

Part Two



LOCAL CONTEXT AND INTERNATIONAL STANDARDS

.....Chapter II

THE LOCAL CONTEXT

Key concepts

The mandate of a human rights field operation usually comes from the Security Council or other UN body, an agreement with the Government, or both.

It is detailed for implementation in light of international human rights and humanitarian law as well as the pre-deployment needs assessment.

It is applied in the context of the people, history, Government, geography, economy, and international human rights and humanitarian law obligations of the country.

1. As discussed in **Chapter I: “Introduction”**, this Training Manual and any training programme based on it need to be supplemented for use in each human rights field operation in light of the operation’s context — including its mandate, the factual circumstances, and the policy judgement of its leadership.
2. This chapter outlines the information which must be assembled about the context, including the specific mandate and country circumstances in order to supplement this Training Manual and to prepare for the training of HROs and others staff.
3. Each human rights field operation receives its terms of reference or **mandate** from the authorizing **UN body** (e.g., the Security Council or the Economic and Social Council (ECOSOC)) or on the basis of an **agreement** between the UN and the host country. Accordingly, the first step would be to acquire and carefully study a copy of the Security Council resolution, UN agreement with the Government and/or other document establishing the human rights field operation.
4. The mandate can be understood in the light of previous mandates given to human rights field operations and the way they have been interpreted and applied. **Chapter III: “Applicable International Human Rights and Humanitarian Law: The Framework”**, and **Part III: “The Monitoring Function”** track the interpretation given to the mandate of earlier human rights operations and the relevant provisions of international human rights and humanitarian law. After studying the precise terms of reference, it should be possible to supplement those chapters. It may also be possible to remove or exclude from training those elements of the chapters which are not relevant.

5. Furthermore, before the UN has established most human rights field operations, it has fielded a preparatory or assessment mission to the expected site for a short period to develop recommendations in regard to the needs which are evidenced, precise terms of reference for the operation to respond to those needs, staffing requirements, expected budget, time scale for mounting the operation, overall design for the operation, relationship of the human rights component with other UN and international operations in the country and other significant aspects of the planning. The report of that needs assessment will assist in interpreting the mandate, including its monitoring aspects, as well as developing information about the factual context in which the operation will be working.

6. In addition to very carefully focused assessment of the mandate, HROs would benefit from **background information about the country** and its human rights situation. Accordingly, from the needs assessment and from other sources, information about the following subjects should be collected and summarized for presentation to new HROs:

- ✓ geography (including topography, climate and maps);
- ✓ brief history of the country;
- ✓ economy (structure, production, fields of employment, unemployment);
- ✓ population (including distribution, relevant ethnic and other composition,
- ✓ significant expatriate groups — see also refugees below);
- ✓ governmental system:
 - ┆ constitution;
 - ┆ legal system;
 - ┆ national, regional, provincial and local structures of Government:
 - legislative structures;
 - judicial system;
 - human rights commissions or ombudsman offices;
 - defence forces and internal security forces;
 - prison structures (persons held, staff, facilities, practices);
 - ┆ criminal justice and law enforcement:
 - penal code;
 - criminal procedure code and practice;
 - ┆ political system and situation;
- ✓ religions and related tensions;
- ✓ languages and related tensions;
- ✓ the situation of groups needing special protection, including women, children, minorities, disabled, indigenous people, and other;
- ✓ internal influences, including militia, revolutionary movements, ethnic conflicts, etc.;
- ✓ the status, number and situation of refugees and internally displaced persons (both from inside and outside the country);
- ✓ culture and customs (relevant to work of HROs);

- ✓ anniversary dates of political, historical, or other significance;
- ✓ how the human rights operation and other international agencies have been
- ✓ or are expected to be perceived by the local population;
- ✓ ratifications or other adherences to human rights and other relevant treaties (including the UN Charter and privileges and immunities of the UN);
- ✓ other international organizations present in the country;
- ✓ international, national and local human rights and similar non-governmental organizations (e.g., women’s associations, youth organizations, minorities associations) in the country; and
- ✓ other information about the human rights situation.

7. These topics can be the subject of brief written summaries and/or oral presentations during training sessions. Much information on the above topics can be found in the “*Country Frameworks*” prepared by the Office of the High Commissioner for Human Rights, which may need to be supplemented — for purposes of training — with additional and direct sources of information on the country and topics concerned. The outline of the Country Frameworks, with its annexed checklist of standards, is contained in **Appendix I** to this chapter. Should the Country Framework not be available from OHCHR, the outline provides useful guidance for the collection of the information needed for the training.

8. The above materials may require more than photocopying and sometimes translation. For example, the HROs should not only receive a copy of the criminal procedure code, but also an analysis of areas where the local law falls short of international standards. Another document might explain in simple terms how the criminal justice system actually functions, including the procedures for investigation, arrest, detention, interrogation, release pending trial, trial, appeal, etc.

9. In developing the information mentioned above and producing brief summaries for use in training, it will be useful to gather a number of documents, which should then become part of a **library/resource room** for the central office and area offices of the field operation:

- ✓ this Training Manual and the related training guide;
- ✓ copies of the mandate of the field operation (in relevant languages);
- ✓ a set of international human rights instruments and other relevant norms (possibly also in the local language, if different from the field operation’s working language);
- ✓ any agreements between the operation and the local or national authorities authorizing access for HROs and their other activities (these agreements should show the signature of the authorities in all relevant language versions);
- ✓ any agreements between the field operation, the ICRC, the UNHCR and other organizations, and/or any agreement between the field operation’s Headquarters and any other UN or international organization present in the country of operation;
- ✓ the needs assessment report which preceded the operation;
- ✓ maps of the country and relevant areas, cities, provinces, etc.;
- ✓ a copy of the country’s Constitution, criminal code and criminal procedure codes;
- ✓ other relevant statutes and treaties;

- ✓ an organization chart or other explanation of the national and local administrative structures;
- ✓ an organization chart or other explanation of the judicial system;
- ✓ an organization chart or other explanation of the police and prison structures;
- ✓ a list of local non-governmental organizations dealing with human rights issues;
- ✓ copies of UN, governmental, and non-governmental reports about the human rights situation;
- ✓ copies of relevant newspaper clippings; and
- ✓ mandate and methods of work of any United Nations human rights mechanism relevant to the country of operation (High Commissioner for Human Rights, treaty body, Special Rapporteurs — both thematic and country).

10. After this Training Manual has been supplemented in light of the mandate, circumstances, and the judgement of the human rights operation leadership and as the operation gets established, a number of *additional documents should be prepared* and made available to HROs, the central office library, and area offices:

- ✓ supplementary training material for the country of operation;
- ✓ an organization chart and reporting channels of the field operation;
- ✓ any standard operating procedures, administrative guidelines, codes of conduct, and field directives issued by the operation;
- ✓ contact information for the central office and area offices;
- ✓ a supply of relevant reporting and other forms;
- ✓ summaries about the context of the operation (identified above);
- ✓ appropriate external reports produced by the operation;
- ✓ any press releases issued by the operation; and
- ✓ organization chart of the Office of the High Commissioner for Human Rights.

Appendix I to Chapter II

OHCHR Country Framework

[Short Name of Country]

GENERAL CONTEXT
Official name of country:
Geographic location:
Area:
Terrain (topography):
Infrastructure:
Capital city:
Other major cities:
Climate:
Water resources:
Ethnic groups:
Languages:
Religions:

HISTORICAL CONTEXT / POLITICAL CONTEXT
Historical brief:
Self-determination (foreign occupation; alien domination; colonial presence; racist regimes; independence movements):

HISTORICAL CONTEXT / POLITICAL CONTEXT

I Parties to the conflict:

I Peace process/agreement:

I Recent political transitions (First elections; revolution; coup d'état; new constitution):

I Form of government:

I Principal political parties:

I Conflict level (international armed conflict; internal armed conflict; state of emergency; civil disorder/sporadic acts of violence; normality; post-conflict reconstruction; etc.):

I Relationships with neighbouring countries:

I Membership in political/military/regional alliances:

I Legally sanctioned discrimination (race, colour, gender, language, religion, opinion, origin, property, birth, sexual orientation, other status):

POPULATION AND DEMOGRAPHIC CONTEXT

I Population (total/%; female/male):

I Annual population growth rate (%):

I Total population under age of 15 (number/%; female/male):

POPULATION AND DEMOGRAPHIC CONTEXT

- | Fertility rate (no. of children) (by gender):
- | % of population living in urban areas (by gender and age):
- | % of population living in rural areas (by gender and age):
- | Status of civil registration system (effective reg. of births, deaths, marriages):
- | Date of last census:

REFUGEES AND IDPs

- | Significant IDP concentrations (including numbers, demographic compositions and areas of origin and refuge):
- | Significant refugee presence/inflow/outflow (including numbers, demographic compositions and areas of origin and refuge):

DEVELOPMENT CONTEXT

ECONOMIC DATA

- | GNP (US\$ billions):
- | GNP per capita (US\$):
- | Real GDP per capita (US\$):
- | External debt (US\$) as % of GNP:
- | Principal industries/principal natural resources:

UNDP HUMAN DEVELOPMENT INDICES

- | General development rating (High/medium/low human development; LDC, industrialized, etc.):
- | Human Development Index (HDI):
- | Gender Development Index (GDI):
- | Gender Empowerment Measure (GEM):
- | Human Poverty Index (HPI):

DEVELOPMENT CONTEXT
EMPLOYMENT
Average income (total/female/male):
Unemployment rates (total/female/male):
INFANT AND MATERNAL SURVIVAL
Infant mortality rate (total/female/male):
Child mortality rate (%):
Under-five mortality rate (total/female/male):
Maternal mortality rate (%):
Survival rate to grade 5 (%):
Underweight prevalence under 5 years:
Percentage of births attended by trained health personnel:
Percentage of 1 year-old children immunized against measles:
EDUCATION
Primary school enrolment ratio (total/female/male):
Secondary school enrolment ratio (total/female/male):
Tertiary school enrolment ratio (total/female/male):
Adult literacy rates (total/female/male):
Free primary school education:
Mandatory primary school education:
Free secondary school education:
Mandatory secondary school education:
HEALTH
Life expectancy at birth (total/female/male):
Percentage of population with access to primary health services:
Contraceptive prevalence rate (%):
Legislation or policy prohibiting family planning to unmarried, below a given age, without spousal or parental consent:
HOUSING
No. of persons per room, or average floor area per person (excluding bathroom):
% of population with access to adequate sanitation:

DEVELOPMENT CONTEXT

- I % of population with access to safe drinking water:
- I Women in Government/Parliament:
- I Social spending vs. military expenditures:

LEGAL CONTEXT**INTERNATIONAL LEGAL CONTEXT**

- I Human rights treaties signed/ratified/acceded to:

<ul style="list-style-type: none"> ○ ICESCR ○ ICCPR ○ ICCPR Op. 1 ○ ICCPR Op. 2 ○ CRC ○ MWC ○ CERD ○ CEDAW ○ CEDAW Optional Protocol (March 1999) 	<ul style="list-style-type: none"> ○ CAT ○ Refugees 1951/Protocol ○ Geneva Conv. I ○ Geneva Conv. II ○ Geneva Conv. III ○ Geneva Conv. IV ○ Geneva Protocol Ad. I ○ Geneva Protocol Ad. II 	<ul style="list-style-type: none"> ○ ILO Conventions ○ UNESCO Instruments ○ Other HR Treaties ○ Regional HR Instruments: <ul style="list-style-type: none"> ○ OAS Instruments ○ OAU Instruments ○ Council of Europe Instruments ○ OSCE Instruments
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- I Treaty reservations:
- I Status of treaty reporting:
- I Agreement with ICRC/ICRC presence:

INTERNAL LEGAL CONTEXT

- I Legal system (common law; civil law; socialist; Islamic; traditional; hybrid; other):
 - Independence of the judiciary:
 - Judicial remedies against State agencies/officials before the judiciary:
- I Court system:

INSTITUTIONAL CONTEXT

1 National plan of action adopted:

1 Existing Governmental (Executive) HR institutions:

1 Existing *Paris Principles* institutions (HR commission or ombudsman):

1 Existing parliamentary HR bodies:

1 Active non-governmental human rights organizations:

1 Principal women's organizations:

1 Principal children's advocacy organizations:

1 Principal labour unions:

1 Leading human rights institutes (academic and research):

UNITED NATIONS CONTEXT

I CHR Country Rapporteur/Representative:

I Major CHR thematic mechanism references:

I TC requested from OHCHR:

I Previous TC provided by OHCHR:

I Membership in UN bodies:

I UN agencies and programmes present:

I UNDAF/HURIST country:

I Resident Coordinator:

I Designated Security Official (DSO):

I UN duty station rating:

I Peace-keeping (DPKO); special political (DPA); or special humanitarian (OCHA) missions;
OHCHR Field Presence:

HUMAN RIGHTS OVERVIEW

Provide a brief description and analytical presentation of the prevailing human rights situation, identifying its key features, principal challenges and recurrent violations, with particular attention to the situation of women, children, persons living in extreme poverty, minorities, indigenous peoples, occupied populations, IDPs, and other groups necessitating particular human rights attention, including the most vulnerable.

Due attention should be paid to the full range of civil, cultural, economic, political and social rights, including the right to development. In analysing the contextual data included in the framework above, desk officers may wish to refer to the annexed checklist for overview and analysis. Full use should be made of the country-specific findings and recommendations of the treaty bodies, special rapporteurs and working groups of the Commission on Human Rights, and other internal sources.

POLITICAL MAP

[Attach a political map here]

Annex: Checklist for Overview and Analysis

- | | | | |
|---|---|--|---|
| ○ Ratifications | ○ Recognition as a person before the law | ○ Right to property | ○ Right to health |
| ○ Conflict or emergency situation | ○ Equal protection of the law | ○ Freedom of thought, conscience and religion | ○ Right to adequate food |
| ○ Development situation | ○ Right to effective remedy for violations | ○ Freedom of opinion, expression and information | ○ Right to adequate clothing |
| ○ Situation of women | ○ Arbitrary arrest, detention or exile | ○ Freedom of assembly | ○ Right to adequate housing |
| ○ Situation of children | ○ Fair trial | ○ Freedom of association | ○ Right to necessary social services |
| ○ Situation of minorities | ○ Presumption of innocence | ○ Right to take part in government, access to public service, and free and fair elections | ○ Right to security for unemployment, sickness, disability, widowhood, old age, or lack of livelihood |
| ○ Situation of indigenous peoples | ○ Retroactive penal measures | ○ Right to social security | ○ Right to special care for motherhood & childhood |
| ○ Situation of other vulnerable groups | ○ Interference with privacy, family, home or correspondence | ○ Right to work, free choice of employment, favourable conditions, and unemployment protection | ○ Right to education |
| ○ Self-determination | ○ Attacks on honour and reputation | ○ Right to equal pay for equal work | ○ Right to participate in cultural life |
| ○ Discrimination | ○ Freedom of movement and residence | ○ Right to leave and return | ○ Rights of authorship |
| ○ Life, liberty and security of the person | ○ Right to leave and return | ○ Right to asylum | ○ Right enabling social and international order |
| ○ Slavery | ○ Right to asylum | ○ Just and favourable remuneration | |
| ○ Torture, cruel, inhuman, degrading treatment/punishment | ○ Right to nationality | ○ Right to form and join trade unions | |
| | ○ Right to marriage and family | ○ Right to rest and leisure | |

.....Chapter III
**APPLICABLE
INTERNATIONAL
HUMAN RIGHTS AND
HUMANITARIAN LAW:
THE FRAMEWORK.....**

Key concepts

*The International Bill of Human Rights provides the **core definition of human rights law** in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.*

*Humanitarian law is principally based on the **four Geneva Conventions of 1949 and two Protocols of 1977 relating to international and non-international armed conflict.***

*There are certain very **basic minimum rights which cannot be the subject of suspension** even during armed conflicts or other public emergencies; they are found in **Article 4 of the Covenant on Civil and Political Rights and Common Article 3 to the Geneva Conventions.***

A. Introduction

1. Every HRO should have a good knowledge of the *rights guaranteed* by international human rights and humanitarian law insofar as *relevant to the mandate* of the operation. This chapter provides the framework for international human rights and humanitarian law, clarifies sources and legal force of international norms, explains the link between human rights and humanitarian law, and discusses the relevance of such law to the work of HROs.

2. International *human rights law* proclaims broad guarantees for the fundamental rights of all human beings. In addition, international *humanitarian law*, as set forth in the four Geneva Conventions of 1949 and the Additional Protocols of 1977, governs the treatment of combatants and civilians during times of international and internal *armed conflict*. International humanitarian law reaffirms the principle that, in situations of armed conflict, those persons not directly participating in the hostilities shall be treated humanely.

B. Legal force of human rights and humanitarian law instruments

3. HROs may notice that multilateral **treaties** are often given different names, *e.g.*, charter, covenant, convention, and protocol. All are treaties among nations which carry **legally binding obligations** according to their language. Except for the UN Charter, which under its Article 103 should prevail in the case of conflict with another treaty, all other treaties are of the same legal effect. The term “protocol” is used for a multilateral treaty which would expand or modify the effect of the convention, covenant, or other treaty with which it is associated.

4. Other internationally agreed texts are referred to as declaration, body of principles, guidelines, etc. The principal difference between treaties and this second type of documents is that treaties may be formally accepted by governments (by ratification or accession) and are thus considered to be legally binding agreements among nations. Documents such as **declarations, guidelines, minimum rules, bodies of principles, vary as to their binding effect** depending upon the degree to which, for example, they authoritatively interpret treaty obligations, reflect customary international law or general principles of law, reflect customary international law in the process of formation, or are considered to reflect best practices without having more binding legal effect.

5. The term “*instrument*” is often used as a generic term to denote either a treaty or another standard-setting document, such as a declaration, body of principles, guidelines, etc.

C. Relevance of international standards

6. HROs need to be aware of *international human rights standards* because those norms define their mandate, provide an international identity to the UN operation, establish legal obligations for the Government, and therefore provide the basis to require respect for human rights from the Government and other actors.

7. International human rights standards are the principal normative point of reference for HROs operating under the auspices of the United Nations. These cannot

be replaced or superseded by the national standards or experience of the country of origin of the HRO, however familiar the officer may be with them. Whether monitoring Government compliance, reporting violations, intervening with local authorities, or offering advice, the legitimate basis for any action of HROs is the international norms and standards contained in the full body of UN and regional human rights instruments.

1. Defining the mandate through the UN Charter, other treaties, and relevant norms

a. UN Charter

8. Whatever the precise *mandate* of the field operation in a particular situation, it will ultimately be *based upon the authority of the United Nations under the UN Charter*. The UN Charter is both the *most prominent treaty* among nations and *contains fundamental human rights* provisions. (See UN Charter Arts. 1, 55, 56, 103.) *UN Charter Article 55* defines the basic human rights objectives of the UN in providing that

the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

9. By ratifying the UN Charter, Member States in *Article 56* “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

10. **Treaties**, including the Charter, constitute the **primary sources of international law**, including international human rights law. Hence, if the mandate indicates that the human rights operation should monitor and promote the protection of human rights, “*human rights*” will be defined by the terms of the UN Charter as well as the other treaties and relevant instruments promulgated by the international community. If the mandate is more precise (*e.g.*, monitoring free and fair elections, the return of refugees, or ethnic discrimination), the rights it identifies can be found and explicated through human rights treaties and other human rights instruments as well as relevant international customary law and general principles of law.

b. International Bill of Human Rights

11. The UN General Assembly defined the human rights obligations of UN Member States in the *International Bill of Human Rights*, which is comprised of:

- ✓ Universal Declaration of Human Rights;
- ✓ International Covenant on Economic, Social and Cultural Rights; and
- ✓ International Covenant on Civil and Political Rights and its first Optional Protocol.

c. International Covenant on Civil and Political Rights

12. The *Covenant on Civil and Political Rights* establishes an international minimum standard of conduct for all States parties to it, *ensuring* the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public, and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience, and religion; peaceful assembly; freedom of association (including trade union rights and political parties); family; and participation in public affairs; but *forbidding* torture; “cruel, inhuman or degrading treatment or punishment”; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt.

d. International Covenant on Economic, Social and Cultural Rights

13. The *Covenant on Economic, Social and Cultural Rights* establishes international minimum standards for States which have ratified this text to take steps to respect, protect and fulfil economic, social and cultural rights. This Covenant requires States parties to devote the maximum of their available resources to the most efficient and rapid manner in order to ensure the full, and in some cases progressive, realization of the rights it recognizes. The rights ensured in the Covenant include: the right to gain a living by work; to have safe and healthy working conditions; to enjoy trade union rights; to receive social security; to have protection for the family; to possess adequate housing and clothing; to be free from hunger; to receive health care; to obtain free public education; and to participate in cultural life, creative activity, and scientific research. The Covenant also strictly prohibits discrimination with respect to economic, social and cultural rights and ensures the equal rights of men and women to the enjoyment of these rights.

e. Specialized treaties

14. The UN has further codified and more specifically defined international human rights law in a *number of treaties relating to various subjects* initially identified by the International Bill of Human Rights. Treaties create legal obligations for those nations that are party to them, but are generally not binding on the international community as a whole. Treaties may, however, create general international law — that is binding on *all* States — when such agreements are intended for adherence by States generally, are in fact widely accepted, and restate general principles of law.

15. Aside from the UN Charter and the International Bill of Human Rights, the most significant UN treaties that have received enough ratifications or accessions to enter into force include (in order of their date of entry into force):

- ✓ Convention on the Prevention and Punishment of the Crime of Genocide;
- ✓ Convention relating to the Status of Refugees;
- ✓ Protocol relating to the Status of Refugees;
- ✓ International Convention on the Elimination of All Forms of Racial Discrimination;
- ✓ Convention on the Elimination of All Forms of Discrimination Against Women;
- ✓ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- ✓ Convention on the Rights of the Child; and
- ✓ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Second ICCPR Protocol).

16. In order for a *treaty to apply* to a particular country, the *State* (i.e. the country) must have *ratified* or otherwise formally adhered to the treaty. Hence, it is important for the HRO to check whether the State where the UN field operation is established has ratified the treaty. Some States attach *reservations* or other limitations on their ratification. Accordingly, it is also important to verify whether such a reservation/limitation has been asserted by the State as to the rights which might be relevant to an HRO's work. It should be noted that even if a reservation has been asserted, the *reservation may be invalid* if it violates the object and purpose of the treaty.

f. Treaty bodies

17. Pursuant to *six of the principal human rights treaties*, committees have been established to oversee their implementation. Those *six treaty bodies* are the Human Rights Committee (under the Covenant on Civil and Political Rights); the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women; the Committee Against Torture; and the Committee on the Rights of the Child. The six treaty bodies regularly **review reports by States parties** as to their compliance with the respective treaties. Most of these bodies issue *general comments and recommendations* that reflect their experience in reviewing the States reports. In this way, they can provide authoritative interpretations of the treaty provisions. In addition, in periodically examining the extent to which the treaties have been implemented by States parties, through the analysis of the State reports, the treaty bodies issue *concluding observations* which describe and address particular areas where States parties should change legislation, policy and practice in order to promote compliance with the treaty in question. Concluding observations are often a valuable source of information of human rights workers. Moreover, three of the treaty bodies — the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee Against Torture — may under certain conditions receive **individual communications** complaining about violations of those treaties and thus issue adjudicative decisions interpreting and applying treaty provisions. While the other treaty bodies cannot yet receive formal complaints in the form of individual communications, they do issue pronouncements interpreting and applying treaty provision, as well as indicating — albeit often in an *ad hoc* manner — that State parties should alter behaviour in order to secure compliance with their treaty obligations.

g. Related UN non-treaty instruments

18. *In addition to treaties*, the United Nations has overseen the development and adoption of dozens of *declarations*, codes, rules, guidelines, principles, resolutions, *and other instruments that serve to interpret and expand on* the general human rights obligations of Member States under Articles 55 and 56 of the UN Charter and may reflect customary international law. The Universal Declaration of Human Rights is the most prominent of those human rights instruments, which not only provides an authoritative, comprehensive, and nearly contemporaneous interpretation of the human rights

obligations under the UN Charter, but also has provisions which have been recognized as reflective of customary international law binding on all States irrespective of whether they are party to the treaties which also contains those provisions. Among the other prominent instruments which are not treaties but which are of great importance in the field of human rights (in order of their date of adoption) are:

- ✓ Standard Minimum Rules for the Treatment of Prisoners;
- ✓ Declaration on the Rights of Disabled Persons;
- ✓ Code of Conduct for Law Enforcement Officials;
- ✓ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- ✓ Standards Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)
- ✓ Declaration on the Right to Development;
- ✓ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- ✓ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;
- ✓ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- ✓ Declaration on the Protection of All Persons from Enforced Disappearances;
- ✓ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities;
- ✓ Declaration on the Elimination of Violence Against Women;
- ✓ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

h. Other United Nations treaties and instruments

19. The United Nations is not the only global organization which has issued or facilitated the issuance of worldwide human rights standards. Others include *UN specialized agencies* (such as the International Labour Organization (ILO) and the UN Educational, Scientific, and Cultural Organization (UNESCO)) as well as the International Committee of the Red Cross (ICRC).

20. As one of the oldest existing intergovernmental organizations, ILO has promulgated 183 recommendations and 176 conventions, including several treaties relating to human rights. UNESCO has promulgated several treaties related to human rights, for example, the Convention against Discrimination in Education, 429 U.N.T.S. 93, *entered into force* May 22, 1962.

i. Geneva Conventions and Protocols

21. The *International Committee of the Red Cross* has, since the mid-19th century, convened governmental conferences to draft treaties protecting soldiers and sailors wounded in armed conflict, prisoners of war, and civilians in times of war. These treaties constitute the core of international humanitarian law which is designed to ensure respect for general principles of humanity during periods of international and

non-international armed conflict. In the context of armed conflicts, international humanitarian law provides a stronger and far more detailed basis for the protection of human rights than the International Bill of Human Rights and other UN human rights instruments.

22. The principal multilateral treaties that legislate *international humanitarian law* — the *four Geneva Conventions of 1949* — have been ratified by more governments than other human rights treaties, aside from the UN Charter and the Convention on the Rights of the Child. The two *Additional Protocols of 1977* extend and make more specific the protections of the 1949 Geneva Conventions to international and non-international armed conflicts. The Conventions and Protocols are as follows:

- ✓ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)
- ✓ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)
- ✓ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)
- ✓ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)
- ✓ Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)
- ✓ Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)

23. Many provisions of the four Geneva Conventions, the two Protocols, and the Hague Conventions of 1899 and 1907 are broadly accepted as restating customary international humanitarian law applicable to all countries. *Humanitarian law applies specifically to armed conflict situations*, which would ordinarily qualify as “*public emergencies*”.

j. Limitations on rights

24. Under certain *specific conditions* set forth in the relevant international human rights treaties, limitations can be imposed by States on the exercise of some human rights. It should be clear, however, that limitations on rights should be seen as the exception, rather than the rule. Limitations on rights, where they are permitted, are **specified in the texts** of the various human rights treaties. In general, such limitations and restrictions must be those which are **determined by law** and **necessary in a democratic society** to:

- ✓ ensure respect for the rights and freedoms of others; and
- ✓ meet the just requirements of public order, public health or morals, national security or public safety.

Limitations on rights imposed outside or beyond the above-mentioned conditions are not tolerated by international human rights law.

k. States of emergency and derogations

25. Under the specific and strict conditions indicated in Article 4 (1) of the International Covenant on Civil and Political Rights, international *human rights law allows States to derogate from* (that is, temporarily suspend) rights during periods of “public emergency”. Article 4 (1) of ICCPR states:

In time of public emergency which *threatens the life of the nation* and the existence of which is *officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the *extent strictly required by the exigencies of the situation*, provided that such measures are *not inconsistent with their other obligations* under international law and *do not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin.

26. There is, however, a group of rights which can never be restricted nor derogated — including in the situation described in Article 4 of ICCPR. These **non-derogable rights** include: the right to be free from arbitrary deprivation of life; torture and other ill-treatment; slavery; imprisonment for debt; retroactive penalty; non-recognition of the law; and infringement of freedom of thought, conscience, and religion (Article 4 (2)).

27. ICCPR provisions underline the exceptional nature of derogations from rights guaranteed in the Covenant. The substantive and procedural conditions under which derogations from rights are permitted by international law should be carefully noted:

- ✓ existence of a threat to the life of the nation;
- ✓ official proclamation of the state of emergency;
- ✓ derogations to be strictly required by the exigencies of the situation;
- ✓ derogations not to be inconsistent with other international obligations of the State;
- ✓ derogations not be discriminatory;
- ✓ non-derogable rights to be respected.

28. Article 4 (3) further requires that States introducing derogations from rights should immediately inform, through the UN Secretary-General, the other States Parties to ICCPR of the provisions from which they have derogated and of the reasons for the derogations.

l. Applicability of international human rights and humanitarian law

29. As explained above and in Chapter I, international humanitarian law is that body of international law which applies to situations of armed conflict — both international and non-international. It establishes protections for individuals and limits on methods and means of warfare by belligerent States.

30. In times of conflict, *human rights law continues to apply*. However, since armed conflict situations would typically qualify as “public emergencies” as defined by Article 4 of ICCPR, it is possible and likely that in such situations restrictions and derogations to human rights may be introduced by States (under the conditions mentioned above). It is therefore likely that the highest level of protection to individuals in situations of armed conflict be provided by international humanitarian law provisions.

31. The following table highlights the applicability of international human rights and humanitarian law in various situations, corresponding to different levels of conflict:

Applicability of Human Rights and Humanitarian Law¹

Situation	Applicable Law
<p>1. International Armed Conflict</p> <p>Including wars between States, and against colonial domination, alien occupation, racist regimes, in exercise of the right to self-determination.</p>	<p>Four Geneva Conventions of 1949</p> <p>(1) Wounded and sick in the field (2) Shipwrecked (3) Prisoners of War (4) Civilian Persons (under occupation)</p> <p>Additional Protocol I of 1977</p> <p>Other human rights provisions (insofar as non-derogable or no emergency declared)</p>
<p>2. Non-International Armed Conflict</p> <p>Civil war or other situation in which organized armed forces, under responsible command, exercise such control over part of the territory so as to permit sustained and concerted military operations and to implement humanitarian law.</p>	<p>Common Article 3 of the Geneva Conventions (applies to Government and armed opposition force)</p> <p>Additional Protocol II of 1977 (more restrictive field of application)</p> <p>Other human rights provisions (insofar as non-derogable or no emergency declared)</p>
<p>3. State of Emergency</p> <p>Disturbances, riots, isolated and sporadic acts of violence, and other public emergency which threaten the life of the nation, in which measures normally compatible with the Constitution and laws are inadequate to address the situation.</p> <p>State of emergency must be officially declared</p>	<p>All human rights, with the following exceptions:</p> <ul style="list-style-type: none"> 1 Derogations from certain rights may be permissible to the extent strictly required by the exigencies of the situation, and only if not inconsistent with other requirements under international law (including Geneva Conventions and Protocols). 1 No discrimination solely on the basis of race, colour, sex, language, religion, or social origin. 1 No derogation is permissible with regard to arbitrary deprivation of life, torture, slavery, or imprisonment for failure to fulfil a contractual obligation.
<p>4. Other Internal Tensions</p> <p>Disturbances, riots, and isolated acts of violence which do not qualify as public emergency threatening the life of the nation.</p> <p>No state of emergency declared</p>	<p>All human rights (but as to each right, see any relevant limitation. Rights can be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society).</p>

¹Standard OHCHR Training Packages for Police and for Peace-keepers

Situation	Applicable Law
5. Normal Situations	All human rights (but as to each right, see any relevant limitation. Rights can be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society).

m. Most protective standard

32. Since there are inconsistencies and gaps between the protections afforded by various human rights and humanitarian law instruments, as well as by national and local laws, the individual should be entitled to the most protective provisions of applicable international, national, or local laws. Accordingly, if humanitarian law affords better rights protections than human rights law, humanitarian law should be applied — and *vice versa*.

n. Regional protection of human rights

33. In addition to the UN mechanisms for implementing human rights, regional structures now operate in *Africa, the Americas, and Europe*. The rights protected by these structures derive from, and are similar to, those of the International Bill of Human Rights, but each of the structures has developed unique approaches to seeking assurance that the rights are put into practice. While the following materials often focus on UN and other worldwide standards, regional standards may be quite important in particular circumstances, for example because the country has ratified *significant regional human rights treaties* which the Government considers *more persuasive* or because those regional instruments are *given prominence in the agreement* with the UN human rights operation (for example, the Dayton Agreements on the conflict in Bosnia and Herzegovina confer the European Convention for the Protection of Human Rights and Fundamental Freedoms with equal status *vis-à-vis* domestic law). The three main regional treaties² on human rights which are referred to in this Manual are the following:

- ✓ African Charter on Human and Peoples' Rights (Banjul Charter)
- ✓ American Convention on Human Rights (American Convention)
- ✓ European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

²For a comprehensive collection of regional human rights instruments, see United Nations Office of the High Commissioner for Human Rights, *Human Rights: A Compilation of International Instruments — Volume II, Regional Instruments*, New York and Geneva, 1997.

2. Relevance of international standards to the identity of the human rights field operation and to its effectiveness

34. As indicated above, this Manual focuses on international human rights norms because they ordinarily define the mandate of the human rights operation. (See also **Part III, Chapter VI: “Identification and Prioritization of Efforts Regarding Human Rights Violations”**.) Moreover, those norms define the *international character* of the field operation, are capable of being explained in a manual intended to cover situations anywhere in the world, and are most likely to be persuasive as international minimum standards.

a. *International character of the operation*

35. *Legitimacy* is the most important asset of a human rights field operation. It rests on the understanding that the operation is just and is representative of the *will of the international community* as a whole rather than some partial interest. This *legitimacy* is further enhanced by the *composition of the field operation*, typically including personnel from a broad spectrum of countries.

36. *The basis of human rights field operations in international law provides further support for the legitimacy of the operations* as reflecting the will of the international community. Indeed, it would be unlikely that the Government or the people of the country in which the operation is located would find HROs convincing if each officer argued that the Government should follow the human rights approaches of her/his own nation. The international minimum standards provide a point of basic agreement not only among nations, but also among the HROs as to what they should monitor, promote, or recommend.

b. *Usefulness of international standards*

37. This Training Manual focuses on worldwide human rights standards because field operations may be mounted anywhere in the world and it would, as a practical matter, be very difficult to cover all the regional and national human rights standards which might be relevant in a particular situation. HROs should not, however, conclude that this Manual discusses all the relevant standards.

38. While the *mandate of a UN operation is based upon UN human rights standards* such as those discussed in this Manual, an agreement between the Government and the UN may define the mandate by referring also to other international norms, regional human rights treaties, the constitution of the country, or other standards. Indeed, if the mandate refers to those non-UN standards or if the non-UN standards are more protective or persuasive, HROs should become acquainted with whatever standards are most helpful to their work. For example, in some countries *regional standards* may be better known and better respected than nearly identical international standards. In those circumstances, HROs would be well advised to use regional standards. Similarly, the constitution or national law may incorporate regional standards, so that they should be prominently used. Another example might be found in a country in which the

constitution or the national law reflects the substance of international standards. Indeed, from the perspective of the individual in most countries, the most important means of protecting human rights and for implementing international law is through *the national legislation, courts, and administrative agencies*. The HRO may be more effective in referring to the constitution or national law to achieve protection for human rights.

39. A third example of the usefulness of non-UN human rights standards might be found in a country where the constitution, national law, or practice is even more protective of human rights than international law. After all, human rights treaties provide only international *minimum* standards. There is nothing to prevent a country from giving greater human rights protection than international standards provide. As indicated above, the individual should be entitled to the most protective provisions of applicable international, national, or local laws. Accordingly, the HRO should use *whatever standards are most protective*.

40. In general, however, HROs will find that there is more protection for human rights under international law than under national law and practice. Accordingly, officers need training on how to invoke the broader protections and profit from international insights as to how human rights can be implemented. The following chapter provides a basis for such training.

.....Chapter IV
**OVERVIEW OF
INTERNATIONAL
HUMAN RIGHTS AND
HUMANITARIAN LAW
STANDARDS**

Key concepts

Human rights officers should be aware of the whole range of international human rights norms, including civil, cultural, economic, political and social rights, although the specific focus of their monitoring work may vary based on the specific mandate of each field operation.

International human rights law contains specific provisions for groups requiring special protection, such as refugees, internally displaced people, women, minorities and children.

International human rights and humanitarian law requires States to prosecute and punish those responsible for violations of such law, for the purpose of ending impunity.

A. Introduction

1. This chapter provides a brief summary of international human rights and humanitarian law standards applicable to the work of HROs. In addition, more detailed coverage of standards relating to specific areas of international human rights may be found in **Part Three: “The Monitoring Function”**, in the chapters relating to such areas as elections, detention, economic, social and cultural rights, internally displaced persons, refugees, fair trial, and others.

2. The HRO should be aware, however, that this summary provides *only a brief view* of the larger constellation of international human rights and humanitarian law norms. The present Training Manual focuses on *only a few basic international human rights* and humanitarian law norms without suggesting that these are the only rights of concern to HROs. In order to narrow the scope of this chapter, the rights discussed were chosen

principally because of their relevance to previous UN human rights observer mandates and field operations. HROs are encouraged to refer to other texts containing more extensive information on human rights and humanitarian law, some of which are listed in the Bibliography at the end of the Manual.

3. The following international human rights and humanitarian law *principles will be discussed* in this chapter: right not to be arbitrarily deprived of life; right to personal integrity; right to liberty and security of person; rights in the administration of justice; freedom of opinion and expression; freedom of association and assembly; freedom of movement and residence; rights of refugees and internally displaced persons; the human rights of women; rights of minorities; right to non-discriminatory treatment; right to property; right to housing and other economic, social and cultural rights; impunity; and other human rights standards.

B. Right not to be arbitrarily deprived of life

1. International standards

a. *International human rights law*

4. Pursuant to Article 3 of the Universal Declaration of Human Rights, “Everyone has the right to life, liberty and security of person.” Article 6 of the Covenant on Civil and Political Rights states that, “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.” The Human Rights Committee has noted that Article 6 enunciates “a right which should not be interpreted narrowly.”¹ Article 4 of the Covenant on Civil and Political Rights provides that the right to be free from arbitrary killing is **non-derogable**, that is, it cannot be suspended even in times of emergency.

5. Article 4(1) of the American Convention declares, “Every person has the right to have his life respected. This right shall be protected by law... No one shall be arbitrarily deprived of his life.” Furthermore, Article 4 of the Banjul Charter guarantees that “[h]uman 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 2(1) of the European Convention provides that “Everyone’s right to life shall be protected by law.”

¹Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994).

b. International humanitarian law

6. International humanitarian law also protects the right not to be arbitrarily deprived of life. *Common Article 3 in the four Geneva Conventions* prohibits “at any time and in any place whatsoever ... violence to life and person, in particular murder of all kinds” against persons taking no active part in an armed conflict not of an international character. Article 4 of Additional Protocol II also prohibits “violence to the life, health and physical or mental well-being of persons [who do not take a direct part or who have ceased to take part in non-international hostilities], in particular murder...”.

7. As to periods of international armed conflict, willful killings of protected persons (civilians, prisoners of war and soldiers *hors de combat*) under the Geneva Conventions constitute grave breaches of international humanitarian law. (See First Geneva Convention, Article 50; Second Geneva Convention, Article 51; Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147; Additional Protocol I, Article 85.)

8. Article 12 of both the First Geneva Convention and the Second Geneva Convention state that armed forces and others who are wounded or sick “shall be treated humanely... Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular they shall not be murdered or exterminated...”.

9. Article 13 of the Third Geneva Convention states that prisoners of war “must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention...”.

10. Article 32 of the Fourth Geneva Convention forbids any measure which causes “physical suffering or extermination of protected persons [civilians who are in the power of a party to an international armed conflict] in their hands. This prohibition applies not only to murder ... but also to brutality applied by civilian or military agents.”

2. Violations of the right not to be arbitrarily deprived of life

a. Arbitrary execution

11. An arbitrary execution is the **killing of a person perpetrated by an agent of the State or any other person acting under Government authority** or with its complicity, tolerance, or acquiescence, but **without any or due judicial process**. Executions resulting from a death sentence issued by a court, are also arbitrary executions if the fair trial guarantees provided in Articles 14 and 15 of the Covenant on Civil and Political Rights are not respected.

12. Arbitrary executions (to be distinguished from executions after a fair trial) often are *killings under suspicious circumstances* with the following characteristics:

- (1) Death occurred when the person was in the hands of law enforcement officials (for example in police custody), public officials or other persons acting in an official capacity;

- (2) The death was not followed by an official inquiry. The authorities did not carry out an adequate autopsy of the victim or did not take the necessary steps to obtain relevant evidence (medical report, signs of previous torture, etc.).
13. Arbitrary executions include killings committed for political reasons, deaths following torture or any other cruel, inhuman or degrading treatment, and killings following kidnapping or forced disappearance, if the conditions mentioned are present.

b. Investigation of arbitrary executions

14. The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution² contain important guidance for States and for HROs. The Principles are set forth under three headings: Prevention, Investigation and Legal Proceedings. Pursuant to Principle 1, governments shall **prohibit by law** all extra-legal, arbitrary and summary executions. Furthermore, governments shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. The *Principles reaffirm the duty of the Government to investigate all arbitrary and summary executions*. The Principles further provide:

Principle 7. Qualified inspectors, including medical personnel or an equivalent independent authority, shall conduct **inspections** in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of its function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.

Principle 8. Governments shall make every effort to **prevent** extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to **investigate** reports of any such executions and to take effective action against such practices. Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall cooperate fully in international investigations on the subject...

Principle 12. The body of the deceased shall not be disposed of until an adequate **autopsy** is conducted... Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred...

Principle 13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent

²The Principles were recommended in 1988 by the Committee on Crime Prevention and Control. The Principles were adopted by the Economic and Social Council in its resolution 1989/65, annex, of 24 May 1989, and endorsed by the General Assembly in its resolution 44/162 of 15 December 1989.

possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

15. Use of these procedures during death investigations should produce the evidence necessary for increased detection and disclosure of other executions. These standards also provide international observers with *guidelines to evaluate investigations of suspicious deaths*. The Principles are augmented and explained by United Nations, Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.³ Relevant information is also contained in the United Nations Guidelines for the Conduct of United Nations Inquiries Into Allegations of Massacres.⁴

c. Limits on the use of force by government officials to prevent arbitrary executions

16. The Human Rights Committee, commenting on Article 6 of the Covenant on Civil and Political Rights, stated that:

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.⁵

17. Killings committed pursuant to a legitimate use of force authorized by law are not considered to be arbitrary executions. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply **non-violent means** before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall **minimize damage and injury**, and respect and preserve human life.

18. Article 3 of the United Nations Code of Conduct for Law Enforcement Officials⁶ establishes that “Law enforcement officials may use force only when **strictly necessary** and to the **extent required for the performance of their duty**.” Moreover, the Commentary to Article 3 states:

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime in affecting or assisting in

³UN Doc.ST/CSDHA/12 (1991).

⁴UN Doc. DPI/1710 (1995).

⁵Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994).

⁶Adopted by General Assembly resolution 34/169 of 17 December 1979.

the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

19. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide for the following guidelines on this matter:⁷

i. General principles on the use of force

Non-violent means are to be attempted first⁸

Force is to be used only when strictly necessary⁹

Force is to be used only for lawful law enforcement purposes¹⁰

No exceptions or excuses shall be allowed for unlawful use of force¹¹

Use of force is to be always proportional to lawful objectives¹²

Restraint is to be exercised in the use of force¹³

Damage and injury are to be minimized¹⁴

A range of means for differentiated use of force is to be made available¹⁵

All officers are to be trained in the use of the various means for differentiated use of force¹⁶

All officers are to be trained in use of non-violent means¹⁷

⁷The following summary of international standards on the use of force and firearms by law enforcement officials is drawn from the publication: *International Human Rights Standards for Law Enforcement — A Pocket Book on Human Rights for the Police*, United Nations High Commissioner for Human Rights, 1996.

⁸Principles on Force & Firearms, principle 4.

⁹Principles on Force & Firearms, principles 4 and 5.

¹⁰Principles on Force & Firearms, principles 5 and 7.

¹¹Principles on Force & Firearms, principle 8.

¹²Principles on Force & Firearms, principles 2 and 5(a).

¹³Principles on Force & Firearms, principles 2, 5(a) and 9.

¹⁴Principles on Force & Firearms, principle 5(b).

¹⁵Principles on Force & Firearms, principle 2.

¹⁶Principles on Force & Firearms, principles 4, 19, and 20.

¹⁷Principles on Force & Firearms, principles 4 and 20.

ii. Accountability for the use of force and firearms

All incidents of the use of force or firearms shall be followed by reporting and review by superior officials.¹⁸

Superior officials shall be held responsible for the actions of police under their command if the superior official knew or should have known of abuses but failed to take concrete action.¹⁹

Officials who refuse unlawful superior orders shall be given immunity.²⁰

Officials who commit abuses of these rules shall not be excused on the grounds that they were following superior orders.²¹

iii. Permissible circumstances for the use of firearms

*Firearms are to be used only in extreme circumstances.*²²

Firearms are to be used only in self-defence or defence of others against imminent threat of death or serious injury²³

-or-

To prevent a particularly serious crime that involves a grave threat to life²⁴

-or-

To arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat²⁵

-and-

In every case, only when less extreme measures are insufficient.²⁶

*Intentional lethal use of force and firearms shall be permitted only when strictly unavoidable in order to protect human life.*²⁷

iv. Procedures for the use of firearms

The officer should identify him/herself as a police official²⁸

-and-

give a clear warning²⁹

-and-

allow adequate time for warning to be obeyed,³⁰

¹⁸Principles on Force & Firearms, principles 6, 11(f), and 22.

¹⁹Principles on Force & Firearms, principle 24.

²⁰Principles on Force & Firearms, principle 25.

²¹Principles on Force & Firearms, principle 26.

²²Principles on Force & Firearms, principle 4.

²³Principles on Force & Firearms, principle 9.

²⁴Principles on Force & Firearms, principle 9.

²⁵Principles on Force & Firearms, principle 9.

²⁶Principles on Force & Firearms, principle 9.

²⁷Principles on Force & Firearms, principle 9.

²⁸Principles on Force & Firearms, principle 10.

²⁹Principles on Force & Firearms, principle 10.

³⁰Principles on Force & Firearms, principle 10.

-but-

such precautions shall not be required if the delay would result in death or serious injury to the officer or others³¹

-or-

It is clearly pointless or inappropriate in the circumstances to do so.³²

v. After the use of firearms

Medical aid is to be rendered to all injured persons.³³

The relatives or friends of those affected are to be notified.³⁴

Investigation are to be allowed for where requested or required.³⁵

A full and detailed report of the incident is to be provided.³⁶

20. Under international law, **States are obliged to carry out impartial and exhaustive investigations into all allegations of arbitrary executions**, including killings using firearms, with a view to clarifying the circumstances, identifying those responsible, bringing them to justice, compensating the victims or their families, and taking all necessary action to prevent the recurrence of similar acts in the future. **The result of such investigations must be made public** (UN Principles on the Effective Prevention and Investigations of Extra-legal, Arbitrary and Summary Executions).

21. Because the excessive use of force and firearms may result in arbitrary killing, this topic is covered under the heading “Right not to be arbitrarily deprived of life”. It should be noted, however, that the excessive use of force and firearms may also result in violations of other fundamental rights, including the right to personal integrity (see below).

d. Genocide

22. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide requires State Parties “to punish ... genocide, whether committed in time of peace or time of war.” (Art. I). The Convention defines genocide as committing one of the following acts with *intent to destroy, in whole or in part, a national, ethnical, racial or religious group*:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

³¹Principles on Force & Firearms, principle 10.

³²Principles on Force & Firearms, principle 10.

³³Principles on Force & Firearms, principle 5(c).

³⁴Principles on Force & Firearms, principle 5(d).

³⁵Principles on Force & Firearms, principles 6, 11(f), 22 and 23.

³⁶Principles on Force & Firearms, principle 22.

- (e) Forcibly transferring children of the group to another group.
23. It should be noted that genocide does not require killing, but may involve the other actions identified by the Convention if committed with genocidal intent and particularly if large numbers are involved.

e. Attempted arbitrary execution

24. The attempt to carry out an arbitrary execution, which fails for reasons beyond the initial intention of one or more Government agents, constitutes an attempted arbitrary execution. Any such attempts should be the subject of an **inquiry** taking into account the following elements:

- (a) The possible political, trade union, religious or associative activity exercised by the victim.
- (b) The function or scope of activity of the supposed author of the attempted arbitrary execution.
- (c) Any extortion, harassment, threat or stalking undergone by the victim or relatives prior to the execution attempt.
- (d) The use, in the attempted killing, of means capable of obtaining the expected result.
- (e) The form and means of the execution attempt.

f. Death threats

25. Any action or statement, explicit or implicit, likely to instil in a person a **justified fear of becoming the victim** of an arbitrary execution is a death threat. HROs should devote attention to death threats:

- (a) arising from members of the armed forces or any other public institutions;
- (b) arising from individuals or paramilitary groups related to the authorities or acting with the complicity of or the tacit approval of the authorities;
- (c) when there is reason to believe that these threats are part of a practice of arbitrary executions; when the threat is precise; and when there is reason to believe that the threat will be followed by action.

26. Accordingly, an HRO should give priority to making inquiries about cases where human life is endangered. The inquiries should attempt to establish that there was an arbitrary execution, an attempted arbitrary execution, or a death threat by identifying the elements of the violations as discussed in **Chapter VI: “Identification and Prioritization of Efforts Regarding Human Rights Violations”**.

C. Right to personal integrity

1. International standards

a. *International human rights law*

27. Pursuant to Article 5 of the Universal Declaration of Human Rights, “No one shall be subjected to **torture** or to **cruel, inhuman or degrading treatment or punishment**.” Article 7 of the Covenant on Civil and Political Rights also guarantees the right to be free from torture. The Human Rights Committee General Comment on Article 7 indicates that even in situations of public emergency this provision is **non-derogable**.³⁷

28. In addition, Article 10(1) of the Covenant on Civil and Political Rights provides that, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Human Rights Committee, in its General Comment 21, interprets Article 10(1) as applying to “anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps or correctional institutions or elsewhere.”³⁸ Commenting on the interplay between Articles 7 and 10 of the Covenant on Civil and Political Rights, the Human Rights Committee stated in General Comment 21,

[N]ot only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.

29. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in Article 1(1):

For the purposes of this Convention, the term “**torture**” means any act by which **severe pain or suffering**, whether physical or mental, is **intentionally inflicted** on a person for such **purposes** as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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.

³⁷Human Rights Committee, General Comment 7, Article 7 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 7 (1994).

³⁸Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 33 (1994).

30. The exception for “lawful sanctions” refers to lawfulness in both national and international law. Hence, it would not be lawful to impose a sanction which violates Rule 31 of the Standard Minimum Rules for Treatment of Prisoners, which *inter alia* forbids corporal punishment. Similarly, the Human Rights Committee has interpreted Article 7 of the Covenant on Civil and Political Rights, stating that “the **prohibition must extend to corporal punishment**, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article.”

31. All of the regional human rights conventions prohibit torture and cruel or degrading treatment or punishment. (American Convention, Article 5(2); Banjul Charter, Article 5; European Convention, Article 3). The American Convention further provides in Article 5(1) that, “Every person has the right to have his physical, mental, and moral integrity respected.” Pursuant to Article 5 of the Banjul Charter, “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.” In addition, there are two regional treaties specifically focusing on torture: the Inter-American Convention to Prevent and Punish Torture, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

b. International humanitarian law

32. In *all four of the Geneva Conventions and the two Additional Protocols* there are provisions which either expressly or by implication forbid torture and other cruel, inhuman or degrading treatment or punishment. During international armed conflict, **torture is forbidden** as to those who are wounded and sick on land by the First Geneva Convention, Article 12; as to the wounded, sick and shipwrecked at sea by the Second Geneva Convention, Article 12; as to prisoners of war by the Third Geneva Convention, Articles 17 and 87; and as to civilians by the Fourth Geneva Convention, Article 32; Additional Protocol I, Article 75; Additional Protocol II, Article 4.

33. Civilians are also protected by Article 37 of the Fourth Geneva Convention, which provides that those civilians who are confined shall be “humanely treated”. Article 118 of the Fourth Geneva Convention forbids imprisonment “in premises without daylight and, in general, all forms of cruelty” against internees.

34. During periods of international armed conflict or wars of national liberation, Article 11 of Additional Protocol I prohibits endangering the “**physical or mental health and integrity of persons** who are in the power of the adverse party, or who are interned, detained or otherwise deprived of liberty...”. Article 75 also forbids “**outrages upon personal dignity**, in particular **humiliating and degrading treatment...**”.

35. As to non-international armed conflicts, Article 3 common to the four Geneva Conventions forbids “**cruel treatment and torture**” of persons taking no active part in the hostilities. Common Article 3 also proscribes “**outrages upon personal dignity**, in particular, humiliating and degrading treatment,” “**mutilation**, cruel treatment and torture.” Furthermore, Article 4 of Protocol II prohibits at any time and in any place whatsoever: “(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment... (c) outrages upon personal dignity, in

particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault... (h) **threats** to commit any of the foregoing acts.”

2. Violations of the right to personal integrity

36. A violation of the right to personal integrity occurs when the State, through its agents or any other person acting in an official capacity, on its instigation or with its consent or acquiescence, applies torture or cruel, inhuman or degrading treatment, thus causing physical, psychological or moral suffering. The greater the extent to which the pain and suffering are serious and intentionally inflicted, the greater the likelihood that the treatment involves an attack to the integrity of the person.

37. In general, three categories of acts correspond to this type of violation:

- (a) Torture;
- (b) Cruel, inhuman or degrading treatment or punishment; and
- (c) Attempted execution

a. Torture

38. As defined by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:

- (a) obtaining from him or a third person information or a confession;
- (b) punishing him for an act he or a third person has committed or is suspected of having committed;
- (c) intimidating or coercing him or a third person; or
- (d) for any reason based on discrimination of any kind.

39. The above-described pain or suffering constitutes torture when 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. Behaviour that characterizes torture should, however, be construed broadly rather than narrowly. In any event, in this definition of torture, three elements should be emphasized:

- (a) acute suffering;
- (b) intentionally inflicted; and
- (c) by a public official or other person acting in an official capacity or on his instigation or with his consent or acquiescence.

40. Under this definition, rape is a form of torture. As discussed above, however, the HRO should note that pain or suffering arising only from, inherent in, or incidental to lawful sanctions may not fall within the definition of torture if the sanctions are acceptable under both domestic law and international human rights law. Conduct that is allowed under domestic law may be considered torture if it is unacceptable under

international instruments such as the Standard Minimum Rules for the Treatment of Prisoners.

b. Cruel, inhuman or degrading treatment or punishment

41. Torture is an aggravated form of cruel, inhuman or degrading treatment. *Not all cruel, inhuman and degrading treatment, however, constitutes “torture”. It is not always easy to establish a difference or a borderline.* For instance, do beatings which undoubtedly are cruel, inhuman and degrading treatment, come under the description of “torture”? After how many blows? Where is the threshold of intensity of suffering, the gravity of the wounds and injuries?

42. Pursuant to Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, **the obligations** contained in Articles 10, 11, 12 and 13 **apply to both torture and other forms of cruel, inhuman or degrading treatment or punishment.** Hence, Articles 12 and 13 require States to ensure that complaints of acts of both torture and cruel, inhuman or degrading treatment or punishment are investigated. Similarly, pursuant to Article 10, States are to include education and information regarding the prohibition against torture/cruel, inhuman or degrading treatment or punishment in the training of law enforcement personnel, medical personnel, public officials, etc.

43. *Defining an act as torture rather than cruel, inhuman or degrading treatment may, however, have important consequences.* For example, Article 4 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each State Party to ensure that all acts of torture are offences under its criminal law. Furthermore, States shall ensure that victims of torture have an enforceable right to fair and adequate compensation (Article 14) and that any statement adduced by torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statements were made (Article 15). These provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment do not apply to cruel, inhuman or degrading treatment or punishment.

44. The distinction between torture and cruel, inhuman or degrading treatment is not always easy. *Nor is it necessary for the HROs to make the distinction.* Torture as well as cruel, inhuman or degrading treatment constitute a violation of human rights as to which the HROs must gather information and report.

D. Right to liberty and security of person

1. International standards

45. In accordance with Article 3 of the Universal Declaration of Human Rights, “Everyone has the right to life, liberty and security of person.” In addition, Article 9 of the Universal Declaration states that, “No one shall be subjected to arbitrary arrest, detention or exile.”

46. Article 9(1) of the Covenant on Civil and Political Rights guarantees that “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.” The Human Rights Committee has pointed out that “paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”³⁹

47. The European Convention and the Banjul Charter also provide the right to liberty and security of person. (European Convention, Article 5(1); Banjul Charter, Article 6.) The American Convention in Article 7(2) states that, “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.” Furthermore, Article 7(3) declares, “No one shall be subject to arbitrary arrest or imprisonment.”

48. For additional standards relating to the rights of detainees, see **Chapter IX: “Visits to Persons in Detention”**.

2. Violations of the right to liberty and security of person

a. *Arbitrary detention*

49. There is a violation of the right to individual liberty when a public official or any other person acting in an **official capacity** or with official instigation, consent or acquiescence, **deprives a person, without a valid reason, of his/her liberty** by confining him/her in a prison or any other detention facility or compels him/her to stay in an assigned residence.

50. Article 9 of the Covenant on Civil and Political Rights contains first of all a requirement of **legality** for arrest and detention. Deprivation of liberty is permissible only when it transpires on such grounds and in accordance with such procedures as are established by the law. The principle of legality is violated if somebody is arrested or detained on grounds which are not clearly established in law or which are contrary to such law.

51. Secondly, it prohibits “arbitrary” arrest. The concept of **arbitrary** goes beyond that of legality. The prohibition of arbitrariness provides for an additional limitation on the possibility to deprive a person of their liberty. It is not enough that the deprivation of liberty be provided by law. The law itself must also not be arbitrary, and the enforcement of the law must not take place arbitrarily. “Arbitrary” is more than against the law or unlawful. It must be interpreted more broadly, as containing elements of injustice, unreasonableness and disproportionality. Therefore, cases of deprivation of liberty provided for by law must not be unproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be appropriate and proportional in view of the circumstances of the case.

³⁹Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 8 (1994).

52. In addition, a violation of the rights of arrested persons indicated in Article 9 of the Covenant on Civil and Political Rights, or a combination of violations of those rights, can lead to arbitrary detention. For example, the Human Rights Committee has established that people who had been arrested without an arrest warrant and had not been informed of the grounds for the arrest, were being arbitrarily detained.

53. Detained persons shall be held only in officially recognized places of detention, and their family and legal representatives are to receive full information.⁴⁰

54. Juveniles are to be separated from adults, women from men and persons who have been convicted from persons who are awaiting trial.⁴¹

55. Decisions about the duration and legality of detention are to be made by a judicial or equivalent authority.⁴² Every detainee shall have the right to appear before a judicial authority and to have the legality of his/her detention reviewed.⁴³

b. Forced disappearance

56. According to General Comment No. 6 of the Human Rights Committee, States parties should take specific and effective measures to prevent the disappearance of individuals. The Declaration on the Protection of All Persons from Enforced Disappearance⁴⁴ contains detailed guidance on States' obligations on this matter. In general, enforced disappearances occur when:

a) persons are **arrested, detained or abducted against their will** or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support — direct or indirect — consent or acquiescence of the Government, and

b) followed by the Government's refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty.

57. The first criterion is that the person must have been arrested or abducted by a Government official or any other person acting in an **official capacity** or with his consent or acquiescence. Such State responsibility is often difficult to verify. Normally the perpetrators of an enforced disappearance cover their tracks carefully.

58. The likelihood of a disappearance is greater if the victims was involved in political, trade union or other association activities. The HRO should ask *whether the victim previously had been threatened because of his/her political activities or beliefs*. Have any other individuals in the same organizations been reported missing?

⁴⁰Principles of Detention or Imprisonment, principles 12 and 16(1); Standard Minimum Rules, rules 7, 44(3), and 92; Declaration on Enforced Disappearance, Article 10; Principles on Summary Execution, principle 6.

⁴¹Covenant on Civil and Political Rights, Art. 10; Children's Convention, Art. 37; Standard Minimum Rules, rules 5, 8, 53, 85(1), and 85(2); Principles of Detention or Imprisonment, principles 5(2) and 8.

⁴²Covenant on Civil and Political Rights, Art. 9(4); Principles of Detention or Imprisonment, principles 32 and 37; Declaration on Enforced Disappearance, Art. 10(1).

⁴³Covenant on Civil and Political Rights, Art. 9(4); Principles of Detention or Imprisonment, principle 32.

⁴⁴Adopted by General Assembly resolution 47/133 of 18 December 1992, UN Doc. A/RES/47/133, 32 I.L.M. 903 (1993).

59. The second element of the definition relates to the Government's refusal to acknowledge the arrest or admit knowledge of the person's whereabouts. The inquiry should include a search for the missing person in official or unofficial detention centres. This inquiry could be pursued by members of his family, friends, HROs, etc. HROs should question Government officials on the previous location and the present whereabouts of the missing person. *Only after the Government's refusal to provide information or in the absence of any information, can an HRO conclude that a case of enforced disappearance is involved.*

60. In short, one may assume that there is a *case of "enforced disappearance"* when the *inquiry leads nowhere*, when there is every reason to believe that *Government officials or people working for them are involved* in the disappearance, and when there are strong indications that the *disappearance was for political or similar reasons.*

61. In most cases, the Government will not admit that its officials or people working for them are involved in the disappearance and omits or refuses to carry out a proper enquiry.

62. The closer a case approaches this definition, the more it constitutes a serious and continuous violation of human rights.

E. Rights in the administration of justice

63. The administration of justice includes the functioning and independence of the **courts**; the role of **prosecutors**; the role of **lawyers**; the role of **law enforcement officials**; human rights during **criminal investigations, arrest and detention**; the right to a **fair trial**; standards for the protection of **prisoners; non-custodial measures**; the administration of **juvenile justice**; the rights of **minorities, non-nationals and refugees; women's** human rights in the legal system; protection and **redress for victims** of crime and abuses of power; the administration of justice under states of emergency; the right to habeas corpus, amparo or similar remedy; and the role of the courts in protecting economic and social rights. As to each of these subjects there are international standards, which are briefly summarized below. For a more detailed and complete treatment of these standards, see Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice* (Professional Training Series, forthcoming); High Commissioner for Human Rights/Centre for Human Rights, *Human Rights and Law Enforcement* (Professional Training Series No. 5, 1997); and Office of the High Commissioner for Human Rights, *Human Rights and Prisons* (Professional Training Series, forthcoming).

1. Courts

64. Article 10 of the Universal Declaration of Human Rights states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

65. This provision is amplified by Article 14(1) of the Covenant on Civil and Political Rights:

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.

66. More explicit protections for the **independence and impartiality of the tribunal** have been adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in the Basic Principles on the Independence of the Judiciary.⁴⁵ Principle 1 states that “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”. Principle 2 states that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.

67. According to Principle 6, “The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”

68. Principle 10 of the Basic Principles on the Independence of the Judiciary states that persons “selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”. Principle 12 requires that judges “shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists”.

69. The Basic Principles on the Independence of the Judiciary also guarantee freedom of expression and association for judges; other *standards* regarding their *qualifications, selection and training; conditions of service and tenure; professional secrecy and immunity; as well as discipline, suspension and removal*.

70. The Human Rights Committee emphasizes that:

the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.⁴⁶

⁴⁵A/CONF.121/22/Rev.1 paras. 58-59 (1985), endorsed by General Assembly resolution 40/146, Official Records of the General Assembly, Fortieth Session, Supplement No. 53, paras. 154-55, (A/40/53) 1986.

⁴⁶Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 144, (A/39/40), 1984.

2. Prosecutors

71. The Guidelines on the Role of Prosecutors⁴⁷ recognize that prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should contribute to fair and equitable criminal justice and the effective protection of citizens against crime. Accordingly, the Guidelines provide standards with regard to qualifications, selection and training of prosecutors; status and conditions of their service; guarantees for their freedom of expression and association; their role in criminal proceedings; the performance of their discretionary functions; alternatives to prosecution; prosecutors' relationship with other Government agencies or institutions; and disciplinary proceedings.

72. Principle 10 requires that “[t]he office of prosecutors shall be strictly separated from judicial functions”. Principle 12 states that “[p]rosecutors shall, in accordance with the law, perform their duties **fairly, consistently and expeditiously**, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”.

73. Principles 13 to 16 further establish the duty for prosecutors to carry out their functions **impartially and without discrimination**; to take proper account of the position of the suspect and the victim; to give due attention to the prosecution of crimes committed by public officials, particularly grave violations of human rights; and to refuse to use evidence that they know was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights.

3. Lawyers

74. The Basic Principles on the Role of Lawyers⁴⁸ recognize that adequate protection of human rights requires **effective access to legal services** provided by an **independent legal profession**, and establish obligations for Governments to provide effective and equal access to lawyers for all without discrimination. The Principles guarantee access to lawyers and legal services; special safeguards in criminal justice matters; standards regarding qualifications and training; protections for the independence and functioning of lawyers; their freedom of expression and association; professional associations; and disciplinary proceedings.

4. Law enforcement officials

75. The Code of Conduct for Law Enforcement Officials⁴⁹ recognizes their duty, imposed upon them by law, to **serve the community** principally by **protecting all persons against illegal acts**, consistent with the high degree of responsibility required by their profession. The Code provides for the protection and respect by law

⁴⁷Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 189 (1990)

⁴⁸Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990).

⁴⁹G.A. res. 34/169, annex, 34 UN GAOR Supp. (No. 46) at 186, UN Doc. A/34/46 (1979).

enforcement officials of human rights and dignity; limits their use of force to situations in which it is strictly necessary; notes their duty to keep certain matters confidential; forbids their use of torture or other ill-treatment; assures that they will protect the health of detainees; states that they will avoid corruption; and provides that they will respect the law. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials⁵⁰ have already been discussed in this chapter, **section B: “Right not to be arbitrarily deprived of life”** above. In addition, for a detailed analysis of international human rights standards relevant to law enforcement officials and functions, see UN High Commissioner/Centre for Human Rights, Human Rights and Law Enforcement (Professional Training Series No. 5, 1997).

5. Human rights during criminal investigations, arrest and detention

76. Article 9 of the Covenant on Civil and Political Rights provides that “No one shall be subject 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.” “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.” Further standards with regard to arrest and detention are discussed in **Chapter IX: “Visits to Persons in Detention”**.

6. Right to a fair trial

77. The right to fair trial is principally guaranteed by Articles 9, 14 and 15 of the Covenant on Civil and Political Rights. With regard to a criminal case, it includes the rights to be **informed promptly** of any charges upon arrest; to be **brought promptly before a judge** or similar judicial officer for an assessment of the legality of an arrest; to **equal treatment** before courts and tribunals; to a fair and usually **public hearing** by a **competent, independent and impartial tribunal** established by law; to be **presumed innocent**; to be informed promptly and in detail in a language one understands of the nature of **charges**; to have adequate time and facilities for the **preparation of a defence**; to communicate with **counsel** of one’s own choosing; to be tried **without undue delay**; to be **tried in one’s presence**; to **defend one’s self** in person or through legal assistance of one’s choice; to be informed that counsel will be appointed if one does not have sufficient funds and the interests of justice require appointment; to examine or have examined **witnesses**; to obtain the attendance and examination of witnesses on the same conditions as adverse witnesses; to have the free assistance of an **interpreter** if one cannot understand the language used in court; not to be compelled to testify against one’s self or to confess guilt; to have a conviction **reviewed by a higher tribunal** according to law; to be **compensated** for any punishment which is conclusively shown to be a miscarriage of justice; not to be convicted for any offence for which one has been finally convicted or acquitted (*non bis in idem*); not to be convicted for any act which did not constitute a criminal offence

⁵⁰Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990).

under national or international law at the time of the conduct (**prohibition of retroactivity of criminal law**); to benefit from any subsequent decrease in punishment. For further discussion of fair trial standards, see **Chapter XIII: “Trial Observation and Monitoring the Administration of Justice”**. (See also this chapter, **section E-9: “Administration of juvenile justice”** and **section E-14 “The right to habeas corpus, amparo or similar remedy”** below.)

7. Standards for the protection of prisoners

78. Article 10 of the Covenant on Civil and Political Rights states, “All persons deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Article 7 provides further, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” For further discussion of applicable standards, see **Chapter IX: “Visits to Persons in Detention”**.

8. Non-custodial measures

79. Article 9(3) of the Covenant on Civil and Political Rights states, “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.” This norm is elaborated in United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).⁵¹

9. Administration of juvenile justice

80. Article 14(4) of the Covenant on Civil and Political Rights provides that juvenile persons shall be entitled to procedures that will **take account of their age** and the desirability of promoting their **rehabilitation**. Moreover, Article 40 of the Convention on the Rights of the Child states, *inter alia*, that any child alleged to have committed a criminal offence shall be treated in a manner consistent with the child’s sense of dignity and worth as well as the desirability of promoting the child’s reintegration in society. Such a child alleged to have infringed the penal law is entitled to the presumption of innocence; to be informed promptly of the charges; to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance, and usually in the presence of the **child’s parents** or legal guardians.

81. The accused child should also not be compelled to give testimony or guilt, but should be able to examine or have examined adverse witnesses; to obtain the participation and examination of witnesses under conditions of equality; to have the free assistance of an interpreter, if needed; to have his privacy respected; and to have any adverse decision reviewed by a higher competent, independent and impartial authority or judicial body according to law.

⁵¹G.A. res. 45/110, annex, 45 UN GAOR Supp. (No. 49A) at 197, UN Doc. A/45/49 (1990).

82. In addition, Governments are requested to promote the establishment of measures for dealing with children in conflict with the law **without resorting to judicial proceedings**. Article 40 also requires that a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other **alternatives to institutional care** be available to ensure that children are dealt with in a manner appropriate to their well-being and **proportionate both to their circumstances and the offence**.

83. Article 37 of the Convention on the Rights of the Child provides that children deprived of their liberty shall be treated in a manner which takes into account the needs of the person of his or her age, and be **separated from adults** unless it is considered in the child's best interest not to do so.

84. Article 6 of the Covenant on Civil and Political Rights states that **sentence of death** shall not be imposed for crimes committed by persons below eighteen years of age.

85. These standards are further developed and clarified in a number of specific instruments, including the also United Nations Rules for the Protection of Juveniles Deprived of their Liberty⁵²; the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)⁵³; and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").⁵⁴

10. Rights of minorities, non-nationals and refugees

86. Article 26 of the Covenant on Civil and Political Rights provides,

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.

87. As mentioned above, Article 14(3)(f) of the Covenant provides an accused person with the right to "have the free assistance of an interpreter if he cannot understand or speak the language used in court". Article 27 also provides minorities with the right to use their own language. Further protections are established in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁵⁵

88. Article 13 of the Covenant on Civil and Political Rights indicates that an *alien lawfully in the territory of a country may be expelled* only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against expulsion, to have the case reviewed, and to be represented for that purpose before the competent authority.

⁵²G.A. res. 45/113, annex, 45 UN GAOR Supp. (No. 49A) at 205, UN Doc. A/45/49 (1990).

⁵³G.A. res. 45/112, annex, 45 UN GAOR Supp. (No. 49A) at 201, UN Doc. A/45/49 (1990).

⁵⁴G.A. res. 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN Doc. A/40/53 (1985).

⁵⁵G.A. res. 47/135, annex, 47 UN GAOR Supp. (No. 49) at 210, UN Doc. A/47/49 (1993).

Additional protections are set forth in the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live.⁵⁶

89. Article 16 of the Convention relating to the Status of Refugees as applied by the Protocol relating to the Status of Refugees, assures refugees *free access to the courts* of law and *equal treatment with nationals* of the country pertaining to access to the courts, including legal assistance. For further discussion of applicable standards, see **Chapter X: “Monitoring and Protecting the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps”** and **Chapter XI: “Monitoring and Protecting the Human Rights of Returnees and Internally Displaced Persons (IDPs)”**.

11. The human rights of women in the administration of justice

90. As cited above, Article 26 of the Covenant on Civil and Political Rights establishes that “[a]ll persons are equal before the law and are entitled without any discrimination to the **equal protection of the law**”, and forbids discrimination on any ground including sex. Article 3 also provides that ratifying governments “undertake to ensure the **equal rights of men and women** to the enjoyment of all civil and political rights set forth in” the Covenant. In addition, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women **forbids discrimination against women**. Article 2 of that Convention further obligates all ratifying governments to “establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”

91. Also relevant is the Declaration on the Elimination of Violence Against Women.⁵⁷ Of particular importance is that the definition of **“violence against women”** contained in article 1 of the Declaration includes “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women [...], whether occurring **in public or in private life**”. The definition encompasses, in addition to violence perpetrated or condoned by the State, violence occurring **within the family** (domestic violence), and **within the community** (article 2). The Declaration establishes the duty for the State — through its law enforcement and administration of justice systems — to **prevent, investigate and punish** all acts of violence against women, whether perpetrated by the State or by private persons, to provide women who are subjected to violence with access to the mechanisms of justice and to just and effective remedies, and to ensure that law enforcement officers and public officials concerned receive training to sensitize them to the needs of women.

⁵⁶G.A. res. 40/144, annex, 40 UN GAOR Supp. (No. 53) at 252, UN Doc. A/40/53 (1985).

⁵⁷G.A. res. 48/104, 48 UN GAOR Supp. (No. 49) at 217, UN Doc. A/48/49 (1993).

12. Protection and redress for victims of crime and abuses of power

92. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁵⁸ provides that victims of crime and/or abuse of power should receive **access to justice, prompt redress and fair treatment** (paras. 4-7); **restitution** (paras. 8-11); **compensation** (paras. 12-13); as well as the necessary material, medical, psychological and social **assistance** (paras. 14-17). Pursuant to paragraph 1, “**victims of crime**” mean persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. The definition of “**victims of abuse of power**” is identical to “victims of crime”, except that harm is caused by acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

93. There are a number of other practical concerns of victims, including the need for information about their rights, **participation in the accused’s trial** or other process of criminal justice, **privacy, freedom from harassment or retaliation** and reassurance about their **safety**.

13. The administration of justice under states of emergency

94. As discussed more fully in **Chapter III: “Applicable International Human Rights and Humanitarian Law: The Framework”**, Article 4 of the International Covenant on Civil and Political Rights states that governments *may derogate* from (that is, not apply) certain rights in times of *public emergency* which *threaten the life of the nation*, are properly *announced* and about which the *UN is notified*. There are, however, certain rights which are non-derogable including the right to be free from *discrimination; rights guaranteed under international law*, including the Geneva Conventions and the two Protocols; as well as the rights to be free from arbitrary deprivation of *life; torture* and other ill-treatment; *slavery; imprisonment for debt; retroactive penalty; non-recognition of the law*; and infringement of *freedom of thought, conscience and religion*. The following section (“The right to habeas corpus, amparo or similar remedy”) also contains important information relevant to the administration of justice in states of emergency.

14. The right to habeas corpus, amparo or similar remedy

95. While the Covenant on Civil and Political Rights does not use the terms “habeas corpus” or “amparo”, it contains several provisions which guarantee the essence of the

⁵⁸G.A. res. 40/34, annex, 40 UN GAOR Supp. (No. 53) at 214, UN Doc. A/40/53 (1985).

habeas corpus writ and aspects of the amparo procedure which are similar in impact to habeas corpus. Article 9 (3) states,

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...

96. Article 9(4) states,

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.

97. The right to habeas corpus and related aspects of amparo are also inherent in Article 2(3), which states,

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

98. Although *habeas corpus and the related aspects of amparo for challenging detention* were not expressly made non-derogable under Article 4 of the International Covenant on Civil and Political Rights, habeas corpus/amparo have gradually been recognized as non-derogable. These developments have occurred because of the recognition that without the ability to challenge the legality of one's detention, especially in times of public emergency, one will never be assured of the other fundamental rights in the Covenant.

99. Two Advisory Opinions issued by the Inter-American Court of Human Rights have concurred in holding that habeas corpus and amparo — the legal remedies guaranteed in Articles 7(6) and 25(1) of the American Convention — may not be suspended, even in emergency situations, because they are among the “judicial guarantees essential” to protect the rights whose suspension Article 27(2) of the American Convention prohibits.⁵⁹ In the first opinion, the Court pointed out that habeas corpus performs a vital role in assuring that a person's life and physical integrity are respected. In its second Advisory Opinion, the Inter-American Court stated that the “essential” judicial guarantees not subject to derogation according to Article 27 include habeas corpus, amparo, and any other effective remedy before judges or competent

⁵⁹ Advisory Opinion of 9 May 1986, Inter-Am. C.H.R., 13 OEA/Ser.L/III.15, doc. 14 (1986) and Advisory Opinion of 6 October 1987, Inter-Am. C.H.R. 13 OEA/Ser.L/V/III.19, doc. 13 (1988).

tribunals which is designed to guarantee respect for the rights and freedoms whose suspension are not authorized by the American Convention.

15. Role of the courts in protecting economic and social rights

100. As discussed more fully in this chapter, in **section I: “Right to property”** and **section J: “Right to housing and other economic, social and cultural rights”** below, international human rights law (the Universal Declaration of Human Rights and the Covenant on Economic, Social and Cultural Rights in particular) protects a wide range of economic, social and cultural rights, including right to and in work, trade union rights, social security rights, family rights, the right to an adequate standard of living, housing and food rights, rights to health care, education rights and rights to cultural life. Although human rights law has traditionally focused primarily upon the role of the courts in protecting civil and political rights, judiciaries have an equally important role to play in securing compliance with the individual economic, social and cultural rights as well. In many countries, individuals and groups entitled to the enjoyment of particular economic, social and cultural rights are turning increasingly to the judicial system as a means of claiming these rights.

101. Although the judicial enforceability (justiciability) of economic, social and cultural rights has been the subject of some controversy, perspectives denying the justiciability of these rights have been repeatedly shown to be far more reflections of misunderstandings than grounded in the status of human rights law.⁶⁰ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights⁶¹ state, “Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time... States parties shall provide for effective remedies including, where appropriate, judicial remedies.”

102. Indeed, a new complaint procedure was established in connection with the European Social Charter in 1995 and negotiations are continuing within the UN context for a similar procedure under the Covenant on Economic, Social and Cultural Rights. The UN Committee on Economic, Social and Cultural Rights has stated, for example, that “Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to the rights which may, in accordance with the national legal system, be considered justiciable. [...] There are a number of other provisions in the Covenant on Economic, Social and Cultural Rights, including articles 3,7 (a) (i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3), which would seem to be capable of immediate application by judicial and other organs in many national legal systems”.⁶²

⁶⁰For a detailed discussion of the justiciability of one right, see: Scott Leckie, (1995), “The Justiciability of Housing Rights”, in *The Right to Complain about Economic, Social and Cultural Rights* (Coomans, van Hoof, Arambulo, Smith and Toebe, eds), pp. 35-72.

⁶¹UN Doc. E/CN.4/1987/17 (1987).

⁶²General Comment N.3, The nature of States parties’ obligations (article 2, paragraph 1, of the Covenant, para. 5.

F. Freedom of opinion and expression⁶³

103. Article 19 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through the media and regardless of frontiers.”

104. The Covenant on Civil and Political Rights declares in 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 of all kinds, regardless of frontiers, either orally, in writing, 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 the present 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 the respect of the rights or reputation of others;
 - b) for the protection of national security or of public order (*ordre public*), or of public health and morals.

105. The Human Rights Committee has commented that Article 19(1) is “a right to which the Covenant permits no exception or restriction.”⁶⁴

106. The American Convention sets forth in Article 13 the right to 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... shall not be subject to prior censorship...
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.

⁶³For a more comprehensive review of international law relating to the right to freedom of expression, see *The Article 19 Freedom of Expression Handbook* (1993).

⁶⁴Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 11 (1994).

107. Article 9(1) of the Banjul Charter states, “Every individual shall have the right to receive information.” Article 9(2) continues, “Every individual shall have the right to express and disseminate his opinions with the law.”

108. Pursuant to Article 9(1) of the European Convention, “Everyone has the right to freedom of thought, conscience and religion...”. In addition, Article 10(1) guarantees that “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...”.

109. The right to freedom of opinion and expression is a basic right that acts as a cornerstone for many other rights, including political rights. For a more detailed examination of political rights guaranteed by international law, see **Chapter XIV: “Election Observation”**.

G. Freedom of association and assembly

110. Article 20 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of peaceful assembly and association.”

111. The Covenant on Civil and Political Rights guarantees in Article 22(1) that, “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Pursuant to Article 22(2), “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of rights and freedoms of others.”

112. Article 11(1) of the European Convention declares, “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Article 16(1) of the American Convention recognizes that “Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports or other purposes”. Both of these regional conventions contain limiting language that mirrors Article 22(2) of the Covenant on Civil and Political Rights. Pursuant to Article 10(1) of the Banjul Charter, “Every individual shall have the right to free association provided that he abides by the law.”

113. *Freedom of association* includes forming, joining and participating in *political parties, trade unions, NGOs, neighbourhood associations, women’s organizations, religious groups and student organizations*. The violation of these rights interfere with the proper working of a democratic society.

114. The right to *peaceful assembly* should be considered in tandem with the right to freedom of association. Article 21 of the Covenant on Civil and Political Rights guarantees that “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with

the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” The right to freedom of peaceful assembly is also guaranteed by Article 15 of the American Convention and Article 11 of the Banjul Charter.

H. Freedom of movement and residence

115. Pursuant to Article 13(1) of the Universal Declaration of Human Rights, “Everyone has the right to freedom of movement and residence within the borders of each State.” Article 13(2) further declares, “Everyone has the right to leave any country, including his own, and to return to his country.”

116. Article 12 of the Covenant on Civil and Political Rights guarantees the right to freedom of movement and residence:

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 protection of 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.

117. The American Convention (Article 22) and Banjul Charter (Article 12) also guarantee the right to freedom of movement and residence. Government-imposed restrictions on the movement of women (for example, by requiring women to be accompanied by a male relative when travelling abroad) are clear violations of this right. Such restrictions also constitute a case of sex-based discrimination which is prohibited under the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights.

118. A Government’s refusal to issue a *passport or personal identification document* is considered to obstruct the exercise of this right, and is therefore a violation of the right to freedom of movement. HROs should also be aware of the *link between residency and nationality* — another fundamental human right protected by Article 15 of the Universal Declaration of Human Rights, and of the impact that a Government’s denial of residency rights may have on the enjoyment of the right to a nationality and vice versa.

119. *Forced population displacement* may also be a violation of international humanitarian law if it occurs during periods of armed conflict. Article 17(1) of the Protocol II to the Geneva Conventions states that “the displacement of the civilian population shall not

be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons demand”, in which cases “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, safety and nutrition”. Furthermore, according to Article 17(2) of Protocol II, “civilians shall not be compelled to leave their own territory for reasons connected with the conflict”.

I. Right to property

120. The Universal Declaration of Human Rights provides in Article 17, “Everyone has the right to own property alone as well as in association with others... No one shall be arbitrarily deprived of his property.” The two Covenants do not contain a similar provision. Indeed, Article 1 of the two Covenants provide, “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” The two Covenants also *forbid* discrimination on several grounds, including *discrimination on the basis of property*.

121. The right to property is closely *associated with the right to housing*. The Covenant on Economic, Social and Cultural Rights provides in Article 11, “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...”. The right to housing is discussed more fully below as an example of an economic right.

J. Right to housing and other economic, social and cultural rights

122. Article 2(1) of the Covenant on Economic, Social and Cultural Rights contains the basic obligation of all governments which ratify that treaty; it reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

123. The Covenant recognizes a number of rights, including the right to work, trade union rights, social security rights, family rights, the right to an adequate standard of living, housing and food rights, rights to health care, education rights and rights to cultural life.

124. Economic, social and cultural rights are discussed more fully in **Chapter XVII: “Monitoring Economic, Social and Cultural Rights”**. As an example, however, of the application of such rights, the Committee on Economic, Social and Cultural Rights in 1991 issued General Comment No. 4 on the *right to adequate housing*:

“Pursuant to article 11(1) of the Covenant, States parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights...

Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11(1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed. There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing...

The right to adequate housing applies to everyone. While the reference to ‘himself and his family’ reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups...

In the Committee’s view, the right to housing... should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised... Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost.”⁶⁵

⁶⁵Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session, General Comment No. 4 (1991)*, Supp. No. 3, Annex III, at 114-15, UN Doc. E/1992/23 (1992) (footnotes omitted)

125. The Comment identifies seven aspects of the right to adequate housing: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.⁶⁶

126. General Comment No. 4 concludes: “[T]he Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”⁶⁷

127. In June 1997 the Committee on Economic, Social and Cultural Rights provided further guidance on forced evictions in its General Comment No. 7:⁶⁸

“In essence, the obligations of States Parties to the Covenant in relation to forced evictions are based on Article 11(1), read in conjunction with other relevant provisions. In particular, Article 2(1) obliges States to use “all appropriate means” to promote the right to adequate housing. However, in view of the nature of the practice of forced evictions, the reference to Article 2(1) to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (as defined in para. 3 above). Moreover, this approach is reinforced by Article 17(1) of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, *inter alia*, the right to be protected against “arbitrary or unlawful interference” with one’s home. It is to be noted that the State’s obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

Article 2(1) of the Covenant requires States Parties to use “all appropriate means”, including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its General Comment No.3 (1991) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply in relation to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards their government greatly reducing their responsibilities in the housing sector, States Parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties should therefore review relevant legislation and policies to ensure that these are compatible with the

⁶⁶*Id.* at 115-17.

⁶⁷*Id.* at 119.

⁶⁸UN Doc. E/CN.4/C.12/1997/4 (1997).

obligations arising from the right to adequate housing and to repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.

...The non-discrimination provisions of Articles 2(2) and 3 of the Covenant impose an additional obligation upon governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no forms of discrimination are involved.

Where some evictions may be justifiable, such as in the case of the persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that those evictions are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected...”.

128. In addition to the relevant provisions of the Covenant on Economic, Social and Cultural Rights, international humanitarian law also contains provisions relevant to *forced evictions*. For example, Article 49 of the Fourth Geneva Convention states,

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.

129. Similarly for non-international armed conflicts, Article 17 of Protocol II of the Geneva Conventions states,

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

K. Rights of refugees and internally displaced persons

1. Refugees

130. The definition of “refugee” is set forth in Article 1 of the Convention relating to the Status of Refugees (as modified by Article 1 of the Protocol) as any person who “owing to a **well-founded fear** of being persecuted for reasons of **race, religion, nationality, membership of a particular social group or political opinion**, is outside of the country of his nationality and is unable, or owing to such fear, is unwilling

to avail himself of the protection of that country”. (See **Chapter X: “Monitoring and Protecting the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps”**.) Certain persons are excluded from refugee status if they have committed a crime against peace, war crime or crime against humanity; committed a serious non-political crime outside the country of refuge; or been guilty of acts contrary to the purposes and principles of the UN.

131. Regional refugee instruments have expanded the definition of refugee. The Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Organization of African Unity,⁶⁹ broadens the definition of refugee by stating in Article 1(2): The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

132. A similar definition of refugee is applicable in Central America through the Cartegena Declaration. (See **Chapter XI: “Monitoring and Protecting the Human Rights of Returnees and Internally Displaced Persons (IDPs)”**.)

133. Central to the concept of refugee protection is the **principle of non-refoulement**. Article 33(1) of the Convention relating to the Status of Refugees states, “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.”

134. Article 31 of the Convention relating to the Status of Refugees *exempts refugees from normal immigration procedures* and provides that States “shall not impose penalties, on account of their illegal entry or presence, on refugees, who come in directly from another territory where their life or freedom was threatened...”.

135. Once refugee status has been granted by a receiving State, the Convention relating to the Status of Refugees guarantees certain **substantive rights** in such areas as freedom of religion, ownership of property, access to the courts, and other.

136. The UNHCR has noted in this context that **women** “share the protection problems experienced by all refugees... In addition..., refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services... [S]pecial efforts may be needed to resolve problems faced specifically by refugee women...⁷⁰ The UNHCR has further noted that the gender-related claims of women to asylum or refugee status usually can be established based on the “political opinion” or “particular social group” categories of the refugee definition.⁷¹

⁶⁹OAU Doc. CM/267/Rev. 1 (1969).

⁷⁰UNHCR, *Guidelines on the Protection of Refugee Women* 7-8, 36 (1991).

⁷¹*Id.*

137. Another important right drawn from international refugee law is the *right to seek asylum*. Article 14(1) of the Universal Declaration of Human Rights proclaims, “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

138. Regional agreements that reinforce the rights of refugees have also been adopted. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa reaffirms the principle of *non-refoulement* and imposes upon member States the obligation to “...use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”

139. The American Convention includes provisions similar to the Convention relating to the Status of Refugees. Article 22(7) states, “Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes.”

140. Moreover, pursuant to Article 22(8) of the American Convention, “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.” (See also **Chapter X: “Monitoring and Protecting the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps”**.)

2. Internally displaced persons

141. Persecution that produces massive involuntary movements across borders generally also produces massive internal displacement. According to the Guiding Principles on Internal Displacement,⁷² internally displaced persons are:

“persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed and internationally recognized State border.”

(See **Chapter XI: “Monitoring and Protecting the Human Rights of Returnees and Internally Displaced Persons (IDPs)”**.)

142. International human rights and humanitarian law instruments, including the Guiding Principles on Internal Displacement, provide legal protection against the human rights violations to which people displaced within their countries are often vulnerable.

143. Although IDPs often experience the same threats and violations of their human rights, they are unable to benefit from the protection provided by international refugee law because they have not crossed an international border. The General Assembly has, however, sometimes requested the United Nations High Commissioner for Refugees

⁷²UN document E/CN.4/1998/53/Add.2.

(UNHCR) to provide protection and other assistance to internally displaced populations. Several other United Nations structures, including the Office of the High Commissioner for Human Rights and the United Nations Children’s Fund, and many other inter-governmental and non-governmental organizations, also offer protection and assistance of varying forms. (See **Chapter XI: “Monitoring and Protecting the Human Rights of Returnees and Internally Displaced Persons (IDPs)”**.)

L. The human rights of women

144. International human rights law provides that (1) women and men are to receive *equal treatment*; and (2) special protections apply to women because of their status as a *vulnerable group*.

145. Article 1 of the Convention on the Elimination of Discrimination against Women defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Under this “non-discrimination model”, women’s rights are violated if women are denied the same rights as men.

146. Pursuant to Article 3 of the Covenant on Civil and Political Rights, “The States parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” The Human Rights Committee, in its General Comment No. 4, interpreted this provision to require not only measures of protection for women, but also **affirmative action** to ensure the positive enjoyment of enumerated rights. Affirmative action includes policies and activities which seek to strongly advance the rights of a vulnerable group through the adoption of measures which temporarily give special treatment or positive discrimination, to one group of people — to redress the inequalities. With specific regard to women, affirmative action is envisaged as a necessary strategy to achieve equality in Article 4 of the Convention on the Elimination of Discrimination against Women.

147. The Convention on the Elimination of Discrimination against Women reaffirms the obligation to accord women equality with men before the law (Article 15). In addition, the Convention on the Elimination of Discrimination against Women obligates States parties to take appropriate measures to *eliminate discrimination* against women in the fields of *public and political life* (Article 7), *education* (Article 10), *employment* (Article 11), *health care* (Article 12), *economic and social life* (Article 13), and *marriage and family relations* (Article 16).

148. Because of historically unequal power relations, women require special protection under international law. Article 6 of the Convention on the Elimination of Discrimination against Women calls upon States parties to suppress all forms of *traffic in and exploitation of women*. Furthermore, General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women states that *gender-based*

*violence is a form of discrimination which seriously inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men.*⁷³

149. As previously mentioned, the Declaration on the Elimination of Violence against Women specifically addresses the problem of *violence against women*, a term defined in Article 1 as: “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring **in public or private life.**”

150. This *definition* is broad and includes: *battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, violence related to exploitation, rape, sexual abuse and sexual harassment at work, school and elsewhere, trafficking in women, and forced prostitution.*

151. The obligations of the State with regard to the elimination of such acts are enunciated in Article 4 of the Declaration on the Elimination of Violence against Women. The State is obliged, *inter alia*, to condemn violence against women, and not to invoke any custom, tradition or religious consideration to avoid its obligations to eliminate violence against women; to pursue all appropriate means in adopting a policy to combat and prevent it; to refrain from engaging in violence against women; to prevent, investigate and punish acts of violence against women, whether perpetrated by the State or by private persons. For more information on international standards relating to the elimination of violence against women, see *Preliminary Report of the Special Rapporteur on violence against women*,⁷⁴ *Report of the Special Rapporteur on violence against women*,⁷⁵ and the two *Reports of the Special Rapporteur on violence against women, its causes and consequences.*⁷⁶

M. Rights of minorities

152. Article 27 of the Covenant on Civil and Political Rights proclaims, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Accordingly, international minority rights includes at a minimum: (1) principles of **equality** before the law and non-discrimination; (2) right to profess and practice one's own **religion**; (3) right to enjoy one's own **culture**; and (4) right to use one's own **language.**⁷⁷

⁷³Committee on the Elimination of Violence against Women, Eleventh Session, General recommendation 19, UN Doc. CEDAW/C/1992/L.1/Add.155 (1992).

⁷⁴UN Doc. E/CN.4/1995/42 (1995).

⁷⁵UN Doc. E/CN.4/1996/53 (1996).

⁷⁶UN Doc. E/CN.4/1997/47 (1997) and E/CN.4/1998/54 (1998).

⁷⁷See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* 69-70 (1992).

153. The Declaration on Persons Belonging to National, Ethnic, Religious or Linguistic Minorities,⁷⁸ reaffirms the above-referenced minority rights in Article 2. In addition, pursuant to Article 1(1), States have an affirmative obligation to “protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”

N. Rights of the child⁷⁹

154. Under international human rights law, children have the right to special care and protection. Pursuant to Article 1 of the Convention on the Rights of the Child, “child” means “every human being **below the age of eighteen years** unless under the law applicable to the child, majority is attained earlier.”

155. The Convention on the Rights of the Child is the most comprehensive instrument on this subject, encompassing recognition of civil, cultural, economic, political and social rights, and of special protections specifically required for children. The Convention has been ratified by more nations than any other human rights treaty and thus represents a significant tool for HROs.

156. The Committee on the Rights of the Child has identified four cardinal principles for applying the Convention on the Rights of the Child:

- (1) **non-discrimination** (Art. 2). It is important to note that the Convention protects children from discrimination not only on the basis of their own circumstances, but also on the basis of circumstances of their parents, legal guardians or other members of their families;
- (2) **best interests** of the child (Art. 3), which should be a primary consideration in all actions concerning children undertaken by public or private bodies;
- (3) the rights to **life, survival and development** (Art. 6), which emphasize not only the right of children not be arbitrarily deprived of life, but also to a life which ensures their full physical, mental, spiritual, moral and social development; and
- (4) respect for the **views of the child** (Art. 12). Children should be able to express their opinions freely, and those opinions should be listened to and given due weight in accordance with the age and maturity of the child, in all matters affecting them.

157. While article 24(1) of the Covenant on Civil and Political Rights requires the State party to take special measures to protect children, the Convention on the Rights of the Child lists specific areas where States are obliged to take measures to protect children’s interests, including:

- (a) the protection of children from physical or mental **harm and neglect**;

⁷⁸G.A. res. 47/135, annex, 47 UN GAOR Supp. (No. 49) at 210, UN Doc. A/47/49 (1993).

⁷⁹For further information on the rights specific to children, please refer to **Chapter XII: “Children’s Rights”**.

- (b) special consideration to be accorded **children in conflict with the law**;
- (c) the right of **disabled children** to special treatment, education and care;
- (d) **health** care for all children;
- (e) free and compulsory primary **education**;
- (f) protection from **economic exploitation**;
- (g) protection from all forms of **sexual abuse and exploitation**; and
- (h) prohibition on the **recruitment** of children under the age of 15 **into the armed forces**.

158. Among children there are particularly *vulnerable groups* requiring attention: children *in detention*, children *deprived of their family* environment, *street children*, *child soldiers* (reflecting relevant provisions of the Geneva Conventions and Protocols), *refugee children*, *unaccompanied children* during *repatriation*, and children with *disabilities*.

159. Specific rules on children in detention are contained in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. For other information on the rights of children, with specific reference to the administration of justice, also refer to this chapter, **section E-9: “The administration of juvenile justice”**.

O. Right to non-discriminatory treatment

160. International human rights law establishes norms of equal protection and non-discrimination. The Universal Declaration of Human Rights states in Article 7, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

161. Article 2(1) of the Covenant on Civil and Political Rights provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

162. In addition, the Covenant on Civil and Political Rights provides for an independent right to equality in 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.

163. The Human Rights Committee has noted that Article 26:

[D]oes not merely duplicate the guarantee already provided for in article 2 but provides for itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities . . . Thus, when legislation is adopted by a State party, it must comply with the requirements of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

164. It is important to note that under Article 4 of the Covenant on Civil and Political Rights, the right to be free from discrimination is **non-derogable**, that is, it cannot be suspended even in times of public emergency.

165. Article 2(2) of the Covenant on Economic, Social and Cultural Rights states:

The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

166. The principle of non-discrimination is also expressly included in most of the “specialized” human rights treaties. As previously mentioned, the Convention on the Rights of the Child provides in Article 2 that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind [...].

167. Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination likewise forbids racial discrimination. Article 1(1) defines “**racial discrimination**” as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

168. Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “**discrimination against women**” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

169. Additionally, pursuant to Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, States parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, notably in the enjoyment of certain rights. General Recommendation XX(48) of the Committee on the Elimination of Racial Discrimination⁸⁰ states that, “Article 5 of the Convention contains the obligation of States parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Note should be taken that the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list.” Pursuant to Articles 2 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination, it is the obligation of the State party to ensure the effective implementation of the Convention.

170. In determining whether the right to non-discriminatory treatment has been violated, the *first* question to be posed is whether a discrimination exists: Any distinction between similarly situated individuals must be justified by reasonable and objective criteria. In other words, is the *distinction objectively or reasonably related to the aim of the law* or the practice? Is that aim itself consistent with recognized principles of human rights?

171. The *second* test of discrimination is whether a law or practice has a *discriminatory impact*. It is the application of this test which will often reveal “hidden” discrimination — such as that which routinely affects minority groups and women. If so, the HRO must assess whether the State has complied with its obligation — for example — under the Covenant on Civil and Political Rights (Art.26) to guarantee “equal and effective protection against discrimination”. Obviously, if the discrimination constitutes an intentional policy of the Government, the State has failed to fulfil its obligation in Article 26. The intention of the Government may be difficult to assess, but it may be inferred, for example, from the obvious and/or extremely disproportionate nature of the discrimination, from the seriousness of the consequences, or from related conduct or statements given by the authorities.

172. Even if the discrimination is not intentional, the Covenant “still sometimes requires States parties to take **affirmative action** in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”⁸¹

173. Moreover, if the discrimination is based on “race, colour, descent, or national or ethnic origin”, the Convention on the Elimination of All Forms of Racial Discrimination requires *significant affirmative efforts to ensure equality*. Article 2(1)(c) of the Convention on the Elimination of All Forms of Racial Discrimination provides, “Each

⁸⁰UN Doc. CERD/48/Misc.6/Rev.2.

⁸¹Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).

State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” The Convention on the Elimination of All Forms of Discrimination Against Women contains a similar provision in Article 4, which states that “[a]doption by States parties of temporary special measures aimed at accelerating *de facto* equality shall not be considered discrimination [...]”.

174. The HRO should note that much discriminatory treatment is *perpetrated by non-State actors*. General Recommendation XX(48) on Article 5 of the Committee on the Elimination of Racial Discrimination states, “[t]o the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.” HROs should encourage institutions and non-governmental organizations to pursue inquiries as to individual cases of discrimination. Systematic practices may, however, make it necessary for UN officers to intervene, particularly if discriminatory treatment may trigger further violence. (See **Chapter VI: “Identification and Prioritization of Efforts Regarding Human Rights Violations”**.)

175. Under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination, a State party may recognize the competence of the Committee on the Elimination of Racial Discrimination to receive communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State party of any of the rights set forth in the Convention. Hence, Article 14 provides a complaint mechanism for persons who believe that their right to non-discriminatory treatment has been violated. A similar complaint mechanism is available to individuals in States that have ratified the Optional Protocol to the Covenant on Civil and Political Rights.

P. Right to development

176. In 1986, the UN General Assembly adopted the Declaration on the Right to Development,⁸² which provides in Article 1: “The **right to development** is an inalienable human right by virtue of which every human person and all peoples are **entitled to participate in, contribute to and enjoy economic, social, cultural and political development**, in which all human rights and fundamental freedoms can be fully realized [...]” The Declaration recognizes development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”

⁸²G.A. res. 41/128, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/41/53 (1986).

177. The right to development includes as its **key elements**: permanent sovereignty over natural resources; self-determination; popular participation; equality of opportunity; and the advancement of adequate conditions for the enjoyment of other civil, cultural, economic, political and social rights.

178. Article 2 states, “The human person is the central subject of development and should be the active participant and beneficiary of the right to development [...] .” The right to development is claimable both by individuals, and collectively by peoples. More importantly, the right **obliges** both **individual states** in their ensuring of equal and adequate access to essential resources, and **the international community** in its duty to promote fair development policies and effective international cooperation.

179. Monitoring and reporting on the right to development is a complex task, which may require careful consideration of the actions, policies, and impact of a host of actors, both within and outside the country of assignment. In addition to those of domestic government agents and departments, the activities of foreign governments, international financial institutions and even multinational corporations can be relevant to a proper assessment of this complex right. In addressing right to development issues, HROs should therefore be prepared to consult closely with the economic and social development agencies and programmes of the UN system which are present in the country, and which can serve as rich sources of country-specific development data and analysis (civil, cultural, economic, political and social).

Q. Impunity principles

180. The trend in international law has been to *foreclose a policy of impunity for grave violations of physical integrity*. The broad trend against impunity in international law can be seen in the final document of the World Conference on Human Rights, which declares that “States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.”⁸³

181. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide requires States parties “to punish... **genocide**, whether committed in time of peace or time of war.” (Article I.) Pursuant to Article IV of the Convention, persons who commit genocide “shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Impunity for genocide is clearly incompatible with the Convention.

182. **Crimes against humanity**, such as genocide, are considered international criminal offences. Article 5 of the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity states, “Persons against whom there is evidence that they have committed crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.”

⁸³A/CONF.157-/23, second part, sect. B.5, para. 60.

183. Under Article 2 of the Covenant on Civil and Political Rights, States undertake to ensure to all individuals the rights specified in the Covenant. States are also required to take the necessary legislative and other measures to give effect to these rights. As such, the Covenant imposes a positive duty upon the States to take measures towards the implementation of the rights protected by the Covenant. Although the Covenant does not explicitly require States Parties to punish violations, the Human Rights Committee has interpreted the Covenant as requiring States to *investigate extra-judicial executions, torture and disappearances*, and to *bring to justice* those persons who are responsible. Furthermore, in a General Comment on Article 7 of the Covenant (which prohibits **torture**), the Committee stated: “The Committee has noted that some States have granted amnesty in respect to acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”

184. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly requires State Parties to institute criminal proceedings against torturers. Article 7 of the Convention requires that States extradite alleged torturers or “submit the case to [their] competent authorities for the purpose of prosecution.”

185. The UN Declaration on the Protection of All Persons from Enforced Disappearance states in Article 14 that any person allegedly responsible for an enforced disappearance shall be brought before competent authorities “for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction...”. In addition, Article 18(1) provides that “[p]ersons who have, or are alleged to have, committed [enforced disappearances] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”

186. The Security Council has reinforced the international efforts to ensure that impunity is not permitted for grave human rights violations by establishing the **International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia** since 1991 and the **International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda**.⁸⁴

187. On the basis of these *two ad hoc tribunals*, the experience of the *Nuremberg and Tokyo Tribunals*, the related trials after World War II under *Control Council Law No. 10*, and a draft from the International Law Commission, the Statute of the permanent **International Criminal Court** was developed under the auspices of the UN General Assembly and agreed in Rome in July 1998. The conclusion of the treaty establishing the permanent court marks a significant step forward in the fight against impunity, and is a clear indication of the international community’s willingness to pursue prosecution and punishment of perpetrators of grave human rights violations.

⁸⁴Security Council resolutions 827 of 25 May 1993 and 955 of 8 November 1994.

188. The International Criminal Court has **jurisdiction** over the following crimes, if committed after the entry into force of the Court's Statute: (1) **genocide**; (2) **crimes against humanity**; (3) **war crimes**; and (4) **aggression** (Article 5 of the Statute). The Court may exercise its jurisdiction with respect to any of the above acts if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor *by a State Party* or *by the United Nations Security Council* acting under Chapter VII of the United Nations, or if the Prosecutor has *initiated an investigation* in respect of such a crime.

189. The Statute also establishes some *pre-conditions* to the exercise of the Court's jurisdiction (Article 12). The Court may exercise its jurisdiction if one or more of the following States are Parties to the Statute or have accepted the jurisdiction of the Court: (a) the State on the territory of which the crime occurred or (b) the State of which the person accused of the crime is a national.

190. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities is also in the process of studying and possibly elaborating further principles relating to impunity with regard to both civil and political rights and economic, social and cultural rights.

R. Other international human rights law standards

191. There are many other human rights law standards in the two Covenants and in other human rights treaties or instruments. Simply because they are not discussed in this chapter does not make them any less worthy of concern. HROs should focus on the *human rights provisions which are most relevant to their operation's mandate*, but should acknowledge the importance of complying with all other human rights standards.