campos' detention. The Committee finds that the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant.

--*Polay Campos v. Peru*, Case No. 577/1994, Views adopted on 6 November 1997 (paras. 8.4, 8.6 and 8.7).

### ***European Court of Human Rights***

[The Court] reiterates that under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance....

The Court notes also that complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason....

--*Ocalan v. Turkey*, ECHR, 12 March 2003 (paras. 231- 232).

### ***Inter-American System***

One of the reasons that incommunicado detention is considered to be an

exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suárez-Rosero was subjected may be described as cruel, inhuman and degrading.

--*Suarez Rosero Case, I/A Court H.R., Judgment of 12 November 1997 (paras. 90-91).*

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[P]rolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention....

--*Velásquez Rodríguez Case, I/A Court H.R., Judgment of 28 July 1988 (para. 156).*

## D. Pre-trial and administrative detention

Pre-trial and administrative detention raises a number of concerns in the context of state action against terrorism. The UN and regional systems all emphasize certain core principles including the necessity of judicial control, the right of accused persons to know the charges at issue, and limits on the length of pre-trial detention.

### *United Nations*

The Human Rights Committee addressed the question of pre-trial and administrative detention on grounds of public security in its General Comment No. 8 on article 9 of the Covenant:

[I]f so-called preventive detention is used, for reasons of public security, it ... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.

*--General Comment No. 8, para.4 (1982).*

#### D.1 Judicial control and prohibition of arbitrary detention

Although article 9 of the Covenant, including its provisions for judicial control, is not specified as non-derogable under states of emergency in article 4, paragraph 2, the Human Rights Committee has stated:

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. 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.

*--General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 2001 (para. 16).*

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The Committee is ... of the view that preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore, the Committee recommends that the requirements of article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with article 14, paragraph 1, of the Covenant. It further recommends, at the very least, that a central register of detainees under preventive detention laws be maintained and that the State party accept the admission of the International Committee of the Red Cross to all types of detention facilities, particularly in areas of conflict.

--CCPR/C/79/Add. 81, para. 27 (1997).

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The Committee is concerned that the undetermined detention which may be ordered by the Secretary of the Ministry of Defense violates the Covenant, particularly when such detention can be challenged only one year after detention. In view of this, the Committee remains concerned about the effectiveness of the habeas corpus remedy in respect of those arrested under the Prevention of Terrorism Act.

--CCPR/C/79/Add.56, para. 452 (1995).

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The Committee remained concerned that despite the reduction in the number of persons held in administrative detention on security grounds, persons may still be held for long and apparently indefinite periods of time in custody without trial. It is also concerned that [those] detained by [the] military order in the occupied territories do not have the same rights to judicial review as persons detained ... under ordinary law.... The Committee takes due note that [the State party] has derogated from article 9 of the Covenant. The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention. The Committee recommends that the application of detention be brought within the strict requirements of the Covenant and that effective judicial review be made mandatory.

--CCPR/C/79/Add.93, para. 21 (1998).



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In Fals Borda v. Colombia, the Human Rights Committee considered a case where the alleged victims had been detained under an emergency law:

On 21 January 1979, Mr. Fals Borda and his wife, Maria Cristina Salazar de Fals Borda, were arrested by troops of the Brigade de Institutos Militares under Decree No. 1923. Mr. Fals was detained incommunicado at the Cuartel de Infanteria de Usaquin, from 21 January to 10 February 1979 when he was released without charges. Mrs. Fals continued to be detained for over one year. Mr. and Mrs. Fals Borda were released as a result of court decisions that there was no justification for their continued detention. They had not, however, had a possibility themselves to take proceedings before a court in order that that court might decide without delay on the lawfulness of their detention.

[...]

The Committee ... is therefore of the view that the facts ... above disclose violations of the International Covenant on Civil and Political Rights, particularly ... article 9(4)....

--Fals Borda v. Colombia, Case No. 46/1979, Views adopted on 27 July 1982 (para. 12.3).

### ***European Court of Human Rights***

The Court has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems.... This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved....

--Ocalan v. Turkey, ECHR, 12 March 2003 (para. 106).

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The Court considers that where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5 § 4. Having regard to the conclusion it reached with regard to Article 5 § 3 ... the Court considers that the period in question [seven days] sits ill with the notion of “speedily” under Article 5 § 4 of the Convention....

The Court notes that in the present case, the length of the applicant's detention in police custody did not exceed the time limit prescribed by law. This is, in fact, the reason why the applicant was unable to challenge his detention in

police custody which lasted seven days, a period which was in conformity with the Turkish law at the relevant time.

--*Igdeli v. Turkey*, ECHR, 20 June 2002 (paras. 34-35).

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In accordance with the relevant law and practice, the decision whether a deportation and detention order should invoke national security -- with the automatic consequence of excluding any judicial review of lawfulness -- is fully within the discretion of the Ministry of the Interior. No court is empowered to enquire into the lawfulness of the detention. The detention order itself, as in the present case, states no reasons.... Moreover, Mr Al-Nashif was detained practically incommunicado and was not allowed to meet a lawyer to discuss any possible legal challenge to the measures against him.

That is a situation incompatible with Article 5 § 4 of the Convention and its underlying rationale, the protection of individuals against arbitrariness. National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved....

[...]

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information....

The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.

Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

--*Al-Nashif v. Bulgaria*, ECHR, 20 June 2002 (paras. 94, 123-124).

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What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial

control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 para. 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, “one of the fundamental principles of a democratic society..., which is expressly referred to in the Preamble to the Convention”....

--*Sakik and Others v. Turkey*, ECHR, 26 November 1997 (para. 44).

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The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13..., in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

It follows that the Court considers that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5 para. 4.... This shortcoming is all the more significant given that Mr Chahal has undoubtedly been deprived of his liberty for a length of time [more than three years] which is bound to give rise to serious concern....

--*Chahal v. the United Kingdom*, ECHR, 15 November 1996 (paras. 131-132).

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The Court stresses in this respect that the unacknowledged detention of an individual is a complete negation of ... guarantees [against arbitrary deprivation of liberty] and a most grave violation of Article 5. Having assumed control over [an] individual, it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been detained and has not been seen since....

--*Orhan v. Turkey*, ECHR, 18 June 2002 (para. 369).

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The Court notes that the applicant's detention in police custody lasted eight days. It recalls that in the Brogan and Others case it held that detention in police custody which had lasted four days and six hours without judicial control fell outside the strict constraints as to the time laid down by Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism....

Even though the investigation of terrorist offences, as supposed in this case, presents the authorities with special problems, the Court cannot accept that it was necessary to detain the applicant for eight days without judicial intervention.

--*Filiz and Kalkan v. Turkey*, ECHR, 20 June 2002 (paras. 25-26).

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The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3....

--*Brogan and Others v. the United Kingdom*, ECHR, 29 November 1988, (para. 62).

### ***Inter-American System***

Article 7 of the Convention ... contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.

--*Gangaram Panday Case*, I/A Court H.R., Judgment of January 21, 1994 (paras. 46-47).

The American Convention on Human Rights, at article 27(2), expressly includes "judicial guarantees essential for the protection of [non-derogable] rights", in its list of non-derogable rights:

[I]t must ... be understood that the declaration of a state of emergency -- whatever its breadth or denomination in internal law -- cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.

[...]

The Court is of the opinion, unanimously, [t]hat the "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.

--/A Court H.R., *Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, October 6, 1987 (paras. 25, 41).*

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In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.

This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.

[...]

[I]t follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.

--/A Court H.R., *Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations, January 30, 1987 (paras 35-36, 40).*

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"[I]n serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that 'the judicial guarantees essential for (their) protection' remain in force".... The

purpose of the judiciary is to protect legality and the rule of law during a state of emergency.

--OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000 (paras. 71-73), citing I/A Court H.R., *Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations*, January 30, 1987.

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The Inter-American Commission and Court have consistently indicated that, not only may no one be deprived of liberty except in the cases or circumstances expressly provided by law, but further, any deprivation of liberty must strictly adhere to the procedures defined thereunder.... The failure to comply with such procedures creates the possibility, and eventually the probability of abuse of the rights of detainees. Where detention is not ordered or properly supervised by a competent judicial authority, where the detainee may not fully understand the reason for the detention or have access to legal counsel, and where the detainee's family may not be able to locate him or her promptly, there is clear risk, not just to the legal rights of the detainee, but also to his or her personal integrity.

--OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter VII (para. 37).

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In the instant case, the detention occurred amid a terrible disruption of public law and order that escalated in 1992 and 1993 with acts of terrorism that left many victims in their wake. In response to these events, the State adopted emergency measures, one of which was to allow those suspected of treason to be detained without a lawful court order. As for [the State party's] allegation that the state of emergency that was declared involved a suspension of Article 7 of the Convention, the Court has repeatedly held that the suspension of guarantees must not exceed the limits strictly required and that "any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would ... be unlawful." The limits imposed upon the actions of a State come from "the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.

[...]

Applying the laws in force to this specific case, the ... Court finds that the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the Convention.

--*Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (paras. 109, 111).*

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The fact that the ineffectiveness of habeas corpus was due to forced disappearance does not exclude the violation of Article 25 of the American Convention. This provision on the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.

--*Castillo Páez Case, I/A Court H.R., Judgment of November 3, 1997 (para. 82).*

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In order to ensure effective judicial oversight of the detention, the competent court must be quickly apprised of the persons who are held in confinement. One of the purposes of such action is to protect the well-being of the persons detained and to avoid any violation of their rights. The Inter-American Commission on Human Rights has determined that, unless such detention is reported to the court, or the court is so advised after an appreciable length of time has elapsed from the time the subject has been deprived of his freedom, the rights of the person in custody are not being protected and the detention infringes that person's right to due process.

--*Case 11.205, Report N° 2/97, Bronstein case, Annual Report of the IACHR 1997 (para. 11).*

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The Inter-American Commission has also addressed the specific question of preventive detention in the immigration context, in a situation arising under the American Declaration of the Rights and Duties of Man:

[I]n evaluating the propriety under the Declaration of instances of preventive and other detention, Article XXV specifies three fundamental requirements that must be satisfied in such circumstances: first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in law; second, it may not be arbitrary; and third, supervisory judicial control must be available without delay. In situations of continuing detention, this necessarily includes supervision at regular intervals.

--*Case 9903, Report N° 51/01, Ferrer-Mazorra et al case, Annual Report of the IACHR 2000 (para. 212).*

## *African Commission on Human and Peoples' Rights*

All the victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons ) Amended Decree No. 14 (1994), that stipulates that the government can detain people without charge for as long as three months in the first instance. The decree also states that the courts cannot question any such detention or in any other way intervene on behalf of the detainees. This decree allows the government to arbitrarily hold people critical of the government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore prima facie violates the right not to be arbitrarily arrested or detained protected in Article 6 [of the African Charter on Human and Peoples' Rights].

*--International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation case, Comm. No. 137/94, 139/94, 154/96 and 161/97, 12<sup>th</sup> Annual Activity report 1998 - 1999 (para. 83).*

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All parties agree that Mr. Mazou was held beyond the expiry of his sentence. No judgment was passed to extend his sentence. Therefore the detention was arbitrary, and the Commission finds that this constitutes a violation of Article 6.... Detention on the mere [suspicion] that an individual may cause problems is a violation of his right to be presumed innocent.

*--Annette Pagnouille (on behalf of Abdoulaye Mazou) case, Comm. No. 39/90, 10<sup>th</sup> Annual Activity Report 1996 – 1997 (paras. 17, 21).*

### D.2 Charges and right to be informed of the reasons for arrest

## *United Nations*

The [Human Rights] Committee is concerned ... that the periods of detention without charge under the [Offences Against the State] Act have been increased, that persons may be arrested on suspicion of being about to commit an offence, and that the majority of persons arrested are never charged with an offence. It is concerned that, in circumstances covered by the Act, failure to respond to questions may constitute evidence supporting the offence of belonging to a prohibited organization. The application of the Act raises problems of compatibility with articles 9 and 14, paragraph 3 (g), of the Covenant.

*--A/55/40, paras. 422-451 (2000).*

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While noting the State party's reservation to article 9 of the Covenant, the Committee considers that this reservation does not exclude, *inter alia*, the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest.

--CCPR/C/79/Add.81, para. 24 (1997).

### ***European Court of Human Rights***

Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.

As the Government pointed out, in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 para. 1 (c) ... is impaired....

--*Fox, Campbell and Hartley v. the United Kingdom*, ECHR, 30 August 1990 (para. 32).

### D.3 Prolonged pre-trial or administrative detention

### ***United Nations***

[Concerning special legislation on armed groups,] the [Human Rights] Committee notes with concern that the duration of pretrial detention can continue for several years and that the maximum duration of such detention is determined according to the applicable penalty.... [The Committee invites the State party] to reduce the duration of pretrial detention and to stop using duration of the applicable penalty as a criterion for determining the maximum duration of pretrial detention.

--CCPR/C/79/Add.61, paras. 12, 18 (1996).

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[The Committee on the Rights of the Child] notes with concern that the Organizational Act 7/2000 on terrorism increases the period of police custody ... for children accused of terrorism.

--CRC/C/15/Add.185, paras. 53-54 (2002).

### *Inter-American System*

The purpose of the principle of "reasonable time" to which Articles 7(5) and 8(1) of the American Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of....

This Court shares the view of the European Court of Human Rights, which in a number of decisions analyzed the concept of reasonable time and decided that three points should be taken into account in determining the reasonableness of the time in which a proceeding takes place: a) the complexity of the case, b) the procedural activity of the interested party, and c) the conduct of the judicial authorities....

--Suárez Rosero Case, I/A Court H.R., Judgment of November 12, 1997 (paras. 70, 72).

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The right to the presumption of innocence requires that the duration of preventive detention not exceed the reasonable period of time cited in Article 7.5. Otherwise, such imprisonment takes on the nature of premature punishment, and thus constitutes a violation of Article 8.2 of the American Convention.

[...]

The Commission has examined two factors to determine whether preventive detention in a specific case constitutes a violation of the right to personal freedom and the judicial guarantees set forth in the American Convention.

In the first place, the national legal authorities must justify the measure cited pursuant to one of the criteria established by the Commission.... In the second place, when the Commission decides that such justification exists, it must proceed to ascertain whether those authorities have exercised the requisite diligence in discharging the respective duties in order to ensure that the duration of such confinement is not unreasonable.

--Case 11.205, Report N° 2/97, Bronstein case, Annual Report of the IACHR 1997 (paras. 12, 23-24).

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[T]he principle of the rule of law that establishes the need for criminal prosecution of all crimes by the State, cannot justify an unlimited length of time to resolve the criminal matter. Otherwise, there would be an implicit assumption that the State always prosecutes guilty people and that thus the length of time taken to convict the accused is irrelevant. By international standards, all persons accused of a criminal offense must be considered innocent until proven guilty.

[...]

[T]he risk of inverting the presumption of innocence increases with an unreasonably prolonged pre-trial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.

The right to defense also guaranteed in the Convention under article 8(2)(f) is threatened by lengthy incarceration without conviction because, in some cases, it increases the defendant's difficulty in mounting a defense. With the passing of time, the limits of acceptable risks that are calculated into the defendant's ability to present evidence and counterarguments are enhanced. The possibility to convene witnesses diminishes as well as the strength of any counterarguments.

--*Case 11.245, Report N° 12/96, Giménez case, Annual Report of the IACHR 1995 (paras. 78-81).*

#### D.4 Incommunicado Detention

##### ***United Nations***

The Human Rights Committee has expressed concern over the risks inherent in the practice of incommunicado pre-trial detention, including the possibility of infliction of torture or ill-treatment:

The Committee expresses concern at the maintenance on a continuous basis of special legislation under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days ... [and] emphasizes that those provisions are not in conformity with articles 9 and 14 of the Covenant. It urges the State party to abandon the use of incommunicado detention.

--*CCPR/C/79/Add.61, paras. 12, 18 (1996).*

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The Committee notes ... that nationals [of the State party] suspected or convicted of terrorism abroad and expelled to [the State party] have not benefited in detention from the safeguards required to ensure that they are not ill-treated, having notably been held incommunicado for periods of over one month (articles 7 and 9 of the Covenant).

--CCPR/CO/76/EGY, para. 16 (2002).

### ***Inter-American System***

The Inter-American Commission and Court have consistently indicated that, not only may no one be deprived of liberty except in the cases or circumstances expressly provided by law, but further, any deprivation of liberty must strictly adhere to the procedures defined thereunder.... The failure to comply with such procedures creates the possibility, and eventually the probability of abuse of the rights of detainees. Where detention is not ordered or properly supervised by a competent judicial authority, where the detainee may not fully understand the reason for the detention or have access to legal counsel, and where the detainee's family may not be able to locate him or her promptly, there is clear risk, not just to the legal rights of the detainee, but also to his or her personal integrity.

--IACHR, OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter VII (para. 37).

## E. Right to fair trial

Key aspects of the right to fair trial are essential to respecting human rights while countering terrorism, including in states of emergency. All systems have stressed the fundamental importance of the presumption of innocence. In addition, all systems have expressed deep concern about the trial of civilians before military and other special tribunals.

### E.1 Presumption of innocence and other rights

#### *United Nations*

Although article 14 of the Covenant is not listed as non-derogable under article 4, the Human Rights Committee (in General Comment No. 29) has concluded that certain aspects of article 14 are obligatory, even in states of emergency:

[T]he 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 ... deviating from fundamental principles of fair trial, including the presumption of innocence.

[...]

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.

*--General Comment No. 29, CCPR/C/21/Rev.1/Add.11, paras. 11, 16 (2001).  
See also General Comment No. 13 (on article 14 of the Covenant).*

#### *European Court of Human Rights*

[In the Brogan case, the Court] concluded that the fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not, on its own, sufficient to ensure compliance with the specific requirements of Article 5 § 3 of the Convention.

The Court, accordingly, finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very

essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.

It concludes, therefore, that there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6 § 1 of the Convention.

Moreover, given the close link, in this context, between those rights guaranteed by Article 6 § 1 of the Convention and the presumption of innocence guaranteed by Article 6 § 2 ..., the Court also concludes that there has been a violation of the latter provision.

--*Heaney and McGuinness v. Ireland*, ECHR, 21 December 2000 (paras. 57-59).

### ***Inter-American System***

The right of every person accused of a criminal offense to be presumed innocent until his guilt is fully proven is a principle set forth ... in the American Convention on Human Rights....

--*IACHR, OEA/Ser.L/V/II.53, doc. 25, ch. IV, 30 June 1981 (para. 9)*.

### **E.2 Military and other special courts**

#### ***United Nations***

The Human Rights Committee has considered, in a number of cases and concluding observations, the nature of tribunals with competence to try offences related to terrorism or state security. In this regard, the Committee has often addressed the role of the military and military courts.

The Committee is concerned that the military and members of security or other forces allegedly continue to exercise special powers over civilians and civilian authorities, including judicial authorities, granted to them through the establishment of Special Public Order Zones by decrees no longer in force. The Committee is particularly concerned that the military exercise the functions of investigation, arrest, detention and interrogation.

--*CCPR/C/79/Add.76, para. 19 (1997)*.

\*\*\*\*\*

The Committee notes with concern that military courts have broad jurisdiction. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee notes that the State party has not

provided information on the definition of "exceptional circumstances" and is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences.

--CCPR/CO/71/UZB, para. 15 (2001).

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Under [the decree in question], cases of treason are tried by military courts, regardless of whether the defendant is a civilian or a member of the military or security forces. In this connection, the Committee expresses its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that, moreover, there is no provision for sentences to be reviewed by a higher tribunal. These shortcomings raise serious doubts about the independence and impartiality of the judges of military courts.

--CCPR/C/79/Add.67, para. 350 (1996).

\*\*\*\*\*

The Committee expresses concern about the broad scope of the jurisdiction of military courts in [the State party], especially its extension beyond disciplinary matters and its application to civilians. It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures and verdicts by the ordinary courts.

--CCPR/C/79/Add.78, para. 14 (1997).

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The Committee ... notes with concern that civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security. Therefore, the Committee recommends that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in any circumstances.

--CCPR/C/79/Add.79, para. 20 (1997).

\*\*\*\*\*

The Human Rights Committee has considered in particular the question of the competence sometimes given to military courts to try civilians as well as members of the armed forces or police in cases where they are alleged to have committed human rights abuses:

The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant).

--CCPR/CO/76/EGY, para. 16 (2002).

\*\*\*\*\*

The Committee ... urges that all necessary steps be taken to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation. To that end, the Committee recommends that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General and the Public Prosecutor.

--CCPR/C/79/Add.76, para. 34 (1997).

\*\*\*\*\*

The State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts.

--CCPR/C/79/Add.78, para. 14 (1997).

\*\*\*\*\*

The Human Rights Committee has also considered the question of redress for convictions by military courts:

The Committee takes note of the measures adopted by [the State party] to pardon persons convicted of terrorism. Notwithstanding its satisfaction at the release of 69 persons, the Committee considers that the pardon does not provide full redress to the victims of trials conducted without regard for due process of law and repeats the recommendation made in paragraph 21 of its observations, which includes the need to establish an effective mechanism, at the initiative of the State, to revise all the convictions handed down by the military tribunals in treason and terrorism cases.



--CCPR/C/79/Add.72, para. 10 (1996).

\*\*\*\*\*

The Human Rights Committee has similarly expressed concern over:

[the] system of trial by "faceless judges", in which the defendants do not know who are the judges trying them and are denied public trials, and which places serious impediments, in law and in fact, to the possibility for defendants to prepare their defence and communicate with their lawyers.

--CCPR/C/79/Add.67, para. 350 (1996).

\*\*\*\*\*

[A] system, which provides for faceless judges and anonymous witnesses, does not comply with article 14 of the Covenant, particularly paragraph 3 (b) and (e), and the Committee's General Comment 13 (21).

--CCPR/C/79/Add.76, para. 21 (1997).

\*\*\*\*\*

In *Polay Campos v. Peru*, the Committee addressed the right to fair trial, as contained in article 14 of the Covenant, through an analysis of "faceless courts":

As indicated by the Committee in its preliminary comments of 25 July 1996 on the Third Periodic Report of Peru and its Concluding Observations of 6 November 1996 ... such trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant.... [I]n fact, the very nature of the system of trials by "faceless judges" in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee's opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2.

-- *Polay Campos v. Peru*, Case No. 577/1994, Views adopted on 6 November 1997 (para. 8.8); see also *Gutierrez v. Peru*, Case No. 678/1996, Views adopted on 26 March 2002.

### ***European Court of Human Rights***

The Court points out that in [several previous] judgments..., it noted that certain aspects of the status of military judges sitting in the State Security Courts that had convicted the applicants in those cases raised doubts as to the independence and impartiality of the courts concerned. The applicants in those cases had had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.

What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified....

--*Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 114).

\*\*\*\*\*

The Court reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 para. 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence....

As to the condition of “impartiality” within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect....

--*Incal v. Turkey*, ECHR, 9 June 1998 (para. 65).

### ***Inter-American System***

Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are

violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create “[t]ribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

[...]

This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. “Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.”

[...]

The Court has established that the military proceedings against the civilians accused of having engaged in crimes of treason were conducted by “faceless” judges and prosecutors, and therefore involved a number of restrictions that made such proceedings a violation of due process. In effect, the proceedings were conducted on a military base off limits to the public. All the proceedings in the case, even the hearing itself, were held out of the public eye and in secret, a blatant violation of the right to a public hearing recognized in the Convention.

--*Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (paras. 128-131, 172).*

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In the context of [the State party] and other countries, the Commission has repeatedly noted that “faceless” justice systems do not provide adequate due process guarantees for criminal defendants.... The anonymity of the prosecutors, judges and witnesses deprives the defendant of the basic guarantees of justice.

Because the defendant does not know who is judging or accusing him, he cannot know whether that person is qualified to do so. Nor may he know whether there exists any basis to request recusal of these authorities based on incompetence or lack of impartiality. As a result, the defendant cannot be guaranteed trial by a competent, independent and impartial court as guaranteed by Article 8(1) of the American Convention.

The defendant is also prevented from carrying out any effective examination of the witnesses against him. The right to examination is largely important, because it provides the defendant with the opportunity to question the witness’s credibility and knowledge of the facts. The defendant cannot adequately examine a witness if he does not possess any information regarding the witness’s background or motivations and does not know how the witness

obtained information about the facts in question. The "faceless" justice system thus also leads to the violation of Article 8(2)(f) of the American Convention, guaranteeing the right of the defense to examine witnesses.

--IACHR, *OEA/Ser.L/V/II.102/Doc. 9, rev. 1, 26 February 1999 (paras. 121-25)*.

### ***African Commission on Human and Peoples' Rights***

[Regarding the issue of the Special Military Tribunal, t]he Commission is not taking an issue with the history and origin of the laws nor the intention why they were promulgated. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter. The Commission is of the opinion that to answer this question, it must necessarily consider the merits or demerits of the trial, an issue the Government does not want to be involved in.

Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the Tribunal in contravention of Principle 10 of the Basic Principles on the Independence of Judges. The said Principle states: *Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.*

In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu, a civilian by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by Article 7 of the Charter.

It is fitting, in this regard, to cite the Commission's general position on the issue of trials of civilians by Military Tribunals. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa, the Commission had, while adopting the Dakar Declaration and Recommendations, noted thus: *In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards. They should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.*

--*Media Rights Agenda case, Comm. No. 224/98, 14<sup>th</sup> Annual Activity report 2000 - 2001 (paras. 59-62)*.

\*\*\*\*\*

The government confirms the situation alleged by the complainants in respect of the composition of the Special Courts. National legislation permits the

President, his deputies and senior military officers to appoint these courts to consist of "three military officers or any other persons of integrity and competence". The composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates Article 7.1(d). The government has a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated Article 26.

The dismissal of over one hundred judges who were opposed to the formation of special courts and military tribunals is not contested by the government. To deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies. Such actions by the government against the judiciary constitute violations of Articles 7.1(d) and 26 of the Charter.

*--Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa case, Comm. No. 48/90, 50/91, 52/91, 89/93, 8<sup>th</sup> Annual Activity Report 1994 - 1995 (paras. 68-69).*

### E.3 Right to appeal

#### *United Nations*

The Human Rights Committee has addressed the question of the right to appeal under article 14, paragraph 5 of the Covenant, with respect to proceedings conducted by special tribunals. For example:

The Committee is concerned that there is no appeal provided for against the decisions of the special court.

*--CCPR/C/79/Add.80, para. 23 (1997).*

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The Committee expresses concern [that] persons suspected of belonging to or collaborating with armed groups ... are judged by the Audiencia Nacional without the possibility of appeal.

*--CCPR/C/79/Add.61, para. 12 (1996).*

The Committee against Torture has also addressed the right to appeal with respect to terrorist offences:

The Committee [against Torture] recommends that the State party ... [e]nsure that all persons convicted by decisions of military courts in terrorism cases shall

have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

--*CAT/C/XXIX/Misc.4, para. 6 (2002)*.

### ***Inter-American System***

The right to appeal the judgment, also recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages. Therefore, the concept of a tribunal previously established by law and the principle of due process apply throughout all those phases and must be observed in all the various procedural instances. If the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid.

--*Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (para. 161)*.

## F. Principle of legality (*nullum crimen, nulla poena sine lege*)

International jurisprudence uniformly emphasizes the importance of the principle of *nullum crimen, nulla poena sine lege*, according to which criminal conduct must be defined in law before an offense can be committed, and with sufficient precision so as to prevent arbitrary enforcement. In this connection, it should be noted that the Covenant (at article 4) includes among its non-derogable provisions article 15, under which no one shall be held guilty of any criminal offence on account of any act which did not constitute a criminal offence at the time it was committed.

### *United Nations*

The Committee is concerned that the relatively broad definition of the crime of terrorism and of membership of a terrorist group under the State party's Criminal Code may have adverse consequences for the protection of rights under article 15 of the Covenant, a provision which significantly is non-derogable under article 4, paragraph 2.

--CCPR/CO/77/EST, para. 8 (2003).

\*\*\*\*\*

The Committee is particularly disturbed by the adoption in 1992 of law No. 97 on terrorism, which contains provisions contrary to articles 6 and 15 of the Covenant. The definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity. The Committee is of the opinion that the definition in question should be reviewed by the ... authorities and stated much more precisely, especially in view of the fact that it enlarges the number of offences which are punishable with the death penalty. The Committee underscores that according to article 6, paragraph 2 of the Covenant, only the most serious crimes may lead to the death penalty.

--CCPR/C/79/Add.23, para. 8 (1993); see also CCPR/CO/76/EGY, para. 16 (2002).

### *European Court of Human Rights*

The Court recalls that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment....

--Ecer and Zeyrek v. Turkey, ECHR, 27 February 2001 (para. 29).

\*\*\*\*\*

The Court recalls that, according to its case-law, Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

--Baskaya and Okçuoglu v. Turkey, ECHR, 8 July 1999 (para. 36).

### ***Inter-American System***

The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention.

--Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (para. 121).

\*\*\*\*\*

Decree Law No. 25,475, of May 6, 1992, defines terrorism at its Article 2 as an act that "provokes, creates, or maintains a state of anxiety, alarm, or fear in the population or in a sector thereof, performs acts against life, the body, health, personal liberty and security, or against property, against the security of public buildings, roads, or means of communication or of transport of any type, energy or transmission towers, motorized facilities or any other good or service, using arms, explosive materials or artefacts, or any other means capable of causing damage or grave disturbance of the public peace, or affect the international relations or the security of society and the State." This Decree expressly



derogated the provisions of the Criminal Code that had been applied to crimes related to terrorism since April 1991, and established, for those responsible, a minimum sentence of 20 years imprisonment and a maximum of life imprisonment.

The definition of the crime of terrorism set forth in the above-mentioned decree is abstract and vague, and thereby violates the basic principle of legality, which is a basic tenet of the criminal law, whose ultimate objective is the juridical security the individual needs to know precisely what acts and omissions may trigger his or her criminal liability.

*--OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000 (paras. 79-80).*

## G. Access to counsel

The UN and regional systems all emphasize the right of access to counsel.

### *United Nations*

The Human Rights Committee has addressed the question of access to counsel with respect to pre-trial and administrative detention:

The Committee notes with concern that, under the general Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to interference with evidence or alerting another suspect. Particularly in circumstances where these powers have not been used ... for several years, where their compatibility with articles 9 and 14, *inter alia*, is suspect, and where other less intrusive means for achieving the same ends exist, the Committee considers that the State party has failed to justify these powers.

*--CCPR/CO/73/UK, para. 13 (2001).*

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The Committee regrets that legal assistance and advice may not be available until a person has been charged.... Steps should be taken to ... ensure that all criminal procedures are brought into compliance with articles 9 and 14 of the Covenant.

*--A/55/40, paras.422-451 (2000).*

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The Committee is concerned that the accused has no right to contact a lawyer during the initial 72 hours of detention in police custody.

*--CCPR/C/79/Add.80, para. 23 (1997).*

### *European Court of Human Rights*

The Court ... notes that the applicant was not tried by an independent and impartial tribunal, was not assisted by his lawyers when questioned in police custody, was unable to communicate with them out of hearing of third parties and was unable to gain direct access to the case file until a very late stage in the proceedings. Furthermore, restrictions were imposed on the number and length of his lawyers' visits and his lawyers were not given proper access to the case file until late in the day. The Court finds that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the

principle of a fair trial, as set out in Article 6, was contravened. There has therefore been a violation of Article 6 § 1, taken together with Article 6 § 3 (b) and (c).

--*Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 169).

\*\*\*\*\*

In the Court's opinion, to deny access to a lawyer for such a long period [48 hours] and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6...

--*Magee v. the United Kingdom*, ECHR, 6 June 2000 (para. 44).

### ***Inter-American System***

In the Basic Principles on the Role of Lawyers, number 8 -- under the heading of “Special safeguards in criminal justice matters” -- sets out the proper standards for an adequate defense in criminal cases. It reads as follows:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials....

Mr. Astorga Valdez’ conviction illustrates even more vividly what little chance the accused had of putting on an effective defense. In his case, the accused was convicted in the court of last instance, based on new evidence that his defense attorney had not seen and consequently could not rebut.

This particular case illustrates how the work of the defense attorneys was shackled and what little opportunity they had to introduce any evidence for the defense. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defense attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defense.

--*Castillo Petruzzi et al. Case*, I/A Court H.R., Judgment of May 30, 1999 (paras. 139-141).

\*\*\*\*\*

Article 8(2)(d)-(e) of the American Convention establishes the right of the accused to have the representation of a lawyer. The Commission has interpreted this provision to include the right to have a lawyer present for all important stages of the proceedings, particularly where the defendant is held in detention. Thus, for example, the Commission has noted that procedures which do not allow for the presence of an attorney "during the first part of the proceeding, in which decisive evidence against the defendant may be produced, could seriously affect his right to a defense...." The Commission has also established the right of a defendant, in general, to have an attorney present when giving a statement or undergoing interrogation....

*--IACHR, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999 (para. 97).*

## H. Freedom of thought, conscience and belief

This right cannot be subject to any derogation under the United Nations or the Inter-American systems. It is, however, subject to derogation in the European system.

### *United Nations*

The [Human Rights] Committee is concerned at reports that, since recent terrorist attacks, persons have been the subject of attack and harassment on the basis of their religious beliefs and that religion has been utilized to incite to the commission of criminal acts. The Committee is also disturbed that incidents of violence and intimidation on the basis of religious affiliation ... continue to occur. The State party should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.

*--CCPR/CO/73/UK, para. 14 (2001).*

\*\*\*\*\*

The Committee expresses its grave concern about the incompatibility of several provisions of the Constitution with the Covenant: for example, ... articles 23, 44 and 45 of the Constitution, which allow derogation under a state of emergency and limitations to the freedom of thought and religion, contravene articles 4, paragraph 2, and 18 of the Covenant. The inconsistency of domestic law with provisions of the Covenant not only engenders legal insecurity, but is likely to lead to violations of rights protected under the Covenant.

*--CCPR/C/79/Add.100, para. 7 (1998).*

<b>I. Right to political participation and freedom of expression, opinion and assembly</b>
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States may derogate from these freedoms in times of emergency that threaten the life of the nation, provided that they follow the specific requirements pertaining to declaration of the emergency. They also may limit these freedoms in the absence of an emergency for specific reasons mentioned in each relevant human rights treaty. There are, however, conditions that must be met as specified below.

***United Nations***

[E]ven on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.

[...]

The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that, by prohibiting the authors of the communication from engaging in any kind of political activity for a period as long as 15 years, the State party has unreasonably restricted their rights under article 25 of the Covenant.

--*Landinelli Silva v. Uruguay*, Case No. 34/1978, Views adopted on 8 April 1981 (para. 8.4).

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In the case *Kim v. Republic of Korea*, the Human Rights Committee examined a conviction under the “National Security Law” for expressing opinion sympathetic to an “anti-State organization” linked with North Korea:

The Committee notes that the author was convicted for having read out and distributed printed materials which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt. Even taking that matter into account, the Committee has to consider whether the author’s political speech and his distribution of political documents were of a nature to attract the

restriction allowed by article 19 (3), namely, the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.

The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression, and that the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security also to prosecute the author for the exercise of his freedom of expression. The Committee considers therefore that the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant.

--*Kim v. Republic of Korea*, Case No. 574/94, Views adopted on 3 November 1998 (paras. 12.4- 12.5).

### ***European Court of Human Rights***

The Court ... observes that in [another] judgment..., it reiterated that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.

Moreover, the dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.... Finally, where such remarks incite people to violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

--*Sener v. Turkey*, ECHR, 18 July 2000 (para. 40).

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In the light of all the foregoing, the Court concludes that, although the reasons put forward by the Government in order to justify their interference with Mrs Vogt's right to freedom of expression are certainly relevant, they are not sufficient to establish convincingly that it was necessary in a democratic society to dismiss her. Even allowing for a certain margin of appreciation, the conclusion must be that to dismiss Mrs Vogt by way of disciplinary sanction from her post as secondary-school teacher was disproportionate to the legitimate aim pursued. There has accordingly been a violation of Article 10....

[...]

The applicant was dismissed from her post as a civil servant for having persistently refused to dissociate herself from the DKP on the ground that in her personal opinion membership of that party was not incompatible with her duty of loyalty.

--*Vogt v. Germany*, ECHR, 26 September 1995 (paras. 61, 65).

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As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.... The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.

--*The United Communist Party of Turkey and Others v. Turkey*, ECHR, 30 January 1998 (para. 43); see also *The Socialist Party and Others v. Turkey*, 25 May 1998 (para. 41); *Freedom and Democracy Party (OZDEP) v. Turkey*, 8 December 1999 (para. 37).

### ***Inter-American System***

The foregoing analysis ... shows the extremely high value that the [American] Convention places on freedom of expression. A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.

[...]



[F]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

--*I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985 (paras. 50, 70).*

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With regard to the content of the right to freedom of thought and expression, those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension:

It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others....

--*Olmedo Bustos et al Case ("Last Temptation of Christ")*, I/A Court H.R., Judgment of February 5, 2001 (para. 64).

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The American Convention is very clear in pointing out, in Article 16, that the freedom of association “shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”

--*Baena Ricardo et al Case*, I/A Court H.R., Judgment of February 2, 2001 (para. 168).

### ***African Commission on Human and Peoples' Rights***

The communications under consideration allege that persons were detained for belonging to opposition parties or trade unions. The government confirmed that the “Decree on Process and Transitional Powers Act 1989”, promulgated

on 30 June 1989, stipulates in section 7 that during a state of emergency any form of political opposition by any means to the regime of the Revolution for National Salvation is prohibited where there is “imminent and grave threat to the security of the country, public safety, independence of the State or territorial integrity and economic stability.”

As stated above, the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.

The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law. Any restrictions on rights should be the exception. The Government here has imposed a blanket restriction on the freedom of expression. This constitutes a violation of the spirit of article 9.2.

*--Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa case, Comm. No. 48/90, 50/91, 52/91, 89/93, 13<sup>th</sup> Annual Activity Report 1999 - 2000 (paras. 78-80).*

## J. Freedom of movement

As with the rights discussed in the previous section, States may derogate from this right in times of emergency that threaten the life of the nation, provided that they follow certain specific requirements. They also may limit the right in the absence of an emergency, under strict limitations contained in the relevant treaty.

### *United Nations*

Freedom of movement is protected by article 12 of the Covenant. This provision nevertheless allows some restrictions and limitations, addressed by the Human Rights Committee in its General Comment No. 27:

Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.

*--General Comment No. 27, CCPR/C/21/Rev.1/Add.9, para. 11 (1999).*

\*\*\*\*\*

In *Celepli v. Sweden*, the Human Rights Committee addressed restrictions on freedom of movement within the State party imposed on a person suspected of involvement in terrorist activities:

The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party. Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the Covenant. In this connection, the Committee also notes that the State party motu proprio reviewed said restrictions and ultimately lifted them.

*--Celepli v. Sweden, Case No. 456/1991, Views adopted on 18 July 1994 (para. 9.2).*

## K. Freedom from Discrimination

The prohibition against discrimination on grounds including race, color, sex, religion, political opinion, and national or social origin is a core human rights norm considered to be *jus cogens*. States must respect it in all circumstances.

### *United Nations*

While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of [the State party] for respect for human rights within the framework of the international campaign against terrorism, the [Human Rights] Committee expresses its concern regarding the effect of this campaign on the situation of human rights in [the State party], in particular for persons of foreign extraction.... The State party is ... requested to undertake an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism.

--CCPR/CO/74/SWE, para. 12 (2002).

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Since 11 September 2001, the UN Committee on the Elimination of Racial Discrimination has addressed in several instances the relationship between terrorism and racial discrimination:

While acknowledging the efforts made to confront the scourge of terrorism, the Committee is concerned about reports that members of particular groups ... are singled out by law-enforcement officials. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which the Committee underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin" (A/57/18, paragraph 514, Statement on racial discrimination and measures to combat terrorism, paragraph 5 of the Statement).

--CERD/C/62/CO/7, para. 24 (2003).

\*\*\*\*\*

The Committee is concerned about reports of a considerable increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001. The Committee recommends that the State party monitor this situation carefully, take decisive action to protect the rights of victims and deal with perpetrators, and report on this matter in its next periodic report.

--*CERD/C/60/CO/5, para. 121 (2002).*

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The Committee notes reports according to which, after the tragic events of 11 September 2001 in the United States, a parliamentary inquiry was conducted into the alleged existence of terrorists among students of Arab origin at the International Independent University.... The State party should ensure that actions taken should follow due process of law and that they avoid any suspicion of racial profiling.

--*CERD/C/60/CO/9, para. 15 (2002).*

\*\*\*\*\*

The Committee notes with concern that, in the aftermath of the events of 11 September 2001 Muslims and Arabs have suffered from increased racial hatred, violence and discrimination. The Committee therefore welcomes the statement of the Prime Minister ... condemning all acts of intolerance and hatred against Muslims, as well as the reinforcement of [State party] legislation to address hate speech and violence. In this connection, the Committee requests the State party to ensure that the application of the Anti-terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling.

--*A/57/18, para. 338 (2002).*

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The Committee notes with concern that almost all asylum-seekers presenting themselves at the border after the events of 11 September 2001 were initially detained. While it notes that this practice by the ... Immigration Service was successfully challenged in the High Court and the practice of detaining asylum-seekers has been suspended except for a small number of cases, it also notes that the High Court's decision has been appealed by the Immigration Service and that the practice may resume if the appeal is successful.

--*A/57/18, para.427 (2002).*

### ***Inter-American System***

Also non-derogable under international human rights law and international humanitarian law is the requirement that states fulfill their obligations without discrimination of any kind, including discrimination based upon religion, political or other opinion or national or social origin. This applies not only to a

state's commitment to respect and ensure respect for fundamental rights in the context of terrorist threats, but also limits the measures that states may take in derogating from rights that may properly be suspended in times of emergency by prohibiting any such measures that involve discrimination on such grounds as race, color, sex, language, religion, or social origin. The principle of non-discrimination also applies to all aspects of a state's treatment of individuals in connection with anti-terrorist initiatives, including their treatment when in detention.

--*Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002 (para. 351).*

**L. Treatment of non-nationals (including asylum, expulsion and *non-refoulement*)**

Article 14 of the Universal Declaration of Human Rights provides that everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in the case of persecution genuinely arising from non-political crimes or from acts, as is the case with terrorist acts, which are contrary to the purposes and principles of the United Nations. At the same time, human rights treaties consider that persons, regardless of their conduct, should never be sent to countries where they face a substantial risk of torture or other serious human rights violation.

***United Nations***

The Human Rights Committee considered the link between removal, expulsion or *refoulement* of non-nationals and torture, in its General Comment No. 20 on article 7 of the Covenant:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.

--*General Comment No. 20, para. 9 (1992)*.

\*\*\*\*\*

The Committee is concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities) (articles 6 and 7 of the Covenant). The State party should maintain its practice and tradition of observance of the principle of non-*refoulement*. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion.

--*CCPR/C/74/SWE, para. 12 (2002)*.

\*\*\*\*\*

The Committee ... expresses its concern about cases of expulsion of foreigners suspected of terrorism without an opportunity for them to legally challenge such measures. Such expulsions are, furthermore, apparently decided on

without taking into account the risks to the physical integrity and lives of the persons concerned in the country of destination (arts. 6 and 7).

--CCPR/CO/75/YEM, para. 18 (2002).

\*\*\*\*\*

[The State party] takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment [No. 20] on article 7 and recommends that [the State party] revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk.

--CCPR/C/79/Add.105, para. 13 (1999).

\*\*\*\*\*

The Human Rights Committee has also expressed concern with respect to *non-refoulement* and access to asylum more generally:

The Committee recognizes that the security requirements relating to the events of 11 September 2001 have given rise to efforts by [the State party] to take legislative and other measures to implement Security Council resolution 1373 (2001). The Committee, however, expresses its concern that the impact of such measures or changes in policy on [the State party's] obligations under the Covenant may not have been fully considered. The Committee is concerned about possible negative effects of the new legislation and practices on asylum-seekers, including by "removing the immigration risk offshore" and in the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled (articles 6 and 7 of the Covenant). The State party is under an obligation to ensure that measures taken to implement Security Council resolution 1373 (2001) are in full conformity with the Covenant.... In addition, the State party should maintain its practice of strictly observing the principle of non-refoulement.

--CCPR/CO/75/NZL, para. 11 (2002).

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The Committee against Torture has also addressed the question of *non-refoulement* of asylum seekers and other foreigners, including with reference to article 3 of the Convention against Torture:



[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.

--*Tapia Paez v. Sweden*, Case No. 39/1996, Views adopted on 28 April 1997.

\*\*\*\*\*

The Committee [against Torture] ... records its concern at the following: ... (b) The Special Control of Foreigners Act, known as the anti-terrorism law, allows foreigners suspected of terrorism to be expelled under a procedure which might not be in keeping with the Convention, because there is no provision for appeal.

--*CAT/C/XXVIII/CONCL.1, para. 6 (2002)*.

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In *Arana v. France*, concerning the deportation in circumstances resembling extradition of an alleged terrorist, the Committee against Torture found violations of article 3 of the Convention against Torture as well as due-process rights:

[T]he author had been convicted in France for his links with ETA, had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police.... At the time of the consideration of the [previous] report..., the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country ... without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

--*Arana v. France*, Case No. 63/1997, Views adopted on 9 November 1999 (para. 11.5).

## *European Court of Human Rights*

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 ... if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 ... is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees....

--*Chahal v. the United Kingdom, ECHR, 15 November 1996 (para. 80).*

\*\*\*\*\*

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3.... That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 ... of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3..., would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article....

[...]

The right to a fair trial in criminal proceedings, as embodied in Article 6..., holds a prominent place in a democratic society.... The Court does not exclude that an issue might exceptionally be raised under Article 6 ... by an extradition

decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country....

--*Soering v. the United Kingdom*, ECHR, 7 July 1989 (paras. 88, 113).

### *Inter-American System*

The Commission considers that, taking into account the fundamental right of the individual to seek asylum from persecution and to be heard in making that presentation through an effective procedure -- rights recognized in the American Declaration -- as well as the legitimate right and duty of the State to uphold citizen security and public order, issues of eligibility to enter the determination process should be placed within the competence of the [Convention Refugee Determination Division]. Given the interests at stake, these eligibility determinations would necessarily involve a different, more expedited procedure than the refugee determination process. While the denial of eligibility to enter the determination process involves a small number of individuals, the nature of the rights potentially at issue -- for example, to life and to be free from torture -- requires the strictest adherence to all applicable safeguards. Those safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent. The status of refugee is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it. The purpose of the applicable procedures is to ensure that it is recognized in every case where that is justified.

[...]

[T]he prohibition of torture as a norm of jus cogens -- as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion -- applies beyond the terms of the 1951 Convention [relating to the Status of Refugees]. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.

--IACHR, *OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000* (paras. 70, 154).

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An alien lawfully in a country may be expelled or deported from it only pursuant to a decision made in accordance with law (Article 22(6) of the American Convention on Human Rights). This means that states must enact legislation conferring powers for deportation and that all decisions must be made according to the regulations in place and not arbitrarily. Moreover, the meaning of "law" in Article 22 is not limited to acts of the legislative branch in a formal sense. In the material sense the context of such acts must be in full accordance with the

constitution and the rule of law, including conformity with all obligations acquired by international treaties.

--*Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report of the IACHR 2000* (para. 97).

### ***African Commission on Human and Peoples' Rights***

The Government ... has relied on the “draw-back” clause of Article 12(2): This right may only be subject to restrictions, provided for by law for the protection of national security, law or order, public health or morality....

The deportation order also stated that the deportees were considered “a danger to peace and good order to [the State party]”. The Commission is of the view that the “draw-back” clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. Secondly, the rules of natural justice must apply. Among these are the *audi alterm partem* rule, the right to be heard, the right of access to the Court. The Court ... in Banda’s case failed to examine the basis of administrative action and as such, it has not been proved that the deportees were indeed a danger to law and order. In any event the suggestion that they were “likely” to be a danger was vague and not proved. It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause. The Commission should act bearing in mind the provisions of Articles 61 and 62 of the Charter.

--*Amnesty International case, Case No. 212/98, 12<sup>th</sup> Annual Activity Report 1998 - 1999* (paras. 49-50).

## ANNEX I

### **Relevant provisions of international instruments mentioned in the Digest**

#### *UNITED NATIONS*

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

###### Article 3

Everyone has the right to life, liberty and security of person.

###### Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

##### *International Covenant on Civil and Political Rights*

###### Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

###### Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

### **Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

### **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

### **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.



### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

### **Article 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### **Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

***Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

### **Article 1**

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

### **Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

### **Article 3**

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

### ***United Nations Convention relating to the Status of Refugees***

#### **Article 3**

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

#### **Article 32**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

### **Article 33**

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

## ***EUROPE***

### ***Convention for the Protection of Human Rights and Fundamental Freedoms***

#### **Article 2. Right to Life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a) in defence of any person from unlawful violence;
  - b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c) in action lawfully taken for the purpose of quelling a riot or insurrection.

#### **Article 3. Prohibition of Torture**

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

#### **Article 5. Right to Liberty and Security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

#### **Article 6. Right to a Fair Trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

#### **Article 7. No Punishment without Law**

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

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

#### **Article 10. Freedom of Expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **Article 11. Freedom of Assembly and Association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### **Article 13. Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

### **Article 15. Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

## ***INTER-AMERICAN SYSTEM***

### ***American Convention on Human Rights***

#### **Article 4. Right to Life**

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

#### **Article 5. Right to Humane Treatment**

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

#### **Article 7. Right to Personal Liberty**

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
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. 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. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

#### **Article 8. Right to a Fair Trial**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;



- 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;
  - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
  4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
  5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

#### **Article 9. Freedom from Ex Post Facto Laws**

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

#### **Article 13. Freedom of Thought and Expression**

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

#### **Article 25. Right to Judicial Protection**

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

#### **Article 27. Suspension of Guarantees**

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

## *AFRICA*

### *African Charter on Human and People's Rights*

#### **Article 2**

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

#### **Article 3**

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law

#### **Article 4**

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

#### **Article 5**

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

#### **Article 6**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

#### **Article 7**

1. Every individual shall have the right to have his cause heard. This comprises:
  - a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
  - c) The right to defence, including the right to be defended by counsel of his choice;
  - d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

### **Article 8**

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### **Article 9**

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

### **Article 12**

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

### **Article 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

## ANNEX II

### *General Comment No. 29*

#### *on Article 4, International Covenant on Civil and Political Rights*

*(adopted at the 1950th meeting of the UN Human Rights Committee, 24 July 2001)*

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. In this general comment, replacing its General Comment No 5, adopted at the thirteenth session (1981), the Committee seeks to assist States parties to meet the requirements of article 4.

2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.<sup>1</sup>

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the

duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.<sup>2</sup> Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.<sup>3</sup>

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

6. The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.

7. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before

the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.<sup>4</sup>

8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency.<sup>5</sup> In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.<sup>6</sup>

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.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.<sup>7</sup>

13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.

(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.



(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.<sup>8</sup> The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. 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.<sup>9</sup>

17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the

provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected: States parties have failed to notify other States parties, through the Secretary-General, of a proclamation of a state of emergency and of the resulting measures of derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers.<sup>10</sup> Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

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<sup>1</sup> See the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, para. 7; Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, para. 23; Peru (1996), CCPR/C/79/Add.67, para. 11; Bolivia (1997), CCPR/C/79/Add.74, para. 14; Colombia (1997), CCPR/C/79/Add.76, para. 25; Lebanon (1997), CCPR/C/79/Add.78, para. 10; Uruguay (1998), CCPR/C/79/Add.90, para. 8; Israel (1998), CCPR/C/79/Add.93, para. 11.

<sup>2</sup> See, for instance, articles 12 and 19 of the Covenant.

<sup>3</sup> See, for example, concluding observations on Israel (1998), CCPR/C/79/Add.93, para. 11.

<sup>4</sup> See the following comments/concluding observations: Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; Jordan (1994) CCPR/C/79/Add.35, para. 6; Nepal (1994) CCPR/C/79/Add.42, para. 9; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Gabon (1996), CCPR/C/79/Add.71, para. 10; Colombia (1997) CCPR/C/79/Add.76, para. 25; Israel (1998), CCPR/C/79/Add.93, para. 11; Iraq (1997), CCPR/C/79/Add.84, para. 9;

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Uruguay (1998) CCPR/C/79/Add.90, para. 8; Armenia (1998), CCPR/C/79/Add.100, para. 7; Mongolia (2000), CCPR/C/79/Add.120, para. 14; Kyrgyzstan (2000), CCPR/CO/69/KGZ, para. 12.

<sup>5</sup> Reference is made to the Convention on the Rights of the Child which has been ratified by almost all States parties to the Covenant and does not include a derogation clause. As article 38 of the Convention clearly indicates, the Convention is applicable in emergency situations.

<sup>6</sup> Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Åbo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116). As a field of ongoing further work reference is made to the decision of the 26th International Conference of the Red Cross and Red Crescent (1995) to assign the International Committee of the Red Cross the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.

<sup>7</sup> See articles 6 (genocide) and 7 (crimes against humanity) of the Statute which by 1 July 2001 had been ratified by 35 States. While many of the specific forms of conduct listed in article 7 of the Statute are directly linked to violations against those human rights that are listed as non-derogable provisions in article 4, paragraph 2, of the Covenant, the category of crimes against humanity as defined in that provision covers also violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of article 27 may at the same time constitute genocide under article 6 of the Rome Statute, and article 7, in turn, covers practices that are related to, besides articles 6, 7 and 8 of the Covenant, also articles 9, 12, 26 and 27.

<sup>8</sup> See article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

<sup>9</sup> See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: "... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency ... . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention." See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: "The Committee is satisfied that States parties generally understand that the right to habeas

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corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole.” Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2.

<sup>10</sup> See comments/concluding observations on Peru (1992) CCPR/C/79/Add.8, para. 10; Ireland (1993) CCPR/C/79/Add.21, para. 11; Egypt (1993), CCPR/C/79/Add.23, para. 7; Cameroon (1994) CCPR/C/79/Add.33, para. 7; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Lebanon (1997), CCPR/C/79/Add.78, para. 10; India (1997), CCPR/C/79/Add.81, para. 19; Mexico (1999), CCPR/C/79/Add.109, para. 12.

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