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Report of the Working Group on Arbitrary Detention

United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court.

Summary

The Human Rights Council requested the Working Group on Arbitrary Detention to draft and present to it before the end of 2015, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The Basic Principles and Guidelines, based on international law, standards and recognized good practice, aim to provide guidance to States on the fundamental principles on which the laws and procedures regulating the aforementioned right should be based and on the elements required for the effective exercise of this right.

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A. Introduction

1. The right of anyone deprived of his or her liberty to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is widely recognized in international and regional human rights instruments,[1] the jurisprudence of the International Court of Justice and international human rights mechanisms, including the reports and country visits of treaty bodies and special procedure mandate holders, regional human rights mechanisms, in the domestic law of States and the jurisprudence of national courts.[2]

2. The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation.[3] It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment.[4] It is also a means of determining the whereabouts and state of health of detainees and identifying the authority ordering or carrying out the deprivation of liberty.

3. This judicial remedy is essential to preserve legality in a democratic society.[5] The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in appropriate remedies and reparations, including an entitlement to release upon a successful challenge, must be guaranteed by the State. Numerous international and regional human rights bodies and instruments have articulated a strong position on the non-derogability in any circumstance of the right to bring such proceedings before a court. The Working Group urges all States to incorporate this position into their national laws.[6] In practice, the absence of inclusive and robust national legal frameworks to ensure the effective exercise of the right to bring such proceedings before a court has resulted in a protection gap for persons deprived of their liberty.[7]

4. In this light, the Human Rights Council requested the Working Group to present to it Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court without delay, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.[8] The Working Group was directed to seek the views of States, United Nations agencies, intergovernmental organizations, treaty bodies, in particular, the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders. In 2013, it distributed a questionnaire to the aforementioned stakeholders requesting details on the treatment of the right to bring such proceedings before a court in the respective legal frameworks.

5. The Working Group submitted a thematic report to the 27th session of the Council on the international, regional and national legal frameworks on the right to challenge the lawfulness and arbitrariness of detention before court (A/HRC/27/47). The thematic report documents general practice accepted as law, and further best practice in applying the requirements of international law.

6. On 1 and 2 September 2014, the Working Group convened a global consultation in Geneva to bring together experts to elaborate on the scope and content of the right to bring proceedings before a court without delay to challenge

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the arbitrariness and lawfulness of detention and receive appropriate remedies, and allow stakeholders to contribute to the development of the Basic Principles and Guidelines. The background paper for the consultation drew from the Council report (A/HRC/27/47) to set out the substantive and procedural obligations on States to ensure the meaningful exercise of the right to bring such proceedings before a court and gave an overview of current State practice in implementing each of the obligations, highlighting several examples of good practice.[9]

7. The Basic Principles and Guidelines, drawn from international standards and recognized good practices, aim to provide guidance to States on the fundamental principles on which the laws and procedures regulating this right should be based and on the elements required for its effective exercise.

8. For the purposes of the Basic Principles and Guidelines, the terms "everyone" or "anyone" mean every human being without discrimination based on: race; colour; sex; property; birth; age; national, ethnic or social origin; language; religion; economic condition; political or other opinion; sexual orientation or gender identity[10]; disability or other status, and any ground which aims towards or can result in undermining the enjoyment of human rights on a basis of equality. It includes, but is not limited to: girls and boys; soldiers[11]; persons with disabilities, including psychosocial and intellectual disabilities; lesbian, gay, bisexual, transgender and intersex persons; non-nationals, including migrants regardless of their migration status, refugees[12] and asylum seekers, internally displaced persons, stateless persons and trafficked persons or persons at risk of being trafficked; persons accused or convicted of a crime; persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism;[13] drug users; people with dementia; human rights defenders and activists; older persons; persons living with HIV/AIDS and other serious communicable or chronic diseases; indigenous people; sex workers; and minorities[14] as based on national or ethnic, cultural, religious and linguistic identity.

9. Deprivation of personal liberty is without free consent.[15] For the purposes of the Basic Principles and Guidelines, the term "deprivation of liberty" includes the period from the initial moment of apprehension, and extends to the arrest, pre-trial and post-trial detention periods.[16] This includes placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, and internally displaced persons, gathering centres, hospitals, psychiatric or other medical facilities or any other facilities where they remain under constant surveillance as this may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.[17] It further includes detentionduring armed conflicts and emergency situations; administrative detention for security reasons; and the detention of individuals considered as civilian internees under international humanitarian law.

10. For the purposes of the Basic Principles and Guidelines, deprivation of liberty is regarded as "arbitrary" in the following cases: (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence, or despite an amnesty law applicable to the detainee, or a person detained as a prisoner of war is kept in detention after the cessation of effective hostilities); (b) When the deprivation of liberty results from the exercise of the rights or freedoms

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guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights; (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character; (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; or, (e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.[18]

11. In its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law[19], the Working Group restated its constant jurisprudence on the prohibition of all forms of arbitrary deprivation of liberty, and demonstrated that it is general practice accepted as law, constituting customary international law and a peremptory norm (jus cogens). In its 2013 annual report to the Council (A/HRC/27/48, para. 83)[20] the Working Group restated that the prohibition of arbitrariness in the deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty, which can arise at any stage of the legal proceedings. In the interactive dialogue at the 22nd session of the Council, States gave general support for the conclusions of the deliberation.[21] The current Basic Principles and Guidelines adopt the criteria laid out by the International Court of Justice in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422 at p. 457 when confirming the status of the prohibition of torture as a peremptory norm (jus cogens). The prohibition on arbitrary detention is supported by the widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application, and it has been introduced into the domestic law of almost all States; finally, arbitrary detention is regularly denounced within national and international fora.

12. For the purposes of the Basic Principles and Guidelines, deprivation of liberty is regarded as "unlawful" when it is not on such grounds and in accordance with such procedure as are established by law.[22] It refers to both detention that violates domestic law and detention that is incompatible with the Universal Declaration of Human Rights, general principles of international law, customary international law,[23] International Humanitarian Law,[24] as well the relevant international human rights instruments accepted by the States concerned. It also includes detention that may have been lawful at its inception but has become unlawful because the individual has completed serving a sentence of imprisonment, following the expiry of the period for which the person was remanded in custody, or because the circumstances that justify the detention have changed.[25]

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

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

15. The Working Group recalls United Nations Security Council Resolution 2170 (2014) in which the duty of Member States was reaffirmed to "comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law, and underscoring that effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing".[26] The Working Group further recalls the Preamble of the Charter of the United Nations which sets out the determination of the peoples 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.[27] It sets out as a purposes of the United Nations, 'to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.[28] The Charter further compels all Members to 'give the United Nations every assistance in any action it takes in accordance with the present Charter.'[29]

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

17. The scope of the Basic Principles and Guidelines is distinct from the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other judicial authority and tried within a reasonable time or be released.

18. Nothing in these Basic Principles and Guidelines should be interpreted as providing a lesser degree of protection than that provided under existing national laws and regulations and international and regional human rights conventions or covenants applicable to the liberty and security of the person. However, this should not be interpreted as meaning that States are bound by international and regional instruments that they have not ratified or acceded to, that do not constitute customary international law.

B. Principles

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

19. Recognizing that everyone has the right to be free from arbitrary[30] or unlawful deprivation of liberty,[31] everyone is guaranteed the right to take proceedings before a court without delay, in order that that court may decide on the arbitrariness or lawfulness of the detention, and obtain appropriate and accessible remedies.[32]

Principle 2. Responsibilities of the State and others

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20. National legal systems at the highest possible level, including, where applicable, in the constitutionmust guarantee the right to take proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate and accessible remedies.[33] A comprehensive set of applicable procedures shall be enacted to ensure the right is accessible, including the provision of procedural and reasonable accommodation, for all persons in all situations of deprivation of liberty and is effective.[34] The necessary human and financial resources shall be allocated to the administration of justice system.[35] The right to bring such proceedings before a court must also be protected in private relationships such that the duties apply to international organisations and under certain circumstances to non-State actors.

Principle 3. Scope of application

21. Any individual who is deprived of liberty in any situation,[36] by or on behalf of a governmental authority at any level including detention by non-state actors that is authorized by domestic legislation, has the right to take proceedings before a court without delay in that State's jurisdiction to challenge the arbitrariness and lawfulness of his or her deprivation of liberty and receive appropriate and accessible remedies.[37] Exerting authority over any form of detention will constitute the effective control over the detention thereby making the detainee subject to the State's jurisdiction. Involvement in detention will give the State the duty to ensure the detainee's right to bring proceedings before a court.[38]

Principle 4. Non-derogability

22. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and obtain appropriate and accessible remedies is not derogable under international law.[39] It must not be suspended, rendered impracticable, restricted, or abolished under any circumstances,[40] even in times of war, armed conflict, or public emergency which threatens the life of the nation and the existence of which is officially proclaimed.[41]

24. Any measures taken to suspend or restrict derogable fundamental rights and freedoms under states of emergency must pursue a legitimate goal and be necessary and appropriate to the goal to be achieved.[42] The international law review of practical measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings will depend upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the derogations.[43] Such practical measures must not, in their adoption, represent any abuse of power[44] and must not have the effect of negating the existence of the right to bring such proceedings before a court, itself.[45]

25. Any such practical measures in the application of the right to bring proceedings before a court to challenge the detention are permitted only to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are consistent with the State's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and are non-discriminatory."[46]

Principle 5. Non-discrimination

26. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy may be exercised by anyone including all persons regardless of: race; colour; sex;

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property; birth; age; national, ethnic or social origin; language; religion; economic condition; political or other opinion; sexual orientation or gender identity; asylum-seeker and migration status; disability or other status.[47]

Principle 6. The court as reviewing body

27. A court of law shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is arbitrary or unlawful.[48]

Principle 7. Right to be informed

28. Anyone deprived of their liberty shall be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language, means, modes, and formats the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty[49] and the right to bring proceedings before the court without delay and obtain appropriate remedies.[50]

Principle 8. Timeframe to bring proceedings before a court

29. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and obtain appropriate and accessible remedies applies from the moment of apprehension[51] and ends with the release of the detainee. The right to claim remedies after release must not be rendered ineffective by statute of limitation.[52]

Principle 9. Assistance by legal counsel and access to legal aid

30. Anyone deprived of their liberty shall, at any time during their detention, including immediately after the moment of apprehension, have the right to legal assistance by counsel of choice.[53] Upon apprehension, all persons shall be promptly informed of this right.

31. Assistance by legal counsel in the proceedings shall be at no cost for a detained person, or the individual bringing proceedings before a court on the detainee's behalf, without adequate means.[54] In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty. This includes, but is not limited to, the detainee's unhindered access to legal counsel provided by the legal aid regime.

32. Persons deprived of their liberty shall be accorded adequate time and facilities and means to prepare their case, including through disclosure of information in accordance with these Basic Principles and Guidelines, and to freely communicate with legal counsel of their own choosing.[55]

33. Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisals, interference, intimidation, hindrance or harassment.[56] Authorities shall respect the privacy and confidentiality of legal counsel-detainee communications.[57]

Principle 10. Persons able to bring proceedings before a court

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34. Procedures shall allow anyone to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and obtain appropriate remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee.[58]

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

Principle 11. Appearance of the detainee before the court

36. The physical presence of the detainee before the court shall be guaranteed[59] at the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court.

Principle 12. Equality before the courts

37. The proceedings shall be fair and effective in practice and the parties to the proceedings in question shall be ensured the right to equal access, to present their full case, equality of arms and be treated without any discrimination before the courts.[60]

38. This includes that no individual shall be deprived *de iure* or *de facto*, in procedural terms, of their right to equal access to his or her case file presented to the court by State authorities, including the prosecution or security apparatus, equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.[61]

Principle 13. Burden of proof

39. In every instance of detention the burden of establishing the legal basis, as well as the reasonableness, necessity and proportionality of the detention, lies with the authorities responsible for the detention.[62]

Principle 14. Standard of review

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

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

42. In order to determine that a deprivation of liberty is non-arbitrary and lawful, the court shall be satisfied that the detention was carried out under grounds and according to procedures prescribed by national law and which are in accordance with international standards, and, in particular, that it was and remains non-arbitrary and lawful under both national and international law.[63]

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Principle 15. Remedies and reparations

43. Anyone arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations,[64] capable of providing restitution, compensation,[65] rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be adequate, effective and prompt.[66] States shall undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that arbitrary detention has taken place. The duty to provide remedies applies to arbitrary detention in any territory under a State's jurisdiction, which includes where the State exercises effective control, or otherwise as the result of its actions or omissions.[67] The right to reparation cannot be rendered ineffective by amnesties, immunities, statute of limitation, or other defences of States.

44. Where a court determines that the deprivation of liberty is arbitrary or unlawful it shall order the conditional[68] or unconditional release from detention.[69] Relevant authorities shall give immediate effect to any order for release.[70]

Principle 16. Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency that threatens the independence or security of a State

45. All detained persons in a situation of armed conflict, as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, are guaranteed the exercise of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive appropriate and accessible remedy.[71] This right and corresponding procedural guarantees, complements and mutually reinforces the rules of international humanitarian law.[72]

46. Domestic legislative frameworks should not allow for any restrictions on the safeguards of persons deprived of their liberty under counter-terrorism measures, emergency legislation or drug-related policies, concerning the right to bring proceedings before a court to challenge the detention.[73]

47. A State which detains a person in a situation of armed conflict, as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, by definition has that person within its effective control, and thus within its jurisdiction, has the duty under international law to guarantee the exercise of the right of the detainee to bring proceedings before a court without delay to challenge the arbitrariness or lawfulness of the deprivation of liberty and receive appropriate remedy.[74] This right, and corresponding procedural guarantees complements and mutually reinforces the rules of the international humanitarian law.[75] Reconsideration, appeal or periodic review of decisions to intern or place in assigned residence alien civilians[76] in the territory of a party to an international armed conflict, or civilians[77] in an occupied territory, shall comply with these Basic Principles and Guidelines, including the Basic Principle on 'The court as reviewing body'.[78]

48. Prisoners of war should be entitled to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and receive appropriate and accessible remedy. where the detainee: (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or seriously sick; or

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(c) claims not to have been released or repatriated without delay following the cessation of active hostilities.[79]

49. Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.[80] Any consequent deviation from procedural elements of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and receive appropriate and accessible remedy must be in conformity with these Basic Principles and Guidelines, including on 'Non-derogability'; 'Right to be informed'; 'The court as reviewing body'; 'Equality of arms'; and 'Burden of proof'.[81]

50. During armed conflict, the deprivation of liberty of children must only be used a measure of last resort and for the shortest appropriate period of time. Basic legal safeguards must be provided in all circumstances, including when children are deprived of their liberty for their protection or rehabilitation, particularly if they are detained by military or security services. Such safeguards must include the right to legal assistance and the right to periodic review of the legality of the deprivation of their liberty by a court. The child must also have the right to have the deprivation of liberty acknowledged by the authorities and to communicate with relatives and friends.

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

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedies by certain groups of detainees. This includes, but is not limited to: children; women (especially pregnant and breastfeeding women); older persons; persons detained in solitary confinement or other forms of incommunicado detention of restricted regimes of confinement; persons with disabilities, including psychosocial and intellectual disabilities; persons living with HIV/AIDS and other serious communicable or contagious diseases; people with dementia; drug users; indigenous people; sex workers; lesbian, gay, bisexual, transgender and intersex persons; minorities as based on national or ethnic, cultural, religious and linguistic identity; non-nationals, including migrants regardless of their migration status, asylum-seekers and refugees, internally displaced persons, stateless persons and trafficked persons or persons at risk of being trafficked.

Principle 18. Specific measures for children[82]

52. Children may only be deprived of their liberty as a measure of last resort and for the shortest possible period of time. The right of the child to have his or her best interests taken as a primary consideration shall be paramount in any decision-making and action taken in relation to children deprived of their liberty.

53. The exercise of the right to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized[83] and be rendered accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

54. The authorities overseeing the detention of children shall *ex officio* request courts to review the arbitrariness and lawfulness of their detention. This does not exclude the right of any child deprived of his or her liberty to bring such

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proceedings before a court in his or her own name or, if it is in his or her best interests, through a representative or an appropriate body.

Principle 19. Specific measures for women and girls

55. Appropriate and tailored measures shall be taken in to account in the provision of accessibility and reasonable accommodation to ensure the ability of women and girls to exercise their right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedies. This includes introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure equal and fair access to justice.

Principle 20. Specific measures for persons with disabilities

56. Courts, while reviewing the arbitrariness and lawfulness of the deprivation of liberty of persons with disabilities,[84] shall comply with the State's obligation to prohibit involuntary committal or internment on the ground of the existence of an impairment or perceived impairment,[85] particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as their obligation to design and implement de-institutionalization strategies based on the human rights model of disability. The review must include the possibility of appeal.

57. The deprivation of liberty of a person with disability, including physical, mental, intellectual or sensory impairments, is required to be in conformity with the law, including international law, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.

58. Persons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of disability.[86] The protection from violence, abuse and ill-treatment of any kind must be ensured.

59. Persons with disabilities are entitled to request individualized and appropriate accommodations and support, if needed, to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.

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

60. Non-nationals, including migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty, shall be informed[87] of the reasons for their detention and their rights in connection with the detention order. This includes the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness as well as the necessity and proportionality[88] of their detention and receive appropriate remedy.[89] It further includes the right to legal assistance in accordance with the Basic Principle on "Prompt and effective provision of legal assistance",[90] in a language they use and in means, modes, and formats they understand.[91] Anyone has the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

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61. Irrespective of the body responsible for their detention order, administrative or other, non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons deprived of their liberty shall be guaranteed access to a court of law,[92] empowered to order immediate release or be able to vary the conditions of release. Such detainees shall promptly be brought before a judicial authority[93] before which they should have access to automatic, regular periodic reviews[94] of their detention to ensure it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.

62. Proceedings to challenges of immigration detention decisions must be suspensive to avoid expulsion prior to the case-by-case examination of migrants, regardless of their status, under administrative detention.[95]

63. The deprivation of liberty as a penalty or punitive sanction in the area of immigration control is prohibited.[96]

64. The deprivation of liberty of an unaccompanied or separated migrant, asylum-seeking, refugee or stateless child is prohibited.[97] Children who are detained because of their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.[98]

C. Guidelines

Guideline 1. Scope of application

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

(a) to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including: military detention, security detention, detention under counter-terrorism measures,[99] involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[100]

(b) irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[101]

Guideline 2. Prescription in national law

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

67. Any restriction to liberty shall be based on national laws. Restrictions to liberty can be based on the constitution or in the common law. Legislative acts are

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to be drafted in accordance with the procedural provisions related to the constitution.

Guideline 3. Non-derogability

68. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, States may take practical measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and obtain appropriate remedies only to the extent strictly required by the exigencies of the situation,[102] provided that:

(a) the court's authority to decide without delay on the arbitrariness and lawfulness of detention, and to order immediate release if the detention is not lawful, is not itself diminished;[103]

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

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

(d) such measures apply temporarily, only for as long as the exigencies of the situation require, and are accompanied by mechanisms to periodically review their continued necessity and proportionality;

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

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

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

69. The court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention.[104]

70. The competence, independence and impartiality of such a court cannot be undermined by procedures or rules pertaining to the selection and appointment of judges.

71. In undertaking the review of the detention, the court has the authority:

(a) to consider the application as a matter of urgency. Adjudication of the case, including time for preparation of the hearing, shall take place as expeditiously as possible.[105] It cannot be slowed because of insufficiency of evidence. Delays attributable to the detainee or his or her legal representative do not count as judicial delay;[106]

(b) to ensure the presence of the detainee regardless of whether he or she has asked to appear;[107]

(c) to order immediate release if the detention is arbitrary or unlawful.[108] Any court order of release shall be respected and immediately implemented by the State authorities;[109]

(d) to render and publicize[110] its decision on the arbitrariness and lawfulness of the detention without delay[111] and within established deadlines. In

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addition to being reasoned and particularized,[112] the court's decision should be clear, precise, complete and sufficient, the contents of which should be made understood in a language, means, modes, and formats that the detainee understands. Upon an unsuccessful challenge, the court's decision must provide reason for why the individual should remain in detention in light of the principle that liberty should be the rule and detention the exception. If further restrictions on the liberty of the individual are under consideration, this shall be dealt with in compliance with the principles of international law;

(e) to take measures against the State authorities in control of the detention where the deprivation of liberty is determined to be arbitrary or unlawful and/or the treatment during the deprivation of liberty was abusive.

72. Exceptionally, for some forms of detention, States may enact legislation regulating proceedings before a specialized tribunal. Such tribunals:

(a) must be established by law affording all guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature.[113]

(b) can only be considered as legitimate and legally valid if reasonable and objective criteria justify its existence, that is, there exists a special legal condition and/or vulnerability of the person that requires specific protection through a specialized tribunal.[114] The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.[115]

73. Military tribunals are not competent to review the arbitrariness and lawfulness of the detention of civilians as military judges and military prosecutors cannot meet the fundamental requirements of independence and impartiality.[116]

Guideline 5. Right to be informed

74. The factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay so as to provide adequate time to prepare the challenge. This includes a copy of the detention order, access to and copy of the case file, in addition to disclosure of any material in its possession, or to which it may gain access, relating to the reasons for the deprivation of liberty.[117]

75. Detaining authorities in any facility where persons are deprived of their liberty must inform detainees of their entitlement to take proceedings challenging the arbitrariness and lawfulness of the deprivation of liberty and to receive a reasoned and individualized decision without delay. This includes how to commence the procedure, as well as of the potential consequences of voluntarily waiving those rights.

76. Such information should be provided in a manner that is gender- and culture-sensitive and corresponds to the needs of specific groups including illiterate persons, minorities, persons with disabilities, older persons, indigenous peoples, non-nationals including migrants regardless of their migration status, refugees, asylum seekers, stateless persons and children. The information shall be provided in a language, means, modes, and format that is accessible and that they understand, taking into account augmentative and alternative means of communications for persons with mental or physical impairments. Information provided to children must be provided in a manner appropriate to their age and maturity.

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77. Means of verification that a person has actually been informed shall established. This may include documentation of the person having been informed by way of printed record, audiotape, videotape or witnesses.

78. Such information should also be widely published and made accessible to the general public and to geographically isolated groups and groups marginalized as a result of discriminatory practices. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following any changes to the law or specific issues affecting a community.

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

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

(a) All records must contain, at a minimum, the following information, which shall be disaggregated by sex and age of the detainee: [118]

(i) The identity of the person deprived of liberty;

(ii) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;

(iii) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;

(iv) The authority responsible for supervising the deprivation of liberty;

(v) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

(vi) Elements relating to the state of health of the person deprived of liberty;

(vii) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;

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

(b) There must exist known procedures in place to safeguard against unauthorised access or modification of any information contained in the register and/or records of persons deprived of liberty.

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

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

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

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Guideline 7. Timeframe to bring proceedings before a court

80. To ensure that an individual shall not be deprived of his or her liberty without being given an effective opportunity to be heard without delay by a court of law, no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention. Authorities must facilitate the detainee's right to bring proceedings before a court as well as immediate access to their legal counsel to prepare their case.

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

82. After the court has held that the circumstances justify the detention, the individual is entitled to take proceedings again on similar grounds after an appropriate period of time has passed, depending on the nature of the relevant circumstances.[119]

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

84. The initiation of the challenge multiple times does not relieve authorities of the obligation to ensure the regular, periodic judicial or other review of the necessity and proportionality of continuing detention,[120] nor exclude the possibility of periodic review by the court, *proprio motu*.

85. Where a decision upholding the arbitrariness and lawfulness of detention is subject to appeal in accordance with national legislation, it should be adjudicated upon expeditiously.[121] Any appeals filed by the State must take place within legally defined limits and circumstances.

Guideline 8. Assistance by legal counsel and access to legal aid

86. Access shall be provided without delay to legal counsel immediately after the moment of deprivation of liberty and at the latest prior to any questioning by an authority, and thereafter throughout the period of detention. This includes providing detainees with the means to contact legal counsel of their choice.

87. Effective legal aid shall be provided promptly from the moment of apprehension in order to ensure that the unaffordable cost of legal counsel does not present a barrier to individuals deprived of their liberty, or his or her representative, without adequate means to bring proceedings before a court.

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

90. Access to legal counsel should not be unlawfully or unreasonably restricted. If access to legal counsel is delayed or denied, or detained persons are not adequately informed of their right to assistance by legal counsel in a timely

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manner, then a range of remedies shall be available in accordance with these Basic Principles and Guidelines;[122]

91. Where the services of legal counsel are not available, every effort shall be made to ensure that services available from suitably qualified legal assistance providers can be accessed by detainees under conditions that guarantee the full respect of the rights of the detainees as set out in international law and standards.[123]

Guideline 9. Persons able to bring proceedings before a court

92. A wider group of individuals with a legitimate interest in the case shall be empowered to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention, including family members, caregivers or legal guardian of the detainee, State authorities independent from the detaining authority, the ombudsman or national human rights institution, a non-governmental organization, the employer or co-workers.

93. When the proceeding is initiated by someone other than the detained person, the court shall make every effort to discover the detained person's will and preferences and shall provide needed accommodations and support for the detained person to participate effectively in his or her own behalf.

94. An informal, cost-free and simplified process to bring such proceedings before a court shall be ensured.[124]

Guideline 10. Appearance before the court

95. To ensure the effectiveness and fairness of the proceedings, as well as to reinforce the protection of the detainee from other violations such as torture or other ill-treatment,[125] the physical presence of the detainee before the court shall be guaranteed at the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty, and every time that the person deprived of liberty requests to appear physically before the court. This shall be ensured through implementation of the following measures:

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

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

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

Guideline 11. Equality of arms

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

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(a) the full and complete access by detainees and their legal counsel to their case files as well as a complete copy of them;[126]

(b) the ability of the detainee to challenge any documents relating to his or her case file, including all the arguments and material elements adduced by the authorities to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention.[127]

Guideline 12. Admissibility of evidence obtained by torture or other prohibited treatment

97. Any statement which is established to have been made or any other evidence obtained as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in any proceedings, except against a person accused of torture or other prohibited treatment as evidence that the statement was made or that other such acts took place.[128]

Guideline 13. Disclosure of information

98. The detaining authority shall provide all relevant information to the judge, the detainee and/or his or her lawyer. Disclosure must include exculpatory information, which includes not only information that establishes an accused's innocence, but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.

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

100. The disclosure of information may be restricted only if the court concludes that:[129]

(a) this is demonstrated to be necessary to pursue a legitimate aim such as protecting national security; respecting the rights or reputation of another individual; or protecting public order, health or morals[130], so long as such restrictions are non-discriminatory and consistent with relevant standards of international law; and

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

101. Any proposed restriction on the disclosure of information must be proportionate. An assessment of proportionality requires a balance to be struck between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this has on the ability of the person to respond to the case or to pursue a challenge to the arbitrariness and lawfulness of detention. This means that if a less restrictive measure can achieve the legitimate aim[131] then that measure should be applied.

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

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Guideline 14. Burden of proof

103. The authorities are required to establish: (i) the legal basis for the detention in question; (ii) the detention is justified according to the principles of necessity, reasonableness and proportionality; and, (iii) other less intrusive means of achieving the same objectives have been considered in the individual case.[132]

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

Guideline 15. Standard of review

105. When reviewing the arbitrariness and lawfulness of the detention, the court is empowered:

(a) to examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, as well as basic principles of reasonableness, proportionality and necessity. Such examination shall take into account details such as age, gender, and marginalized groups.

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

(c) to consider and pronounce on whether alternatives to detention have been considered, including non-custodial alternatives to detention in line with the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

(d) to take into account any orders of detention made subsequent to the start of the court proceedings and prior to the rendering of the court's decision.

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

Guideline 16. Remedies and reparations

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

108. A copy of the decision finding the detention arbitrary or unlawful will be transmitted to the person concerned, with notification of the procedures for obtaining reparations. These persons have the right to full compensation for material harm, elimination of the consequences of material harm and restoration of all rights that were either denied or infringed.

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

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110. The enforceable right to receive compensation for anyone determined to have been arbitrarily or unlawfully detained and for any harm suffered by a person as a result of unlawful deprivation of liberty, irrespective of whether the detaining authorities were responsible for such harm, shall be regulated by comprehensive legislation.[133] Compensation shall also be made available to persons wrongly subjected to criminal charges that were subsequently dropped.

111. Compensation out of the public treasury of the State, federal entity or municipality for material damage suffered by a victim of arbitrary of unlawful detention may include: earnings, pensions, social benefits and other monies lost as a result of the criminal prosecution; any property of the victim that was seized or otherwise appropriated by the State on the basis of a conviction or court ruling; compensation for lack of health care, rehabilitation, accessible and reasonable accommodation in the place of detention; fines and trial costs that the person had to bear as a result of the enforcement of the conviction; the victim's legal costs; and other costs.[134]

112. Victims of arbitrary or unlawful detention shall also have an enforceable right before the competent domestic authority to prompt and adequate: (a) restitution[135]; (b) rehabilitation[136]; (c) satisfaction[137]; and (d) guarantees of non-repetition[138]; in line with the United Nations Basic Principles on Remedy and Reparation.

Guideline 17. Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency that threatens the independence or security of a State

113. Where persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism are deprived of their liberty:[139]

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

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

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

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

114. Where civilians are detained in relation to an international armed conflict, the following must be ensured:

(a) Reconsideration of a decision to intern or place in assigned residence alien civilians[140] in the territory of a party to an international armed conflict, or

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civilians[141] in an occupied territory, or appeal in the case of internment or assigned residence[142], must be undertaken "as soon as possible"[143] or "with the least possible delay"[144]. While the meaning of these expressions must be determined on a case-by-case basis, delays in bringing a person before the court or administrative board must not exceed a few days and must be proportional in the particular context;

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

(c) Where decisions to intern or place a civilian in assigned residence are maintained following the latter proceedings, internment or residential assignment must be periodically reviewed, at least twice each year. Such review must be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards.

115. The right of persons detained as prisoners of war to bring proceedings before court without to delay to challenge the arbitrariness and lawfulness of their detention and receive appropriate and accessible remedy shall be respected in order to:

(a) determine whether a person does fall within the category of prisoner of war[145];

(b) Act as a check to ensure that a seriously injured or seriously sick prisoner of war is repatriated or transferred to a neutral State;[146] and/or

(c) Act as a check to ensure that prisoners of war are released and repatriated without delay after cessation of active hostilities.[147]

116. In regard to detention in relation to a non-international armed conflict:

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

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

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

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

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

(c) Where decisions to detain a person subject to administrative detention in a non-international armed conflict are maintained, the necessity of the detention

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must be periodically reviewed by a court or administrative board that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards.

(d) Where an internment regime is established, it shall be consistent with international human rights law and international humanitarian law applicable to non-international armed conflict, to allow full compliance with the right to bring proceedings before a court.[148]

Guideline 18. Specific measures for children

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

118. A safe, child-sensitive environment should be established for children deprived of their liberty. Detained children should be treated with dignity and respect, and in a manner that takes into account any element leading to vulnerability, in particular with regard to: girls; younger children; children with disabilities; non-nationals, including migrants regardless of their migration status, refugees and asylum-seeking children, and stateless children; trafficked children or children at risk of being trafficked; children from minority, ethnic or indigenous groups; and LGBTI children.

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

120. To ensure children's prompt and effective access to an independent and child-sensitive process[149] to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of their detention and receive appropriate remedies,[150] the following specific measures shall be enacted:

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

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

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

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

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

(f) National laws should stipulate measures aimed at the prevention of ill-treatment or intimidation of a child who brings or has brought such a complaint, and should provide for sanctions of persons in violation of such laws;

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

(h) Each case from the outset must be handled expeditiously, without any unnecessary delay.[151] A decision must be rendered as soon as possible, and not later than two weeks after the challenge is made;[152]

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

Guideline 19. Specific measures for women and girls

121. Applicable and appropriate measures shall be taken in to account in the provision of accessibility and reasonable accommodation to ensure the right of all women and girls to equal and fair access of the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy. These shall include:

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

(b) Taking active steps to ensure that, where possible, persons who possess education, training, skills and experience in the gender-specific needs and rights of women are available to provide legal aid, advice and court support services in all legal proceedings to female detainees.[153]

122. The practice of keeping girls and women in detention for the purpose of protecting them from risks of serious violence (protective custody) should be eliminated and replaced with alternative measures that ensure the protection of women and girls without jeopardizing their liberty.[154]

Guideline 20. Specific measures for persons with disabilities

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123. The involuntary committal or internment on the ground of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is prohibited.[155] States shall take all necessary legislative, administrative and judicial measures to prevent and remedy involuntary committals or internments based on disability.[156]

124. Where persons with disabilities are deprived of their liberty through any process,[157] they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of the person, reasonable accommodation, and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities.[158]

125. A mechanism shall be established, replete with due process of law guarantees, to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent[159] and that the review include a possibility of appeal.[160]

126. Measures shall be taken to ensure accessibility and the provision of reasonable accommodation to persons with disabilities in their places of deprivation of liberty, including the following guarantees:

(a) Every person with a physical, mental, psychosocial, intellectual or sensory disability deprived of his or her liberty is treated with humanity and respect, and in a manner that takes into account their needs by provision of reasonable accommodation in order to facilitate their effective procedural performance.[161]

(b) All health and support services, including all mental health-care services, are provided based on the free and informed consent of the person concerned.[162] The denial of legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substituted decision-maker, constitutes arbitrary deprivation of liberty in violation of international law. Perceived or actual deficits in mental capacity, that is, the decision-making skills of a person that naturally vary from one to another, must not be used as justification for denying legal capacity, understood as the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency);

(c) Persons with disabilities can access, on an equal basis with other persons subject to detention, the physical environment, information and communications, and other facilities provided by the detaining authority. Accordingly, all relevant measures must be taken, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of deprivation of liberty;[163]

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

(e) Persons with disabilities shall be provided with legal or other appropriate support, including interpretation and peer support mechanisms so that individuals receiving services in mental health facilities or residential facilities of any kind can be educated about their rights and remedies under domestic and

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international law, including those contained in these Basic Principles and Guidelines, and organizations may act on behalf of those detained against their will.

127. The following measures shall be taken to ensure procedural accommodation and the provision of accessibility and reasonable accommodation for the exercise of the substantive rights of access to justice and equal recognition before the law:

(a) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity with respect to proceedings related to the detention and in the detention setting itself.[164] Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making;[165]

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

(c) Persons with disabilities can access, on an equal basis with other persons subject to detention, buildings in which law-enforcement agencies and the judiciary are located. The jurisdictional entities must ensure that their services include information and communication that is accessible to persons with disabilities.[166] Appropriate measures shall be taken to provide signage in Braille and in easy to read and understand forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to communication in the facilities of jurisdictional entities;[167]

(d) Individuals who are currently detained in a psychiatric hospital or similar institution and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release including injunctive relief;

(e) Such relief should consist of an order requiring the facility to release the person immediately and/or to immediately cease any forced treatment, as well as systemic measures such as requiring mental health facilities to unlock their doors and inform persons of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and the right to live independently and be included in the community. Such assistance programs should not be centred on the provision of mental health services or treatment, but free or affordable community-based services, including alternatives that are free from medical diagnosis and interventions. Access to medications and assistance in withdrawing from medications should be made available for those who so decide;[168]

(f) Persons with disabilities are provided with compensation in the case of arbitrary or unlawful deprivation of liberty.[169] This compensation must also consider the damage caused by the lack of accessibility, denial of reasonable accommodation, lack of health care and rehabilitation, which have affected the person with disability deprived of liberty.

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

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128. Any restrictions on the liberty of non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons, must be a measure of last resort, necessary and proportionate, and imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes.[170]

129. All individuals who may find themselves in the territory or subject to the State's jurisdiction shall be guaranteed effective and free access to the courts of law.[171] This includes the right to:

(a) be informed orally and in writing of the reasons for detention, and on the rights of persons in detention, including the right to challenge the arbitrariness and lawfulness of detention, in a language, means, modes, and formats that the person detained understands.[172] This may require the provision of information through qualified interpreters and translators at no cost to the detainee and the publicizing of information, including through posters and television monitors in places of detention;

(b) bring proceedings, either personally or through a representative, before a court without delay to challenge the necessity, proportionality, arbitrariness and lawfulness of detention and receive appropriate remedies.

(c) contact, and be contacted by any interested parties that might be able to address their needs and provide them with relevant information or legal assistance. This includes providing facilities to meet with such persons. This is particularly important where migrant detention facilities are located in remote locations far from population centres. In such situations, mobile courts and video conferencing may be used to gain accessibility to a court of law but may not displace the right of a detained person to appear in person before a judge;

130. The monitoring of all places of immigration detention and public reporting by relevant United Nations agencies[173], regional and international human rights mechanisms, national human rights institutions, non-governmental organizations and consular officials[174] (conditional upon request by persons in immigration detention) shall be permitted to ensure that the exercise of the right to bring proceedings before court to challenge the lawfulness and arbitrariness of detention and receive appropriate remedy is accessible and effective.

131. Decisions regarding the detention of non-nationals must also take into account the effect of the detention on their physical or mental health.[175] When physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.

132. All decisions and actions in relation to non-nationals below the age of 18, whether accompanied or unaccompanied, shall be guided by the right of the child to have his or her best interests taken as a primary consideration, and shall accord with the specific protections afforded to children in these Basic Principles and Guidelines.

133. The national legislative frameworks and migration policies shall reflect that the detention of children because of their or their parent's migration status always constitutes a child rights violation and contravenes the right of the child to have his or her best interests taken as a primary consideration.[176]

134. Unaccompanied children who are non-nationals shall be informed about their legal status to ensure that they fully understand their situation. The provision of public defence services and/or guardians, who are adequately trained to work with children, particularly taking into account the extreme vulnerability and need

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for care, and speak a language they understand. Children who are non-nationals should not be placed in detention centres or shelters for migrants, but in non-custodial community-based alternatives to detention, where they can receive all services necessary for their protection, such as adequate nutrition, access to quality education and leisure, care, physical and psychological medical care and security. Special attention should be given to family reunification;[177]

135. In the case of migrants in an irregular situation, the scope of the judicial review cannot be confined to a formal assessment of the migrant's current migration status. It shall include the possibility of release if the detention is determined to be unnecessary, disproportionate, unlawful or arbitrary.[178]

136. In the case of asylum-seekers, the scope of judicial review should recognise that there is a right to seek asylum under international law and as it is neither an unlawful nor a criminal act, it cannot be the basis for their detention. Asylum-seekers and refugees are to be protected from penalisation for their illegal entry or stay in accordance with international refugee law, including through the use of detention.[179]

Guideline 22. Implementation measures

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

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

139. For the proper implementation of these guarantees, States are encouraged to promote appropriate training for those working in the field of the administration of justice, including police and prison staff.[180] This further includes providing training to judges, tribunal and legal officers on how to apply customary international law and rules from the International Convention on Civil and Political Rights, as well as relevant international standards. The Working Group on Arbitrary Detention stands ready to assist in fulfilling this duty of States.

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

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

142. These Basic Principles and Guidelines shall be widely disseminated, including to justice sector actors, the community, and to national human rights institutions, national preventative mechanisms, statutory oversight authorities and other institutions or organisations with a mandate to provide accountability, oversight or inspections to places of deprivation of liberty. Accessible formats for the mentioned dissemination must also be considered. The Office of the High

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Commissioner for Human Rights is respectfully requested to further its wide dissemination.

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[1] It is an essential component of due process rights necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. Articles 8, 9 of the Universal Declaration of Human Rights (UDHR); Article 9(4), International Convention on Civil and Political Rights (ICCPR); Article 37(b, d) of the Convention on the Rights of the Child (CRC); Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD); Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearances (ICPPED) which as the other duties in this convention is confirmed as customary international law; Articles 16, 32(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; Principles 4, 11, 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); Rules 7.1, 10.2, 13 of the United Nations Rules for the Protection of Juvenile Deprived of Their Liberty; Guideline 7 of the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (UNCHR Guidelines); Article 7(1)(a) of the African Charter on Human and People's Rights (African Charter); Article 5(h) of the Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014); Sections M, S of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); Article XXV of the American Declaration of the Rights and Duties of Man (1948) (American Declaration); Article 7(6) of the American Convention on Human Rights (American Convention); Principles V, VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008); Article 14(6, 7) of the Arab Charter on Human Rights (Arab Charter); and, Article 5(4, 9) of the European Convention on Human Rights (ECHR).

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

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

[3] Report of the WGAD (A/HRC/19/57, para. 61).

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

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

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

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

[7] WGAD: Persons deprived of their liberty are frequently unable to benefit from legal resources and guarantees that they are entitled to for the conduct of their defence as required by law in any judicial system and by applicable international human rights instruments (A/HRC/10/21, paras. 45-47; A/HRC/19/57, para. 63). The right to challenge the lawfulness of detention is frequently denied in circumstances where a detainee has never been formally charged or brought before a judge, has been held incommunicado or

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in solitary confinement, or has been denied an effective possibility or remedy to challenge his or her detention (Opinion nos. 33/2012, 38/2012, 19/2012, 22/2012, 08/2011, 14/2011).

[8] Human Rights Council res. 20/16 (A/HRC/RES/20/16) para. 10. The Working Group appointed one of its members and subsequent Chair-Rapporteur, Mads Andenas, as reporter for the Basic Principles and Guidelines.

[9] The observations on State practice are based on the responses provided by the 44 States to the Working Group's questionnaire, representing all global regions and diverse legal traditions, and other stakeholder submissions. The latter source not only demonstrates general practice accepted as law but also assists in identifying protection gaps and in proposing good practices to ensure effective coverage for persons deprived of their liberty to effectively exercise this procedural safeguard.

[10] Human Rights Committee, Concluding Observations on the seventh periodic report of Ukraine, CCPR/C/UKR/CO/7 (HRC, 2013): 8. […] the Committee is concerned that sexual orientation and gender identity are not explicitly included in the non-exhaustive list of grounds of protection in the anti-discrimination law, and that the law provides for insufficient remedies (only compensation for material and moral damage) to victims of discrimination (arts. 2 and 26). The State party should further improve its anti-discrimination legislation to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards. The State party should explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination and provide victims of discrimination with effective and appropriate remedies, taking due account of the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. It should also ensure that those responsible for discrimination bear administrative, civil and criminal responsibility in appropriate cases.
10. The Committee is […] further concerned at reports that according to Ministry of Health order No. 60 of 3 February 2011 "On the improvement of medical care to persons requiring a change (correction) of sex", transgender persons are required to undergo compulsory confinement in a psychiatric institution for a period up to 45 days and mandatory corrective surgery in the manner prescribed by the responsible Commission as a prerequisite for legal recognition of their gender. […] While acknowledging the diversity of morality and cultures internationally, the Committee recalls that all States parties are always subject to the principles of universality of human rights and non-discrimination. The State party should therefore state clearly and officially that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transexuality, or hate speech, discrimination or violence against persons because of their sexual orientation or gender identity. The State party should provide effective protection to LGBT persons and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim's sexual orientation or gender identity. […] The State party should also amend order No. 60 and other laws and regulations with a view to ensuring that: (1) the compulsory confinement of persons requiring a change (correction) of sex in a psychiatric institution for up to 45 days is replaced by a less invasive measure; […]
See also Concluding Observations on country reports: CCPR/C/KWT/CO/2 para. 30; CCPR/C/PHL/CO/4 (HRC, 2012), para. 10; CCPR/C/BLZ/CO/1 (HRC, 2013), para. 13; CCPR/C/CHN-HKG/CO/3 (HRC, 2013), para. 23; CCPR/C/LTU/CO/3 (HRC, 2012), para. 8; CCPR/C/ARM/CO/2 (HRC, 2012), para. 10; CCPR/C/GTM/CO/3 (HRC, 2012), para. 11; CCPR/C/BOL/CO/3 (HRC, 2013), para. 7; CCPR/C/JAM/CO/3 (HRC, 2011), para. 8; CCPR/C/FIN/CO/6 (HRC, 2013), para. 8; CCPR/C/DOM/CO/5 (HRC, 2012), para. 16; CCPR/C/PER/CO/5 (HRC, 2013), para. 8; CCPR/C/URY/CO/5 (HRC, 2013), para. 12; CCPR/C/TUR/CO/1 (HRC, 2012), para. 10;

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

[12] Articles 26 and 31 of the 1951 Refugee Convention.

[13] Human Rights Committee (HRC) General Comment no. 35, paras. 3, 18 and 46; and, Communications: 265/1987, Vuolanne v. Finland, para. 9.3 (military); 1069/2002, Bakhtiyari v. Australia, para. 9.5 (children); 1090/2002, Rameka v. New Zealand, paras. 7.2-7.3 (parole); see Concluding observations Ukraine 2013, para. 10 (LGBTI); Switzerland 2001, para. 15 (non-citizens).

[14] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992, Article 1.

[15] HRC General Comment no. 35, para. 6;

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

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WGAD Deliberation no. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 57 (A/HRC/22/44), citing E/CN.4/1997/4, para. 66;
HRC General Comment no. 35, para. 13;
[17] WGAD Deliberation no. 9, paras. 58-59;
HRC General Comment no. 35, paras. 5 and 6;
[18] WGAD Revised methods of work, para. 8 (A/HRC/16/47, Annex);
HRC General Comment no. 35, paras. 11, 12, 14-21;
[19] Report of the Working Group on Arbitrary Detention, A/HRC/22/44.
[20] Report of the Working Group on Arbitrary Detention (A/HRC/27/48), para. 83.
Also see the principle established at the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders: "Pretrial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free."
[21] Deliberation No. 9 has been cited as one source on the approach to identification of customary international law by the Special Rapporteur of the International Law Commission on the identification of customary international law, Sir Michael Wood, in his first and second reports on formation and evidence of customary international law submitted to the International Law Commission, see First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/663), para. 53 and Annex of the Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/672), paras 41.8 and 76.6.
[22] HRC General Comment no. 35, paras. 11, 22-23;
[23] The Working Group has in its jurisprudence applied the criteria in conformity with the conclusions on the identification of customary international law by the Special Rapporteur of the International Law Commission on the identification of customary international law, Sir Michael Wood, in his first and second reports on formation and evidence of customary international law submitted to the International Law Commission, see First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/663), and Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/672). The basic approach is two constituent elements, a general practice which is accepted as law. In the international law on human rights, it is accepted that general principles of international law have an important role, and interacts with these two constituent elements in the formation of customary law.
[24] The Working Group regards the work of the Red Cross as complementary in securing the rights of the arbitrarily detained and as highly authoritative on IHL, and has applied the ICRC customary international study as such, see Jan-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005, and likewise the ICRC Customary IHL database.
[25] HRC General Comment no. 35, para. 43; and, Communication No. 1090/2002, Rameka v. New Zealand, paras. 7.3 and 7.4.
[26] United Nations Security Council Resolution S/RES/2170 (2014) (15 August 2014),'Threats to international peace and security caused by terrorist acts'; Also see S/RES/1674 (2006) (28 April 2006), 'Protection of civilians in armed conflict'; and, S/RES/2071 (2012) (12 October 2012), 'Mali'.
[27] United Nations Charter, 1 UNTS XVI (26 June 1945), Chapter I: Purposes and Principles, Preamble.
[28] United Nations Charter, Chapter I: Purposes and Principles, Article 1(1).
[29] United Nations Charter, Chapter I: Purposes and Principles, Article 2(5).
[30] In para. 10, res. 20/16, the HRC states the aim of the basic principles and guidelines is to "assist […] Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with intl human rights law."
In para. 19 of its Deliberation no. 9, the WGAD stated: "The notion of arbitrary stricto sensu includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary". Further, the WGAD in its 2011 report to the HRC (A/HRC/19/57) stated, "the absence of a remedy of habeas corpus constitutes, per se, a human rights violation by depriving the individual [...] of the human right

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to protection from arbitrary detention." Hence, if the Principles are restricted to a discussion of the lawfulness of the detention, not only will the aim of the HRC's exercise be lost, but it would also severly limit the scope of protection this right could offer to persons deprived of their liberty.

[31]UDHR (Article 9).

[32] The right to bring such proceedings before court is well enshrined in treaty law and customary international law and constitutes jus cogens, as observed by the WGAD in its deliberation No. 9 (2013) concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44). The current Basic Principles and Guidelines meet the criteria laid out by the International Court of Justice in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422 at p. 457 when confirming the status of the prohibition of torture as peremptory norm (jus cogens). The prohibition on arbitrary detention is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application, and it has been introduced into the domestic law of almost all States ; finally, arbitrary detention is regularly denounced within national and international fora. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens). That prohibition is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims ; the International Covenant on Civil and Political Rights of 1966 ; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States ; finally, acts of torture are regularly denounced within national and international fora." (Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422 p. 457).

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

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

Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), Report on the Maldives, CAT/OP/MDV/1, paras. 96 to 98.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HRC General Comment 31, para. 10;

CAT General Comment 2, para. 7;

[38] This Principle is not limited to the legal concept of "the writ of habeas corpus".

[39] See: Introduction, paragraph 4, of this report.

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

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

WGAD 2011 Report of the Working Group on Arbitrary Detention, A/HRC/16/47, 19 January 2011, para. 63: "The Working Group is of the view that, in their domestic legislation, States should ensure that the remedy of habeas corpus meets the following minimum requirements in order to comply with international human rights law...Non-derogability: even in cases provided for in article 4 of the Covenant, and in cases of armed conflict – whether between two or more States parties or within the same State party – in conformity with the Geneva Conventions. Provision to that effect has been made by all human rights bodies of the United Nations system (see Commission on Human Rights resolution 1993/36,

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para. 16, and many others, including resolution 1994/32, which refers to habeas corpus as "a personal right not subject to derogation, including during states of emergency")."

Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/ C /21 /Rev.1 /Add.11 (2001), para. 11: The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

Human Rights Committee, General Comment No. 35 of the HRC. Document CCPR/C/21/Rev.1/Add.11, para. 14: "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." Footnote 9: "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."

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

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

[41] Arab Charter (art. 4 (1 and 2)): The legal protections provided for in article 14 of the Charter cannot be derogated from, not even in in times of public emergency;

Inter-American Convention on Forced Disappearance of Persons (Article X);

HRC General Comment No 29, para. 16;

Commission on Human Rights resolution 1992/35, para. 2;

Joint Study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention, represented by its Vice-Chair Shaheen Sardar Ali; and The Working Group on Enforced or Involuntary Disappearances, represented by its Chair Jeremy Sarkin (A/HRC/13/42), paras. 46-47;

Report on the visit of the Subcommittee on Prevention of Torture to Honduras, UN Doc CAT/OP/HND/1 (2010), para. 282(a)-(b);

Report of the WGAD, A/HRC/7/4, para. 64; E/CN.4/1995/31, para. 25 (d).

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

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

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

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

[44] IACHR Advisory Opinion OC-8/87, para. 39.

[45] American Convention (Article 27(1));

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

[46] American Charter s. 27(1).

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[47] See: para. 9 of this report regarding the definition of "anyone". Also see: ICCPR, Articles 2(1), 4(1), 14, 16 and 26; 1951 Refugee Convention, Article 3.

[48] ICCPR (Article 14(1));

African Commission, Constitutional Rights Project v Nigeria, No 153/96, 13th Activity Report (15 November 1999) paras 15-18.

Body of Principles (Principle 11): "1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. … 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention."

HRC Communications Nos. 1090/2002, Rameka v. New Zealand, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court) and 291/1988, Torres v. Finland, para. 7.2 (finding review by Minister of the Interior insufficient); and general comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), paras 19- 24. "A "court" must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature"; Vuolanne v Finland, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), paras 7.2 and 9.6 .

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003, entrusts judicial bodies to, at all times, hear and act upon petitions for habeas corpus, amparo or similar procedures, and states that no circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures. These are defined as "a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body" (section S (m), Principles A(4) and A(5)).

Inter-American Court of Human Rights, Chaparro Álvarez and Lapo Íñiguez v Ecuador, Series C No 170 (21 November 2007), paras 128-130. The authority which decides on the legality of an arrest or detention must be a judge or court; article 7(6) of the Convention is therefore ensuring judicial control over the deprivation of liberty". Vélez Loor v. Ecuador, para. 126 [complete citation]: "The review by a judge or a court is a fundamental requirement to guarantee adequate control and scrutiny of the administrative acts which affect fundamental rights".

European Court of Human Rights (Grand Chamber), D.N. v Switzerland, App No 27154/95 (29 March 2001), para 42. The procedure … requires a hearing of the detainee before the judicial organ, a body independent of the executive, with a guarantee of impartiality and the force to implement its decisions.

[49] ICCPR (Article 9(2)).

African Commission Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014) (Article 5(h)): upon arrest, persons must be informed of the right to challenge their detention.

[50] HRC General Comment no. 35, paras. 25 and 46; and, Concluding observations: Switzerland (1996), para. 111; and Benin (2004), para. 16.

[51] HRC Communication No. 291/1988, Torres v. Finland, para. 7.2 (seven days); Paul Kelly v Jamaica, UN Doc CCPR/C/41/D/253/1987 (8 April 1991), para 5.6 (one month); HRC, Akhadov v. Kyrgyzstan, UN Doc CCPR/C/101/D/1503/2006 (25 March 2011), para. 7.4 (two weeks); Concluding observations: Suriname, UN Doc CCPR/CO/80/SUR (2004), para 14; Sri Lanka (A/50/40), (1995), para. 452 (one year).

[52] See para. 10 of this report regarding the term "deprivation of liberty".

Body of Principles (Principle 32): "1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful."

[53] Body of Principles (Principle 11): "1. .... A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law."

HRC General Comment no. 35, para. 46; Communications; Umarova v Uzbekistan, UN Doc CCPR/C/100/D/1449/2006 (19 October 2010), para. 8.5; Bousroual v Algeria, UN Doc CCPR/C/86/992/2001 (30 March 2006), para 9.7. See also: Concluding Observations: Benin (2004), para. 16; Belgium, UN Doc CCPR/C/BEL/CO/5 (2010), para 17; Portugal, UN Doc CCPR/C/PRT/CO/4 (2012); Turkey, CCPR/C/TUR/CO/1 (13 November 2012), para 17; Czech Republic, CCPR/CO/72/CZE (27 August 2001), para 17; The Netherlands, CCPR/C/NLD/CO/4 (25 August 2009), para 11; Spain, UN Doc CCPR/C/ESP/CO/5 (2008), para 14.

UN Basic Principles on the Role of Lawyers, unanimously endorsed by the General Assembly in resolution 45/166 of 18 December 1990, Principle 7;

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Inter-American Court of Human Rights, Vélez Loor v Ecuador, Series C No 218 (23 November 2010), para 139.
Inter-American Principles, Principle V (4).:The detainee must have an "opportunity to be represented by counsel or some other representative".
African Commission on Human and Peoples Rights, Liesbeth Zegveld and Messie Ephrem v Eritrea, No 250/2002, 17th Activity Report (November 2003), para 55;
Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles M(2)(b), (e), and (f).
European Court of Human Rights, Castravet v Moldova App No 23393/05 (13 March 2007) paras 47-50; Singh v the United Kingdom (App No 23389/94) ECHR1996-I (21 February 1996), para 68; Soysal v Turkey App No 50091/99 (3 May 2007) paras 77-81.

[54] Body of Principles (Principle 32(2)).

[55] ICCPR, article 14.3. (b)
IACHR, article 8.2.c.

[56] UN Basic Principles on the Role of Lawyers, Principle 16.

[57] UN Basic Principles on the Role of Lawyers, Principles 8 and 22;
UN Principles and Guidelines on Access to Legal Aid, para 43(d);
UN Body of Principles (Principles 18(3) and (4)).
HRC, Austria, UN Doc CCPR/C/AUT/CO/4 (2007), para 16.
European Court of Human Rights, Castravet v Moldova App No 23393/05 (13 March 2007), paras 51-55, 58-60; Istratii and Others v Moldova App No 8721/05 (27 March 2007) paras 91-95, 98-100; Modarca v Moldova App No 14437/05 (10 May 2007) paras 89-93, 96-98; Musuc v Moldova App No 42440/06 (6 November 2007) para. 57; Rybacki v Poland, App no 52479/99 (13 January 2009), paras 56-62.
Inter-American Principles, Principle V, fourth para;
Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(c).

[58] International Convention for the Protection of All Persons from Enforced Disappearance (Article 17 (2(f)): State parties must "guarantee that … any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful";
HRC General Comment no. 35, para. 46;
Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section M (Principle M(5)(b) and (e)): "anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty".
American Convention (Article 7(6)): "… The interested party or another person in his behalf is entitled to seek these remedies."
Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle V, fifth paragraph, and Principle VII, first paragraph): "This right may be exercised by third parties or organizations, in accordance with the law".
Body of Principles (Principle 32(1)).
WGAD Background paper, para. 44: The responses of States to the Working Group's questionnaire show widespread practice in guaranteeing the detainee the right to initiate proceedings to challenge the lawfulness of detention, him or herself, or to be represented by counsel of choice. A number of States have empowered a wider group of individuals to initiate such proceedings, including a legal guardian, a state authority such as the prosecutor or state-appointed health professional, the ombudsman or national human rights institution, a non-governmental organization, or the employer or co-workers.

[59] Body of Principles (Principle 32): "2. …The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority."
HRC General Comment no. 35, para. 42; "The detainee has the right to appear in person before the court, and the court must have the power to order the detainee to be brought before it."
Inter-American Court of Human Rights, in advisory opinion OC-8/87 (30 January 1987) on habeas corpus in emergency situations, para. 33: the protection is "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered."

[60] Paragraph 8 of General Comment 32 of the HRC.

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

[61] HRC, General Comment No 32, para 13.

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

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

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

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

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

[64] Article 8, UDHR;

HRC General Comment no. 35, para. 52.

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

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

[65] ICCPR, Article 9(5).

UN Basic Principles on Remedy and Reparation, para 20.

International Convention on the Protection of the Rights of All Migrant Workers (Article 16(9)): Where it has been determined that migrant workers and members of their families have been victims of unlawful arrest or detention, the Convention guarantees an enforceable right to compensation. A claim for compensation may be made where the arrest or detention is found unlawful under national or international law and States parties must ensure that the right to compensation can be effectively enforced before the competent domestic authority (CMW/C/GC/2, para. 35).

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

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

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

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

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

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

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

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

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

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

[67] See Principle 8, above, «any form of detention will constitute the effective control over the detention thereby making the detainee subject to the State's jurisdiction». See in general the UN Committee against Torture, General comment No. 3 (2012), Implementation of article 14 by States parties.

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[68] Human Rights Committee communication no. 473/1991, Barroso v. Panama, paras. 2.4, 8.2 (habeas corpus for bail from pretrial detention).

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

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

[70] ICCPR (Article 2(3)(c));

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

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

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

[71] Report of the Working Group on Arbitrary Detention, A/HRC/16/47: 46. Pursuant to article 72 of additional Protocol I, the provisions of Section III (Treatment of Persons in the Power of a Party to the Conflict) are additional to the rules concerning humanitarian protection of civilians in the power of a Party to the conflict, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict. In this regard, the ICRC refers to three instruments binding the States which are Parties to them: (a) the International Covenant on Civil and Political Rights (1966); (b) the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); (c) the American Convention on Human Rights (1969).

48. Paragraph 4 of article 75 of Protocol I reproduces most of the fair trial guarantees provided for in international human rights instruments (International Covenant on Civil and Political Rights art. 14; European Convention on Human Rights, arts. 5-6; American Convention on Human Rights, art. 8). Indeed, as is noted in the ICRC commentaries, in each of these treaties there is a clause permitting derogations from the articles in question in time of war (ICRC Commentary on Protocol I, para. 3092). However, article 75 is not subject to any possibility of derogation or suspension and consequently it is these provisions which will play a decisive role in the case of armed conflict. Besides, the provisions in all these instruments are more or less equivalent (Ibid).

49. Similarly, it is emphasised in the preamble to Additional Protocol II that "international instruments relating to human rights offer a basic protection to the human person." In this regard, the ICRC notes that this provision establishes the link between Protocol II and the international instruments on human rights. (ICRC Commentary on Protocol I, para. 4427).

International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, Volume I: Rules, Rule 99 'Arbitrary deprivation of liberty is prohibited', pp. 349-352, [https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf]:

(iii) Obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.

The International Covenant on Civil and Political Rights and European and American Conventions on Human Rights provide for the right to have the lawfulness of detention reviewed by a court and the release ordered in case it is not lawful (so-called writ of habeas corpus). This right is also provided for in the American Declaration on the Rights and Duties of Man and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote. This rule is part of the domestic law of most, if not all, States in the world.319 It was included in the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines.

In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (states of emergency), the UN Human Rights Committee stated that "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant". In its advisory opinions in the Habeas Corpus case and the Judicial Guarantees case in 1987, the Inter-American Court of Human Rights concluded that the writ of habeas corpus is among those judicial remedies that are "essential" for the protection of various rights whose derogation is prohibited under the American Convention on Human Rights and which is non-derogable in itself as a result.322

The African Commission on Human and Peoples' Rights has held that proceedings to decide on the lawfulness of detention must be brought before a court that is independent of the executive authority that ordered the detention, in particular in emergency-type situations where administrative detention

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is practiced.323 The European Court of Human Rights has similarly stressed the requirement that the review of the legality of detention be undertaken by a body which is independent of the executive.324 There is, in addition, extensive practice to the effect that persons deprived of their liberty must have access to a lawyer.325 The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote, also specifies that "a detained person shall be entitled to have the assistance of a legal counsel".326 In particular, the opportunity to challenge the lawfulness of one's detention requires the assistance of a lawyer, in order to be effective.

It should be noted, however, that all persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention unless the government of the State affected by the non-international armed conflict claimed for itself belligerent rights, in which case captured enemy "combatants" should benefit from the same treatment as granted to prisoners of war in international armed conflicts and detained civilians should benefit from the same treatment as granted to civilian persons protected by the Fourth Geneva Convention in international armed conflicts.

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

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

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

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

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

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

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

[74] Please refer to endnote 71.

[75] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section II: The detention of alien civilians in the territory of a party to the conflict may be ordered "only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary", or if the civilian voluntarily demands this and his or her situation "renders this steps necessary" (article 42).

In this case, Article 43 governs the procedure for review, entitling a civilian who has been interned or placed in assigned residence "to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose". If the internment or assigned residence is maintained, "…the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit". This reflects the rationale behind Rule 128(B) of the ICRC's catalogue of rules of customary IHL, which provides that: "Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities".

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[76] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section II: The detention of alien civilians in the territory of a party to the conflict may be ordered "only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary", or if the civilian voluntarily demands this and his or her situation "renders this steps necessary" (article 42).

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

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

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

[79] Third Geneva Convention relative to the Treatment of Prisoners of War, Articles: 4, 21, 109, 118.

Additional Protocol I, Article 75(3); and Rule 128(A) of the ICRC's catalogue of rules of customary IHL.

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

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

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

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

[82] "Child" shall mean any person under 18 years of age, in line with the Convention on the Rights of the Child.

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

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

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

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

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

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

The Convention on the Rights of Persons with Disabilities interchangeably uses "disability" both as social effect resulting from an interaction (Preamble, (e); also art. 1) and as impairment (see differentiation in preamble (e), biological). See A/HRC/28/37, paras 8, 20, 60.

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

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

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

[88] The detention of migrants should not only be prescribed by law, but this detention should be necessary and proportional to the objectives to be achieved as has been noted in OHCHR's study on the human rights of migrant children (A/HRC/20/24, para 9.) Also see Inter-American Court of Human Rights, case of Velez Loor v Panama, para 163-172 where the Court notes that preventive custody may be suitable to ensure the appearance at immigration proceedings or to guarantee the application of a deportation order.

[89] Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers sets out the right to liberty and security of person for migrant workers and members of their families and the right not to be subjected individually or collectively to arbitrary arrest or detention (paras. 1 and 4). Migrant workers and members of their families who are deprived of their liberty by arrest or detention are entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (para. 8).

OHCHR Recommended Principles and Guidelines on Human Rights at International Borders (Guideline 8.4) : Establishing and strengthening procedural safeguards on detention including judicial authorisation and oversight, possibility to appeal and legal laid, to ensure the legality, proportionality and necessity of any deprivation of liberty and to periodically review the necessity and proportionality of continued detention.

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UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (Guideline 7): respect for the detainee's right, either personally or through a representative, to challenge the lawfulness of detention before a court of law at any time.

HRC: the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party. General comments No. 35 (2014) on Article 9 : the right to liberty and security of persons, paras. 3, 7; No. 15 (1986) on the position of aliens under the Covenant, and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (HRI/GEN/1/Rev.9 (Vol. I) p. 189, para. 2; and p. 245, para. 10).

[90] Committee on Migrant Workers, General Gomment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention, and have timely access to effective legal remedies (para. 33);

OHCHR Recommended Principles and Guidelines on Human Rights at International Borders (Guideline 8.14): providing migrants in detention with unconditional access to competent, free and independent legal aid, as well as any necessary interpretation services, for the purpose of exercising their right to habeas corpus, to judicial review of the lawfulness of their detention.

[91] Guideline 7 of the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention, 2012 [available at: http://www.refworld.org/docid/503489533b8.html]

Special Rapporteur on the human rights of migrants (A/HRC/20/24, para. ?): Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings.

International Convention on the Protection of the Rights of All Migrant Workers (Article 16): In attending such proceedings, they are entitled to have cost-free assistance to an interpreter if they cannot understand or speak the language used (para. 8).

[92] Convention relating to the Status of Refugees (arts. 16 and 32 (2)): basic minimum standards for the treatment of refugees, including free access to the courts of law on the territory of States parties and the ability to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.

[93] WGAD: Detention must be ordered or approved by a judge or a body affording equivalent guarantees of competence, independence and impartiality (E/CN.4/1999/63, para. 69).

[94] WGAD: The procedural guarantee of article 9(4), ICCPR, requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. There should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. A maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released (A/HRC/13/30, para. 61).

HRC: "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed" (CCPR/C/59/D/560/1993, para. 9.4).

Special Rapporteur on the human rights of migrants, in his 2012 annual report on the detention of migrants in an irregular situation (A/HRC/20/24), recalled the statement of the WGAD that there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, and that review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review (para. 23).

Committee on Migrant Workers, General Comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power (para. 32).

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

[96] Article 31(1) of the 1951 Refugee Convention: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

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IACHR: "147. […] deprivation of liberty as a penalty or a punitive sanction in the area of immigration control is outside the scope of the question and, in accordance with the jurisprudence of this Court, must be regarded arbitrary and thus contrary to the Convention and American Declaration; footnote 271: Cf. Case of Vélez Loor v. Panama, supra, para. 169. Special Rapporteur of the United Nations on the Human Rights of Migrants, Ms. Gabriela Rodríguez Pizarro: "[d]etention of migrants on the ground of their irregular status should under no circumstance be of punitive nature". Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, para. 73.

Working Group on Arbitrary Detention: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention." UN Doc. A/HRC/7/4, 10 January 2008, para. 53.

Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, UN Doc. A/HRC/11/7, May 14, 2009, para. 65.

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

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

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

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

[98] Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the 'Rights of all children in the context of international migration', Recommendation on 'Right to liberty and alternatives to detention', paras. 32 and 78: "Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status."

Report of the Special Rapporteur on Torture, A/HRC/28/68, para. 80: "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children….The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. Deprivation of liberty in this context can never be construed as a measure that complies with the child`s best interests. Immigration detention practices across the globe, whether de jure or de facto, put children at risk of cruel, inhuman or degrading treatment or punishment. …Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status…"

Inter-American Court of Human Rights, Advisory Opinion-21 (OC-21) (19 August 2014) concerning the Rights and Guarantees of Children in the Context of Migration and / or in Need International Protection, para. 160: "States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated".

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

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

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

[100] HRC General Comment no. 35, para. 40; and, Communications Nos. 962/2001, Mulezi v. Democratic Republic of the Congo, para. 5.2 (military detention); 1051/2002, Ahani v. Canada, para. 10.2 (counter-terrorism); 1061/2002, Fijalkowska v. Poland, para 8.4 (involuntary committal to psychiatric institution); 560/1993, A. v. Australia, para. 9.5 (immigration detention); 291/1988, Torres v. Finland, para. 7.4 (extradition); 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5 (presidential fiat) and 265/1987, Vuolanne v. Finland, para. 9.5 (solitary confinement). Concluding observations: India (1997), para. 438; Israel (1998), para. 317 (security detention); United Kingdom (2008), para. 17 (counter-terrorism); Rwanda (2009), para. 16 (recommending abolition of detention for vagrancy); Cameroon (1994), para. 204; Republic of Moldova (2002), para. 11; and Lithuania (2004), para. 13. No category of detainees may be denied taking such proceedings: Communications Nos. R.1/4, Torres Ramírez v. Uruguay, para. 18 (military); and 1449/2006, Umarov v. Uzbekistan, para. 8.6.

[101] The requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context, and the procedural guarantee is not susceptible to abrogation.

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

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

Committee on Enforced Disappearances: recommends the adoption of "the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances,

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even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure" (CED/C/ESP/CO/1, para. 26).

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

[103] Human Rights Committee General Comment 2, para. 16.

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

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

[105] ICCPR (Article 9(4));

African Principles, Principle M(4).

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

American Convention (Article 7(6));

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

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

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

[106] HRC General Comment no. 35, para. 47;

[107] HRC General Comment no. 35, para. 42;

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

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

[110] International human rights law also requires that, in accordance with the principle of the open administration of justice, judicial decisions be made public, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Article 14(1) ICCPR; Touron v Uruguay, Human Rights Committee Communication 32/1978, UN Doc CCPR/C/OP/1 at 61 (1984), para 12; Weisz v Uruguay, Human Rights Committee Communication 28/1978, UN Doc CCPR/C/OP/1 at 57 (1984), para 16.

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

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

European Court of Human Rights: Patsuria v Georgia (2007) ECHR 893, para. 62; and Aleksanyan v Russia (2008) ECHR 1903, para. 179.

[113] HRC General Comments no. 35, para. 45, and No. 32, paras. 18-22; communication nos. 1090/2002, Rameka v. New Zealand, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); 291/1988, Torres v. Finland, para. 7.2 (finding review by the Minister of the Interior insufficient);

A tribunal managed entirely within the government department responsible for enforcing detention regulations and/or detention facilities fails to meet the abovementioned standards.

[114] The determination of need for specific protection of a vulnerable group, for example, such as indigenous peoples and children, shall not be made without full consultation with the affected group and its representative organizations, and measures taken must be consistent with applicable standards of international law.

169 ILO Convention (articles 9-10);

Vienna Declaration and Programme (Part I, parr. 20);

Convention on the Rights of the Child (art. 40, parr. 3);

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Beijing Rules; y Riad Directives;
HRC General Comment *N° 17 (art. 24 of the ICCPR)*, parrs. 1 and 2;
CRC, *General Comment* N° *10*, parr. 10;
IAHRC, Advisory Opinion AO-17/2002, 28 august 2002, parr. 109.

[115] HRC communication N° 172/1984, *Broeks vs The Netherlands*, Comunication N° 182/1984, *Zwaan-de-Vries vs. The Netherlands*, Comunication N° 196/1985, *Ibrahima Gueye and others vs. France*; Comunication N° 819/1998, *Joseph Kavanagh vs. Ireland; Comunication* N° 516/1992, *Alina Simunek vs. Check Republic.*

[116] Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, para. 70(c); "Category III: Military judges and military prosecutors often do not meet the fundamental requirements of independence and impartiality; military procedures applied by military courts often do not respect the basic guarantees for a fair trial;"

Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Issue of the administration of justice through military tribunals, E/CN.4/2006/58, paras 20-21: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts";

Human Rights Committee,HRC General Comment No. 13 on , Article 14, para. 4; "4. The provisions of article 14 of the ICCPR, para. 4: "[noting]apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special tribunalscourts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.".

[117] UN Basic Principles on the Role of Lawyers, Principle 21;

European Court of Human Rights, Lamy v Belgium, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), Nikolova v Bulgaria, App no 31195/96 (25 March 1999), para 63 and (Grand Chamber), Mooren v Germany, App no 11364/03 (9 July 2009), paras 121-125.

[118] International Convention for the Protection of All Persons from Enforced Disappearance (2006), Article 17(3).

Declaration on the Protection of All Persons from Enforced Disappearance (1992), A/RES/47/133, Article 10.

United Nations Body of Principles for the Protection of All Persons under Any Form or Detention or Imprisonment, Principle 16(1): 'Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.'

The United Nations Office on Drugs and Crime (UNODC) Handbook on Prisoner File Management (2007), page 21: '[t]ransfer details of prisoners should be duly recorded to ensure these rights are exercised and to ensure against disappearances. Accurate records should also contain parole eligibility and/or release dates.'

[119] HRC General Comment no. 35, para. 43; and communication nos. 1090/2002, Rameka v. New Zealand, para 7.3 (annual review of post-conviction preventive detention); 754/1997, A. v. New Zealand, para. 7.3 (regular review of involuntary hospitalization); 291/1988, Torres v. Finland, para. 7.4 (review every two weeks of detention for extradition).

[120] WGAD Opinion no. 34/2006, Ali Saleh Kahlah Al-Marri v. USA, UN Doc A/HRC/7/4/Add. 1 (2008), paras. 36-37.

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[121] WGAD Background paper, para. 81: Although there is no obligation for States to provide for a right to appeal under international law, a quarter of responding States demonstrated legal provisions guaranteeing the right of appeal of an unsuccessful challenge to the lawfulness of the detention.

Oxford Pro Bono Publico study: There is a very strong trend in the practice of States toward guaranteeing the right to appeal to a higher court against an order of preventive detention (p. 97).

[122] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Resolution 67/187 adopted by the General Assembly on the report of the Third Committee (A/67/458), Principle 9 Remedies and Safeguards (para. 31): 'States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.'

[123] Depending on the system in place this may include other legal advisors, legal assistants, paralegals and those running legal clinics that possess the requisite skills and training as required under national law for the provision of legal assistance and services.

[124] WGAD Background paper, para. 44: The Working Group observes that the majority of States support an informal, cost-free and simplified process to bringing a claim challenging the legality of detention before court, offering even the ability to dispense with any requirement for the challenge to be submitted in writing.

[125] Subcommittee on Prevention of Torture: "States parties should consider effective judicial review and due process during the detention of individuals in criminal proceedings as a prerequisite for the prevention of ill-treatment or torture of persons deprived of their liberty and as a means of conferring legitimacy on the exercise of criminal justice" (para. 19).

[126] UN Basic Principles on the Role of Lawyers, Principle 21;

[127] European Court of Human Rights, Lamy v Belgium, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), Nikolova v Bulgaria, App no 31195/96 (25 March 1999), para 63; (Grand Chamber), Mooren v Germany, App no 11364/03 (9 July 2009), paras 121-125.

HRC, General Comment No 32, para 13, citing Jansen-Gielen v The Netherlands, UN Doc CCPR/C/71/D/846/1999 (3 April 2001), para 8.2 and Äärelä and Näkkäläjärvi v Finland, UN Doc CCPR/C/73/D/779/1997 (24 October 2001), para 7.4.

[128] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.

Committee Against Torture, General Comment No. 2 : Article 15 is "likewise obligatory as applied to both torture and ill-treatment" and that it must be observed in all circumstances (at para. 6).

Human Rights Committee, General Comment 20 of 1992: " the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" (para. 12); General Comment 32 of 2007, because article 7 is non--derogable in its entirety, "no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14…" (paragraph 6).

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (United Nations General Assembly resolution 3452 (XXX)): "any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence … in any proceedings." (Article 12)

[129] Joint Study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), para. 292(b);

International Convention for the Protection of All Persons from Enforced Disappearance (Article 22).

[130] ICCPR, article 19(3).

[131] For example, such as providing redacted summaries of information, ex parte or in camera review of the information.

[132] UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of AsylumSeekers and Alternatives to Detention (2012), Guideline 7 (v)

Committee on Migrant Workers General Comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families: The burden of proof rests on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced (para. 32).

[133] IACHR Article 10. Right to Compensation. Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

[134] UN Basic Principles on Remedy and Reparation (Principle 20).

[135] This should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.

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Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. UN Basic Principles on Remedy and Reparation (Principle 19).

[136] Including medical and psychological care as well as legal and social services;UN Basic Principles on Remedy and Reparation (Principle. 21).

[137] Including, where applicable, any or all of the following:

(i) Effective measures aimed at the cessation of continuing violations;

(ii) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(iii) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(iv) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(v) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(vi) Judicial and administrative sanctions against persons liable for the violations;

(vii) Commemorations and tributes to the victims;

(viii) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

UN Basic Principles on Remedy and Reparation (Principle. 22).

[138] : including, where applicable, any or all of the following measures, which will also contribute to prevention:

(i) Ensuring effective civilian control of military and security forces;

(ii) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(v) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(vii) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(viii) Reviewing and reforming laws mandating, contributing to or allowing detention that is arbitrary or unlawful under international law.

UN Basic Principles on Remedy and Reparation (Principle. 23)

WGAD Opinion no. 25/2009 (para. 33); Opinion no. 42/2008 (para. 29); Opinion no. 22/2006 (para. 23).

[139] WGAD Report, A/HRC/10/21, paras. 54 (d – g)

[140] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section II: The detention of alien civilians in the territory of a party to the conflict may be ordered "only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary", or if the civilian voluntarily demands this and his or her situation "renders this steps necessary" (article 42).

In this case, Article 43 governs the procedure for review, entitling a civilian who has been interned or placed in assigned residence "to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose". If the internment or assigned residence is maintained, "…the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit". This reflects the rationale behind Rule 128(B) of the ICRC's catalogue of rules of customary IHL, which provides that: "Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities".

[141] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Part III, Section III: The Occupying Power may, at the most, subject civilians to internment or assigned residence within the

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frontiers of the occupied country "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons" (article 78). "Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay…" If a decision to intern or place in assigned residence is upheld, this "…shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power".

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

[142] Article 78 of the Fourth Geneva Convention: If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 [Link] of the present Convention.

[143] Article 43 of the Fourth Geneva Convention

[144] Article 78 of the Fourth Geneva Convention

[145] It is noted that the implications of this are very serious for the person concerned given that this can mean a very lengthy period of detention until the cessation of active hostilities. See: Third Geneva Convention relative to the Treatment of Prisoners of War, Article 4: Persons may be held as prisoners of war if they "have fallen into the power of the enemy" and if they fall within one of the categories specified in Article 4, including members of armed forces of a party to the IAC (4(1)), members of other armed forces who profess allegiance to a party to the IAC (4(3)), members of militias fulfilling certain conditions (4(2)), persons who accompany the armed forces, such as civilian contractors and war correspondents (4(4)).
Article 5: 'Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.'

[146] Article 109 of the Third Geneva Convention: "Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article." POWs may be subject to internment in a POW camp, or to close confinement if this is necessary to safeguard their health, and then only so long as the circumstances that make such confinement necessary continue (Article 21). Confinement to a cell or room may otherwise only be permitted in execution of penal or disciplinary sanctions (Part III, Section VI, Chapter III).
According to articles 112 and 113, a Medical Commission should be established to decide such releases. [Right to challenge in this case would provide a complementary protection, in case these commissions do not function properly.]

[147] Article 118 of the Third Geneva Convention: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."
Additional Protocol I, Article 75(3); and Rule 128(A) of the ICRC's catalogue of rules of customary IHL

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

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

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

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

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

[153] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Resolution 65/229 adopted by the General Assembly on the report of the Third Committee (A/65/457), Rule 2: 'Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice […]'; Rule 26: 'Women prisoners' contact with their families, including their children, their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. […]'.

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 10: 32. 'Special measures should be taken to ensure meaningful access to legal aid for women, […]. 33. Such measures should address the special needs of those groups, including gender sensitive and age-appropriate measures'; Guideline 9: '52. States should take applicable and appropriate measures to ensure the right of women to access legal aid, including: (a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice; (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims; (c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.'

[154] Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, paras. 78-79, 91; Para. 78. 'The present section addresses the practice of keeping girls and women in detention for the purpose of protecting them from risks of serious violence. The Working Group has previously addressed in its annual report protective custody of women and girls who may be detained for life. That form of deprivation of liberty is highly gendered in its reach, remit and application. In some countries, women and girls are placed in custody due to the risk of gender-based violence, such as honour crimes, and their release may be conditional upon the consent of a male relative and/or a guarantor (see A/HRC/20/16/Add.1). Para. 79. 'There will typically be no legal basis for the detention, procedural guarantees will not be observed, and the detention will constitute discrimination. The Working Group recalls the views of the United Nations treaty bodies and the Special Rapporteur on violence against women, its causes and consequences, that the practice of protective custody should be eliminated and replaced with alternative measures ensuring the protection of women without jeopardizing their liberty.'; Report of the Working Group on Arbitrary Detention, 24 December 2012, A/HRC/22/44, recommendation in para 82(b): 'Ensure that the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including […] protective custody;'; Report of the Working Group on Arbitrary Detention to the Commission on Human Rights, 16 December 2002, UN Doc. E/CN.4/2003/8, para. 65: The Working Group recalled its annual report in 2001 (E/CN.4/2002/77 and Add.1 and 2) and reiterated that 'the Working Group had recommended, with regard to the detention of women who have been the victims of violence or trafficking, that recourse to deprivation of liberty in order to protect victims should be reconsidered and, in any event, must be supervised by a judicial authority, and that such a measure must be used only as a last resort and when the victims themselves desire it.'

Rule 59 of the Bangkok Rules: '…Temporary measures involving custody to protect a woman shall only be applied when necessary and expressly requested by the woman concerned and shall in all cases be supervised

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by judicial or other competent authorities. Such protective measures shall not be continued against the will of the woman concerned.'

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report to the Human Rights Council (13th session, A/HRC/4/33/Add.3): 39. "[The Special Rapporteur] is highly critical of the current policy of taking females under the provisions of the Crime Prevention Law into "protective" detention because they are at risk of becoming victims of an honour crime." Para. 72 lit. (u): 'in some countries, prolonged detention as such can become ill-treatment, as is the case for instance when women are detained for their 'protection' for up to 14 years because they are at risk of becoming victims of honour crimes." The Special Rapporteur recommended in the context of his visit to Jordan in 2006 that "[f]emales (...) detained under the Crime Prevention Law for being at risk of becoming victims of honour crimes be housed in specific victim shelters where they are at liberty but still enjoy safe conditions.'

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Commission on Human Rights, Integration of The Human Rights of Women and the Gender Perspective, Violence Against Women, 6 January 2003, E/CN.4/2003/75, paras. 90 and 91: '[p]rotective custody as a means of dealing with victims of VAW [violence against women] should be abolished. Any protection provided should be voluntary. Shelters should be opened and offer security, legal and psychological counselling and an effort to help women in the future. NGOs' cooperation in this field should be sought.' 'States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including appropriate protection, safe shelter, counselling, legal aid, health-care services, rehabilitation and reintegration into society.'

Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 'Pathways to, conditions and consequences of incarceration for women' (21 August 2013, UN-Doc. A/68/340): '75. In some countries, women are unable to return home on release due to fear that violence may be committed against them. According to one report, female prisoners in Iraq have asked to remain in detention centres following their scheduled release due to fear of honour-related violence.128 It is argued that in India "the inter-changeability of punitive and protective or curative institutions has led to prison cells being regarded as places of safe custody".129 In Australia, research has shown that women are left homeless, or forced to remain in secure custody, due to fear of payback and retaliation by the community.'

UN Committee against Torture, 2010 Report on visit to Jordan, UN-Doc. CAT/C/JOR/CO/2, para. 21. 'The Committee notes with concern that the Suppression of Offences Act of 1954 authorizes "protective custody" for women at risk of violence, which according to reports is akin to administrative detention, and that some women are still retained in such custody (arts. 2, 11 and 16). The Committee urges the State party to replace the practice of "protective custody" with other measures that ensure the protection of women without jeopardizing their liberty, and to accordingly transfer all women currently held in "protective custody" to other safe and rehabilitative shelters. To this end, the Committee encourages the State party to adopt a national plan for the protection of women in danger.'

UNODC, Handbook for prison managers and policymakers on women and imprisonment, 2014, pp. 87, 88: 'In other countries pre-trial detention may be used as a form of protective custody for victims of rape, to protect the victim as well as to ensure that she will testify against her rapist at court. 89 Both of these practices are unacceptable, further victimizing women and putting them at risk of further abuse. Most importantly, such practices deter women from reporting rape and sexual abuse, thereby allowing perpetrators to escape justice.' – 'Pre-trial detention should not be used as "protective custody". Other means of protection, for example, in shelters managed by independent bodies, NGOs or other community services, should be used.'

[155] Committee on the Rights of Persons with Disabilities: (a) "No one shall be detained against his or her will in any kind of a mental health facility." [Concluding Observations on: Austria, para. 30; Australia, para. 34; Sweden, para. 36]; (b) "Criteria such as "danger to self or others" or "need for care and treatment" cannot legitimize a detention that is based on disability or perceived disability, in particular detention based on categorizations such as "mental disorder" or "mental illness". [Statement on Article 14 of the CRPD and Concluding Observations on: El Salvador, para. 32; Austria, para. 29; Sweden, para. 35; Denmark, para. 36]; (c) "No one shall be detained in a psychiatric hospital or similar institution as a security measure applied to persons with disabilities who are subject to criminal proceedings." [Statement on Article 14; Concluding Observations on: Australia, para. 30; New Zealand, para. 33; Mexico, para. 30(a); Ecuador, para. 29(c); Denmark, para. 34; Belgium, paras. 27 and 34.]

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[156] Committee on the Rights of Persons with Disabilities, Concluding Observations on: Austria, para. 30; Sweden, para. 36; Azerbaijan, para. 29; New Zealand, para. 30; "Legislative provisions that authorize involuntary committal and involuntary treatment, including provisions found in mental health legislation and incapacity legislation, shall be repealed." [CRPD Statement on Article 14; Concluding Observations on: Tunisia, para. 25; Spain, para. 36; Peru, para. 29; El Salvador, para. 32; Australia, para. 32(e) and 34; Mexico, para. 30(b); Republic of Korea, para. 26; Belgium, para. 26.]

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

[158] Committee on the Rights of Persons with Disabilities Negotiation Archives, Chair's remarks on Article 14.1(b) concluding the discussion of Article 14, in UN Convention on the Rights of People with Disabilities Ad Hoc Committee – Daily Summaries 8(4) (19 January 2006) http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm: "Persons with disabilities may only be lawfully deprived of their liberty on grounds that are applicable to the population as a whole, and subject to the same substantive and procedural guarantees. Detention that has the purpose or effect of discriminating based on disability is prohibited."

[159] Committee on the Rights of Persons with Disabilities, General Comment No. 1 on article 12 of the Convention regarding equal recognition before the law: respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting their right to liberty and security of the person (paras. 40 and 41). The denial of the legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty, violating articles 12 and 14 of the Convention. States must refrain from such practices and establish a mechanism to review cases of placement in a residential setting without specific consent (CRPD/C/AUT/CO/1, paras. 29–31). The standard of "best interpretation of will and preferences" rather than "best interests" applies in cases where, after significant efforts have been made, it has not been practicable to determine the will and preferences of the person (para. 19).

[160] Committee on the Rights of Persons with Disabilities, Concluding observations: Republic of Korea (2014), para. 26; Concluding observations: Tunisia (2011), para. 25.

[161] Convention on the Rights of Persons with Disabilities, article 13, para. 1.

[162] The right to enjoyment of the highest attainable standard of health includes the right to health care on the basis of free and informed consent. States have an obligation to require all health and medical professionals, including psychiatric professionals, to obtain the free and informed consent of persons with disabilities prior to any treatment, including in places of detention or arrest. In conjunction with the right to legal capacity on an equal basis with others, States have an obligation not to permit substituted decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disability. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities;

[163] Committee on the Rights of Persons with Disabilities, General Comment No. 1 para. 46; Concluding Observations on: China, para. 32; Paraguay, para. 48; El Salvador, para. 42; Austria, para. 37; Australia, para. 42: Legislation, policies and programs shall be enacted to eliminate institutional care for persons with disabilities, and to ensure that living arrangements acceptable to persons with disabilities as well as desired supports are available in the community and respect the person's autonomy, will and preferences;

Convention on the Rights of Persons with Disabilities, Articles 3(c), 14.2 and 19; and Concluding Observations on Australia, para. 30: Housing arrangements in places of detention shall afford the same opportunities to persons with disabilities as to others, and shall provide reasonable accommodation for disability. No one shall be transferred without his or her free and informed consent to a mental health facility or mental health unit in the place of detention. Diversion programs, probation and parole, and eligibility for programs and services within the detention setting, shall not require compliance with mental health services.

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

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

[165] Committee on the Rights of Persons with Disabilities, General Comment No. 1, para. 17: "Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.

[166] Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 37

[167] Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 20.

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

[169] This includes deprivation of liberty based on disability or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability.

[170] OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, Guideline 8.1 : "Amending legislation to establish a presumption against detention in law, and legally prescribing human rights-compliant alternatives to detention, so that detention is a lat resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes."

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

[171] Guideline 7 of UNHCR's 2012 Detention Guidelines.

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

[173] UNHCR's specific mandate gives it the right to act in substitution of States for asylum-seekers, refugees and stateless persons who cannot obtain protection from their own governments. See: Guideline 7 paragraph 47 (vii) of the 2012 Detention Guidelines, as supported by UNHCR Executive Committee Conclusion No. 85 (XLIX) (1998); Report of the WGAD, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 on the Situation regarding immigrants and asylum-seekers; and Report of the WGAD, E/CN.4/1999/63, 18 December 1998, paragraphs 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10; Articles 2(3) and 8 of the International Law Commission's Articles on Diplomatic Protection (2006).

[174] OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, Guideline 8.16. "Consular authorities should only be contacted if requested by or with the free, informed consent of the person concerned."

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

[176] Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the 'Rights of all children in the context of international migration', Recommendation on 'Right to liberty and alternatives to detention', para. 78.

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

[177] OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders, Guideline 8 on Avoiding detention, para 11: "Ensuring that in the exceptional cases where children are detained, they are housed with their family members unless there are compelling reasons for separation; that unaccompanied children are not housed with unrelated adults; and that all children have access to adequate healthcare and education. Child protection agencies, rather than immigration agencies should take primary responsibility for children."

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[178] Committee on Migrant Workers, General Comment no. 2 (2013): the scope of the judicial review cannot be confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is not established by law (para. 32).
[179] Article 31(1), 1951 Refugee Convention.
[180] Convention on the Rights of Persons with Disabilities, article 13, paragraph 2.

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