

UNITED NATIONS HUMAN RIGHTS COUNCIL
69th Session of the Working Group on Arbitrary Detention
22 April to 1 May 2014

**INTERNATIONAL COMMISSION OF JURISTS: ADDITIONAL SUBMISSIONS
ON BASIC PRINCIPLES AND GUIDELINES ON REMEDIES FOR ARBITRARY
OR UNLAWFUL DETENTION, AND THE RIGHT TO CHALLENGE THE
LAWFULNESS OF DEPRIVATION OF LIBERTY BEFORE A COURT**

Submitted 3 April 2014

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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Additional Submissions on the Basic Principles and Guidelines

This submission by the International Commission of Jurists (ICJ) supplements an earlier submission to the Working Group dated 11 November 2013 on the "draft basic principles and guidelines" that the Working Group is preparing pursuant to Human Rights Council resolution 20/16 of 17 July 2012.

The ICJ now provides information in relation to a series of questions raised by members of the Working Group during the ICJ's appearance before the Working Group on 18 November 2013.

Issues raised:

1. In addition to detained individuals, their lawyers and families, should other individuals or groups be able to bring proceedings challenging the detention?
2. What is the entitlement of a detained person to disclosure by the government of information relevant to their detention, in the context of challenging the lawfulness of the detention?
3. What sources support the right of the detained individual physically to appear before the court for the hearing of a challenge to the detention, as this is not expressly codified in article 9(4) ICCPR?
4. Are States not party to the ICCPR under an obligation to provide compensation to victims of arbitrary or otherwise unlawful detention?
5. In terms of the right to remedy and challenge, is any distinction to be drawn between the criminal justice system and other forms of detention such as detention of migrants, detention on psychiatric and various existing administrative regimes?
6. What role, if any, can military courts play in the right to challenge the lawfulness of detention?
7. Regarding the non-derogable character of the right to challenge the lawfulness of detention: can one speak of non-derogableness outside of the ICCPR framework? Is the right a matter of a *jus cogens* peremptory norm?

Responses:

1. Broad scope of individuals able to initiate challenge

Proceedings to challenge the lawfulness of detention must be capable of being initiated not only personally by the detainee, but also by his or her legal counsel, family members, and other interested parties, whether or not they have proof of the consent of the individual detainee.

Ensuring the broadest possible scope for such persons to bring proceedings to challenge the detention is essential for the right to challenge to be practical and effective in cases of incommunicado detention, as well as enforced disappearance or other forms of secret detention. Indeed, these are the kinds of cases in which detainees are at most risk of prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, and extrajudicial execution, and in which ensuring every possibility for prompt judicial intervention may be of the utmost importance.

The International Convention for the Protection of All Persons from Enforced Disappearance recognizes the obligation to guarantee, in domestic legislation, that “any person with legitimate interest” shall, in all circumstances be entitled to take proceedings before a court to challenge the lawfulness of detention and obtain release.¹ Several illustrative examples of categories of individuals who always have a legitimate interest are mentioned in the Convention provision (“such as relatives of the person deprived of liberty, their representatives or their counsel”), but the term “such as” makes clear that these three examples are not exhaustive of the kinds of persons who may have a “legitimate interest”. The provision is the most recent legal articulation of the underlying right to challenge to have been agreed by states, and reflects other international and regional standards, as well as interpretations of existing general treaty provisions by their competent treaty bodies.

Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that “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.” The Human Rights Committee has interpreted article 9 to require that proceedings at the national level “reviewing the legality of the detention” (i.e. article 9(4) provisions) be capable of being initiated not only personally by the person in detention, but also by “relatives, friends or lawyers of persons detained”.²

For similar reasons, in deciding on communications brought to it under the Optional Protocol to the Covenant, alleging arbitrary or otherwise unlawful

¹ International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly resolution 61/77, (20 December 2006), Article 17(2): “Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation: ... (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, *any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel*, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation of liberty is not lawful.” (Emphasis added)

² See Human Rights Committee, concluding observations on Algeria, UN Doc CCPR/C/79/Add.95 (18 August 1998), para 12.

detentions in violation of article 9, the Committee itself has accepted communications brought by family members of, or other persons other than, the detainee or his or her lawyer.³ This is also reflected in the Committee's rules of procedure, which note that in deciding whether communications of individual complaints are admissible, the Committee shall ascertain whether "the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant" but which expressly explain that, "Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally."⁴

Principle 32(1) of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that, "A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority⁵ to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful."⁶ While family members or other persons are not explicitly mentioned in Principle 32(1), this cannot be read as precluding an obligation on states to ensure that national law permits them to bring similar proceedings.⁷ Indeed, Principle 7(3) of the Body

³ See, for instance: *José Antonio Coronel et al. v. Colombia*, UN Doc CCPR/C/76/D/778/1997 (2002) brought by the fathers and sisters of six formerly detained deceased victims. *David Alberto Cámpora Schweizer v Uruguay*, UN Doc CCPR/C/OP/2 at 90 (1990), brought by the wife of David Alberto Campora Schweizer alleging that he was arbitrarily imprisoned in Uruguay. *Celis Laureano v Peru*, CCPR/C/56/D/540/1993, submitted by a Peruvian citizen on behalf of his granddaughter, whose whereabouts were unknown when the application was filed. *Hiber Conteris v Uruguay*, Communication No 139/1983 (17 July 1985), UN Doc Supp No 40 (A/40/40) at 196 (1985) brought by the sister of Mr. Conteris, who was arrested by the security police, allegedly without a warrant, at Carrasco Airport, Montevideo. *Marieta Terán Jijón v Ecuador*, UN Doc CCPR/C/44/D/277/1988, submitted by the mother of Juan Fernando Terán Jijón, who as at the time of submission of the communication (21 January 1988) detained at the Penal Garcia Moreno in Quito, Ecuador. *Saodat Khomidova v. Tajikistan*, UN Doc CCPR/C/81/D/1117/2002 (2004), also submitted by the detainee's mother; *Mojica v Dominican Republic*, UN Doc CCPR/C/51/D/449/1991), brought on the behalf of the applicant's son. *Mihoubi v Algeria*, UN Doc CCPR/C/109/D/1874/2009, brought by the NGO Track Impunity Always (TRIAL) on the behalf of the mother of an Algerian national disappeared and allegedly detained unlawfully since 1993. *Faraoun v. Algeria*, UN Doc CCPR/C/109/D/1884/2009 filed by TRIAL on behalf of the wife, mother and child of the victim, allegedly held in a state of incommunicado detention for 15 years. See also *Larbi v Algeria*, CCPR/C/108/D/1831/2008, *Azouz v Algeria* CCPR/C/108/D/1798/2008, *Zerrougui v Algeria*, CCPR/C/108/D/1796/2008.

⁴ Rule 96(b) of the Human Rights Committee rules of procedure (included in UN Doc HRI/GEN/3/Rev.3, 28 May 2008).

⁵ See the special definition of "judicial or other authority" under the "Use of Terms" provision of the Body of Principles: (f) "The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence." This formulation makes clear that the official must be judicial in character, even if the title of the office is not specifically "judge": see Rodley & Pollard, *The Treatment of Prisoners under International Law* (3d edition, Oxford University Press, 2009), p 457.

⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution 43/173 adopted by the General Assembly, 9 December 1988, A/RES/43/173 (hereinafter: 'Body of Principles')

⁷ See the Body of Principles, Principle 3 ("There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes

of Principles explicitly provides that any person “who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right ... to report the matter to the ... organs vested with reviewing or remedial powers”, which must pursuant to Principle 4 include a judicial office. Anyone, then, has the right under the Body of Principles to complain to a judge that the deprivation of liberty of some other person has been effected in violation of that part of Principle 2 which states, “Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law.”

Regional standards also support a wide scope for persons other than the detainee and his or her lawyer to bring proceedings challenging the detention and seeking release. In the Inter-American human rights system, article 7(6) of the American Convention on Human Rights, providing for the right to challenge the lawfulness of detention before a court and obtain release, provides that “the interested party or another person in his behalf is entitled to seek these remedies.”⁸ Similarly, Principle V and Principle VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognize the right of “others”⁹ and “third parties or organizations”¹⁰ to an effective recourse before judicial authorities. In its Report on the Human Rights of Persons Deprived of Liberty in the Americas published in 2011, the Inter-American Commission on Human Rights stated that “it is important that the State guarantee that persons deprived of their liberty, or third parties acting on their behalf, have access to the competent courts for protecting their rights.”¹¹

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, under the heading “Right to habeas corpus” state that, “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”.¹² As with the

them to a lesser extent”) and the General Clause (“Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.”)

⁸ American Convention on Human Rights, “Pact of San Jose”, Costa Rica, Adopted on 22 November 1969, 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. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. *The interested party or another person in his behalf is entitled to seek these remedies.*” (Emphasis added).

⁹ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-American Commission on Human Rights (IACHR), 13 March 2008, Principle V paragraph 5 – “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...” (Emphasis added).

¹⁰ Ibid. Principle VII paragraph 1 – “Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. *This right may be exercised by third parties or organizations*, in accordance with the law.” (Emphasis added).

¹¹ Inter-American Commission on Human Rights (IACHR), Report on the Human Rights of Persons Deprived of Liberty in the Americas, 31 December 2011, OEA/Ser.L/V/II. Doc. 64, paragraph 248.

¹² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights in its 33rd Ordinary Session in May 2003, Principle M(5) “Right to habeas corpus”, paragraph (b). Paragraph

Human Rights Committee under the Covenant, the African Commission has also decided communications brought to it by third parties, alleging arbitrary or otherwise unlawful detention of individuals who are unable to bring the applications themselves or through their own lawyers.¹³

It may also be noted that at the national level, where the writ of habeas corpus originally developed and later informed international provisions such as article 9(4) of the ICCPR, there is also scope for persons other than the detainee and his or her lawyer to bring applications.¹⁴

2. Right to disclosure of basis for detention

The procedures for challenging the lawfulness of detention before a court must include guarantees to ensure that the proceedings are fair and effective in practice. Among other things, the proceedings must respect the right to equality before the courts and the principle of equality of arms,¹⁵ including the requirement that the same procedural rights be provided to all parties, subject only to any distinctions that are based on the law and can be justified on objective reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.¹⁶

One such element is that the person deprived of liberty must as a rule have the opportunity to contest all the arguments and evidence adduced by the authorities to justify the detention.¹⁷ The right of a detainee to challenge detention will be of

(e) of Principle M(5) further prescribes that: "Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures." See also Principle E "Locus Standi", which provides that, "States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination."

¹³ *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), § 1-8.

¹⁴ For discussion of the situation in the USA, UK and Australia, see A. D. R. Zellick, Judith Farbey, R.J. Sharpe, Simon Atrill, *The Law of Habeas Corpus*. Oxford University Press (Third Edition), 2011: 237; *Whitmore v. Arkansas*, 495 U.S. 149 (1990), § 162; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591, § 211; *R v Cassel* [1916] 1 KB 595 at 609, 613.

¹⁵ Human Rights Committee, General Comment No. 32, paras 7, 8 and 13; Concluding Observations on: Tajikistan, UN Doc CCPR/CO/84/TJK (2005), para 12; Bosnia and Herzegovina, UN Doc CCPR/C/BIH/CO/1 (2006), para 17; United Kingdom, UN Doc CCPR/C/GBR/CO/6 (2008), para 17; India, UN Doc CCPR/C/79/Add.81 (1997), para 24. European Court of Human Rights, *Mamedova v Russia*, App No 7064/05 (1 July 2006), para 89; *Garcia Alva v. Germany*, App No 23541/94 (13 February 2001), para 39; (Grand Chamber), *A and Others v the United Kingdom*, App No 3455/05 (19 February 2009), paras 203-224; (Grand Chamber), *Mooren v Germany*, App No 11364/03 (9 July 2009), paras 121-125.

¹⁶ Human Rights Committee, General Comment No 32, para 13, citing *Dudko v. Australia*, UN Doc CCPR/C/90/D/1347/2005 (23 July 2007), para 7(4)

¹⁷ 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. See also Human Rights Committee, 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

little practical meaning, and persons deprived of liberty are unlikely to have confidence in the fairness or effectiveness of the proceedings, if the basis for the detention is not disclosed to the detainee and his or her legal counsel.

One aspect of the right of a person deprived of liberty to disclosure of information is already reflected in, for instance, article 9(2) of the ICCPR, which requires that persons be informed of the reasons for arrest or detention, and that persons arrested for the alleged commission of a criminal offence be promptly informed of any charges.

However, disclosure of information is also essential more generally for the effectiveness of judicial oversight over any form of detention. *Any* form of deprivation of liberty on *any* ground must be subject to effective oversight and control by the judiciary, including through the effective consideration of applications to court to challenge the lawfulness of deprivation of liberty.¹⁸ Clearly the ability of the judge to evaluate the detention will be fundamentally compromised if relevant information is withheld by the executive from the judge. Even where information is disclosed to the judge but withheld from the detainee and his or her lawyer, the judge will be deprived of the benefit of possible explanations the detainee and his or her lawyer could provide, as well as being unaware of potential challenges to the reliability of the information that might depend on knowledge of the detainee or his or her lawyer and that would not necessarily be apparent to the judge. By definition, neither the judge nor any other person can be confident that no such explanations or challenges to reliability of government information exist or are likely to exist, if the detainee and his or her lawyer of choice are deprived of access to the information.¹⁹

For this reason, it has been recognised that the right to challenge lawfulness of detention, under for instance article 9(4) of the ICCPR and article 5(4) of the European Convention on Human Rights, implies a right of the detainee and the detainee's lawyer to have access to the evidence that the government seeks to rely on to justify the detention, as well as other relevant information in the government's possession.²⁰

Further points regarding disclosure of information relating to the reasons for deprivation of a person's liberty include the following:

Äärelä and Näkkäläjärvi v Finland, UN Doc CCPR/C/73/D/779/1997 (24 October 2001), para 7(4)

¹⁸ ICCPR article 9(4); the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 4 and 11(1). See also sources cited in answer to question 5, below.

¹⁹ See Amnesty International, *United Kingdom: Left in the dark: The use of secret evidence in the United Kingdom*, EUR 45/014/2012 (15 October 2012), pp 11-12 and sources cited in footnotes 23 and 24 therein.

²⁰ See for example: Human Rights Committee, Concluding Observations on the United Kingdom, UN Doc CCPR/C/GBR/CO/6 (30 July 2008), para 17; Committee against Torture, Concluding Observations on Australia, UN Doc CAT/C/AUS/CO/3 (22 May 2008), para 10; European Court of Human Rights, *Korneykova v. Ukraine*, no 39884/05 (19 January 2012), para 68: "The proceedings must be adversarial and must always ensure equality of arms between the parties. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client's detention." See also *A and others v United Kingdom* (Grand Chamber), no 3455/05 (19 February 2009), paras 200-224.

1. The right to disclosure of information applies equally to criminal and non-criminal proceedings, as a fundamental aspect of the principle of equality of arms.²¹
2. By analogy with the right to disclosure of information in the preparation of a person's case,²² the State has an obligation to disclose any material in its possession, or to which it may gain access, relating to the reasons for a person's arrest or detention. 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, e.g. in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.²³
3. In principle, some restrictions on disclosure of information may be justified, at least as regards non-disclosure of information that the government does not intend to rely on in the proceedings. However, a restriction can be acceptable if at all, only when where the court hearing the challenge to detention concludes, based on specific evidence, that all of the following requirements are satisfied:
 - a. The proposed restriction is necessary to pursue a legitimate aim such as: (a) protecting national security;²⁴ (b) preserving the fundamental rights of another individual, such as the protection of witnesses who are at risk of reprisals;²⁵ or (c) safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.²⁶
 - b. The proposed restriction is proportionate.²⁷ 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

²¹ See, for example European Court of Human Rights: *Krcmar and Others v. Czech Republic* (2000), para. 40; and *Nideröst-Huber v. Switzerland* (1997), para. 24. See further Organisation for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), *Legal Digest of International Fair Trial Rights* (Warsaw, OSCE/ODIHR, 2012), p.123. Working Group on Arbitrary Detention, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law," UN Doc A/HRC/22/44 (24 December 2012), paras 72-74 and 81.

²² ICCPR article 14(1) and 14(3)(b).

²³ Human Rights Committee, 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), para. 33.

²⁴ See, for example: *Mirilashvili v. Russia* (2008) ECHR 1669, para. 202; and *Dowsett v. United Kingdom* (2003) ECHR 314, para. 42. See also Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 38.

²⁵ See, for example: *Doorson v. Netherlands* (1996) ECHR 14, para. 70; and *Kovač v Croatia* (2007) ECHR 597, para. 27.

²⁶ See, for example: *Rowe and Davis v. United Kingdom* (2000) ECHR 91, para. 61; *Lüdi v. Switzerland* (1992) ECHR 50, para. 49; and *Van Mechelen and Others v. Netherlands* (1997) ECHR 22, para. 57.

²⁷ See, for example: *Rowe and Davis v. United Kingdom* (2000) ECHR 91, para. 63; and *Dowsett v. United Kingdom* (2003) ECHR 314, para. 44.

to the case or to pursue a *habeas corpus* petition.²⁸ This means that if a less restrictive measure can achieve the legitimate aim (such as providing redacted summaries of information, for example)²⁹ then that measure should be applied.³⁰

- c. Any difficulties caused to a party in the proceedings will be “sufficiently counterbalanced” by the judicial authorities in a way that ensures that the person is able effectively to respond to the case or to pursue a *habeas corpus* petition.³¹ This might involve, for example, an *ex parte* evaluation by the trial judge of whether all or part of the information may be withheld and whether a redacted summary of the information should be provided.
 - d. If the impacts of the proposed restriction on disclosure cannot be sufficiently counterbalanced by other means, and the authorities still refuse to make the disclosure (and the Court does not have the authority to compel such disclosure), then the Court must order the person released. The Court cannot participate in the arbitrary or otherwise unlawful deprivation of liberty that would result from continuing to detain the person while denying them an effective opportunity to challenge the lawfulness of detention.
4. The application of the above requirements when the government not only seeks to withhold information but also intends to rely on the information in the proceedings to justify the deprivation of liberty, is highly controversial as it means that the individual faces the possibility of detention or imprisonment on the basis of secret evidence.
 5. Seeking to satisfy the “counter-balancing” requirement, a few countries have implemented systems of “special advocates” (a pool of legal counsel who are pre-approved by the executive government to view security-classified information), including to allow the government to rely on secret evidence in seeking to justify deprivations of liberty. The ‘special advocates’ are allowed to see information that the individual and his or her lawyer of choice are not permitted to see, and to make arguments about that evidence in hearings from which the individual and his or her lawyer

²⁸ See, for example: *Doorson v. Netherlands* (1996) ECHR 14, para. 70; and *Rowe and Davis v. United Kingdom* (2000) ECHR 91, para. 61.

²⁹ The question of summaries of information redacted for security reasons has been considered by the Human Rights Committee in a case concerning the reasonableness of a security certificate issued against the author (a certificate issued by the executive branch that the author was deemed to pose a threat to national security). The Committee noted that the court had taken steps to ensure that the applicant was aware of, and was able to respond to, the case made against him and that he was also able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved and the safeguards introduced by way of providing the person with a redacted summary of the information, the Committee was persuaded that this process was fair to the applicant and thus found no violation of Article 14 of the ICCPR. See *Ahani v. Canada*, Human Rights Committee Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), para. 10(4).

³⁰ See, for example: *Van Mechelen and Others v. Netherlands* (1997) ECHR 22, para. 58; and *Rowe and Davis v. United Kingdom* (2000) ECHR 91, para. 61.

³¹ See, for example: *Doorson v. Netherlands* (1996) ECHR 14, para. 72; *Van Mechelen and Others v. Netherlands* (1997) ECHR 22, para. 54; *Edwards v. United Kingdom* (1992) ECHR 77, para. 36; and *Rowe and Davis v. United Kingdom* (2000) ECHR 91, paras. 61 and 64-65.

are excluded. However, this unusual practice remains highly controversial. The High Commissioner for Human Rights has emphasised the problematic nature of limitations on the ability of special advocates to fully discharge their functions and act as a sufficient counterbalance to non-disclosure of information, particularly when these advocates are not able to communicate with non-security cleared persons after the disclosure of evidence (including to receive relevant instructions from the detainee or the detainee's lawyer of choice).³² Indeed, Special Advocates, for instance in the United Kingdom, themselves have concluded that such circumstances, under which they have operated, "are inherently unfair; they do not 'work effectively', nor do they deliver real procedural fairness."³³

3. Right physically to appear before the court

The detained person must have a right to be physically present before the Court during the challenge proceedings. This is important to ensure the effectiveness and fairness of the proceedings, as well as to reinforce the protection of the detainee from violations such as torture or other ill-treatment.³⁴

4. The Obligation to Provide Compensation

The right of victims of unlawful arrest or detention to prompt and adequate compensation is explicitly affirmed by global and regional human rights treaties: article 9(5) of the International Covenant on Civil and Political Rights ("ICCPR"), article 5(5) of the European Convention on Human Rights (ECHR), and article 14(7) of the Arab Charter, (as well as Article 16(9) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and Article 85(1) of the Rome Statute of the International Criminal Court). The two regional treaties that do not explicitly address this right – the American Convention on Human Rights and the African Charter of Human and Peoples' Rights – have been interpreted by the Inter-American Court and the African Commission respectively to include a right to compensation for unlawful

³² Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 36.

³³ See Special Advocates submission to the Justice and Security Green Paper consultation conducted by the UK government, January 2012, paragraph 15, http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf.

³⁴ On the requirement to bring the person before the Court as an aspect of the right to challenge the lawfulness of detention, see among others: UN Body of Principles, Principle 33(2). Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) (1987), Advisory Opinion OC-8/87, Series A, No. 8, para 35; *Chaparro Álvarez and Lapo Íñiguez v Ecuador* Series C No 170 (21 November 2007), paras 129-130. European Court of Human Rights, *Singh v the United Kingdom*, App No 23389/94 (21 February 1996), para 67; *Klamecki v Poland (no 2)*, App No 31583/96 (3 April 2003), paras 128-131; *Lebedev v Russia*, App No 4493/04 (25 October 2007) para 113; see also the draft revised Human Rights Committee General Comment on article 9 of the ICCPR, UN Doc CCPR/C/GC/R.35/Rev.2 (27 November 2013), para 43bis. On its role in protecting against torture, see UN General Assembly, Resolution 67/161 (20 December 2012), para 22; Human Rights Council, Resolution 13/19 (2010), para 5; Committee against Torture, General Comment No 2, UN Doc CAT/C/GC/2 (2008), para 13.

or otherwise arbitrary detention.³⁵ The consistency across the global and regional treaty systems in itself suggests that the explicit treaty provisions and jurisprudence in fact reflect an underlying rule of general international law.

As the Working Group has already held, the prohibition of arbitrary detention is a part of customary international law. It is a long-standing principle of international law that wherever there is a legal right, there must also be a legal remedy where that right is violated. As the Permanent Court of International Justice stated in the *Chorzów Factory case* in 1928:

It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation ... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.³⁶

This already-existing principle of effective reparation and remedy under customary international law was translated to the context of duties of a state to make effective reparation to an individual in the Universal Declaration of Human Rights, article 8 of which states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."³⁷

The General Assembly has also reaffirmed a right to effective remedy and reparation, including compensation, as a rule of general application beyond the terms of specific treaties. The UN Basic Principles on the Right to a Remedy and Reparation, for instance, reaffirm that compensation should be provided for economically assessable damage resulting from gross violations of international human rights law and serious violations of international humanitarian law, including: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.³⁸ The study which formed the original foundation for the UN Basic Principles noted that "while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: ... arbitrary and prolonged detention..."³⁹ The Vienna Declaration and Programme of Action also includes "arbitrary detentions" in an illustrative list of "gross and systematic violations".⁴⁰

³⁵ *Loayza Tamayo v. Peru* Inter-American Court of Human Rights, Reparations, (1998), para 129; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Principles"), 2001, DOC/OS(XXX)247, Principle M(1)(h)), *Embga Mekongo Louis v. Cameroon*, Communication 59/91, decided 22 March 1995 at the 17th Ordinary Session.

³⁶ Permanent Court of International Justice, *Factory at Chorzów (Merits)*, *Germany v Poland* 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) at p 29.

³⁷ G.A. res. 217A (III), U.N. Doc A/810 (1948).

³⁸ 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 ("UN Basic Principles on Remedy and Reparation"), adopted and proclaimed by General Assembly in resolution 60/147 of 16 December 2005, Principle 20.

³⁹ "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,

The Inter-American Commission on Human Rights is an example of a body mandated under the OAS to make findings concerning the American Declaration of the Rights and Duties of Man, including in relation to states that are not party to the American Convention on Human Rights. The Inter-American Commission has issued findings requiring compensation for violations of human rights such as arbitrary deprivation of life, despite the absence of any explicit provision in the Declaration for such compensation.⁴¹

It may be noted that the Working Group itself has in its opinions on individual communications, concluded that customary international law includes provision for compensation for arbitrary or otherwise unlawful detention.⁴²

5. Right to challenge in different contexts (migrants, psychiatric etc.)

The right to challenge the lawfulness of a deprivation of liberty applies to anyone deprived of liberty on any grounds and in any context.⁴³

6. The right to challenge detention and military courts

The right to challenge detention before a court primarily contemplates recourse to the ordinary civilian courts. If a state chooses to provide military courts with some role in proceedings for challenging deprivation of liberty, it must not displace the existing role of the ordinary civilian courts, and the military courts' role should be strictly limited to proceedings against members of the military forces charged with breaches of internal rules of military discipline.

Anyone deprived of liberty on any grounds and in any context must have access to an independent, impartial and competent court of law for the purposes of challenging the lawfulness of detention. It is not sufficient that some other type of authority, be it judicial, quasi-judicial, or administrative, can review the detention and compel release. The court must satisfy essential requirements of

Final report submitted by Mr. Theo van Boven, Special Rapporteur", UN Doc E/CN.4/Sub.2/1993/8 (2 July 1993), paras 13 and 137(1).

⁴⁰ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 30.

⁴¹ See for example, Case 11.436, *Victims of the tugboat "13 de Marzo" vs. Cuba*, report no. 47/96, October 16, 1996 at paras 77 and 110.

⁴² See for example, Opinion 15/2011, China (re : Liu Xiaobo), adopted 5 May 2011, UN Doc A/HRC/WGAD/2011/15 (27 February 2011), para 27.

⁴³ See, for example, Human Rights Committee, General Comment No 8, Article 9 (Right to liberty and security of persons), UN Doc A/37/40 paras 95-96 (30 June 1982), para 1. Citing the General Comment, the International Court of Justice in *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* ICJ Reports 2010 (30 November 2010) affirmed that ICCPR article 9(1) and (2) and article 6 of the African Charter "apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued"(para 77) – while article 9(4) was not at issue in the case, it clearly follows from the Court's reasoning that 9(4) must have a similarly broad scope of application. See also Inter-American Principles, Definition of "Deprivation of Liberty" and Principle V, fifth paragraph. (See also the draft revised Human Rights Committee General Comment on article 9 of the ICCPR, UN Doc CCPR/C/GC/R.35/Rev.2 (27 November 2013), para 42).

competence, impartiality, independence, and its processes must include and respect fundamental procedural safeguards.⁴⁴

The right to effective judicial oversight over any form of detention under article 9(3) and (4) of the ICCPR must be read together with article 14(1) of the ICCPR, which guarantees that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This requirement applies to criminal and non-criminal proceedings alike. The Human Rights Committee describes the notion of a 'tribunal' as "a body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".⁴⁵

The following key issues concern recourse to military courts and tribunals and are relevant to the question of their potential use to determine the legality of detention:

1. Although the ICCPR does not explicitly prohibit the establishment or use of military courts and tribunals (or special courts or tribunals constituted outside the ordinary court system for particular purposes), the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have reaffirmed that human rights standards apply fully to any cases that are disposed of by military or other special courts.⁴⁶
2. Whatever their institutional arrangements, military and special courts must fully adhere with the requirements of independence and impartiality, and fair trial rights must be guaranteed.⁴⁷ Military tribunals that are

⁴⁴ See for instance, Human Rights Committee, *Vuolanne v Finland*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), paras 7.2 and 9.6. European Court of Human Rights (Grand Chamber), *D.N. v Switzerland*, App No 27154/95 (29 March 2001), para 42. Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Series C No 170 (21 November 2007), paras 128-130. African Commission on Human and Peoples' Rights, *Constitutional Rights Project v Nigeria*, No 153/96, 13th Activity Report (15 November 1999) paras 15-18. See also Human Rights Committee, 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; and African Principles, Principles A(4) and A(5).

⁴⁵ Human Rights Committee, 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), para. 18.

⁴⁶ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc A/68/285 (2013), para. 16. See also General Comment No. 32, para. 22; and *Akwanga v. Cameroon*, Human Rights Committee Communication No. 1813/2008, UN Doc CCPR/C/101/D/1813/2008 (2011), para. 7.5.

⁴⁷ The Special Rapporteur on the independence of judges and lawyers has therefore recommended that: "The independence of military tribunals must be legally guaranteed at the highest possible level" – see Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), para. 93. A key challenge to the independence of military courts concerns the selection of members of military courts or commissions who fall within the same chain of command. This interference with independence can be both subjective (as potentially influencing individual members of military courts or commissions) and/or objective (as impacting on their outward appearance of impartiality). The Special Rapporteur on human rights while countering terrorism has concluded that, despite any advice to the contrary, more junior members of a military commission may therefore be directly or indirectly influenced in their consideration of the facts: see Report of the Special Rapporteur on the promotion and

attached to the executive branch rather than forming a part of the ordinary judiciary heighten concerns about lack of independence and impartiality.⁴⁸

3. Military courts that do not use the duly established procedures of the legal process must not be created (or given jurisdiction) to displace the jurisdiction of the ordinary civilian courts.⁴⁹
4. Where recourse to military courts is provided for under national law, such courts should have jurisdiction only over military personnel accused of military offences or breaches of military discipline.⁵⁰ A number of instruments and the jurisprudence of international and regional mechanisms demonstrate a trend against extending the criminal jurisdiction of military tribunals over civilians.⁵¹ For instance:
 - a. The UN draft *Principles Governing the Administration of Justice through Military Tribunals* state: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State

protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.3), para. 24.

⁴⁸ The UN Basic Principles on the Independence of the Judiciary state in Principle 5 that: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures". They also stipulate that: "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".

⁴⁹ See Principle 5 of the UN Basic Principles on the Independence of the Judiciary (reproduced in previous footnote), and Principle A(4)(e) of the African Principles, which states: "Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies".

⁵⁰ The draft Principles Governing the Administration of Justice through Military Tribunals, elaborated by a former Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights in consultation with human rights experts, jurists and military personnel from throughout the world, drawing on Principle 5 of the Basic Principles on the Independence of the Judiciary, state that: "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": see Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux (E/CN.4/2006/58), Principle 5. See also *Kholodova v. Russian Federation*, Human Rights Committee Communication No. 1548/2007, UN Doc CCPR/C/106/D/1548/2007 (2012), para. 10.5; Human Rights Committee, *Concluding Observations: Third periodic report of Peru*, UN Doc CCPR/C/79/Add.67 (1996), para. 12; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), para. 100; and *An updated framework draft of principles and guidelines concerning human rights and terrorism*, UN Doc A/HRC/Sub.1/58/30 (2006), para. 46. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(a).

⁵¹ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), paras 47-50. Despite this, the mandate of the Special Rapporteur on the independence of judges and lawyers, amongst other Special Procedures of the UN Human Rights Council, has noted the "regrettably common practice" of using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism: see Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), para. 46 (see also Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (E/CN.4/2004/60), para. 60). This is equally applicable in the context of military hearings concerning the legality of a person's deprivation of liberty.

shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts";⁵²

- b. The African Commission *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under the heading "Right of Civilians not to be tried by Military Courts", state: "Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts."⁵³
5. In a report focussed on military tribunals, the Special Rapporteur on the independence of judges and lawyers concluded that the trial of civilians by military tribunals should be prohibited, save in strictly exceptional cases concerning civilians assimilated to the military⁵⁴ who have allegedly perpetrated a criminal offence outside the territory of the State and where regular courts are unable to undertake the trial.⁵⁵
 6. Although the ICCPR does not expressly address the issue, the Human Rights Committee has underscored that the use of military courts to try civilians would be inconsistent with the ICCPR, unless the state could demonstrate in relation to a given individual and situation that recourse to military courts was "unavoidable" – that in the particular circumstances the regular civilian courts were wholly unable to undertake the trials and no other alternative forms of special or high-security civilian courts could do so.⁵⁶ The ICJ is not aware of any situation where the Human Rights

⁵² See footnote 50 above.

⁵³ Principles and guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(c).

⁵⁴ In referring to civilians 'assimilated to the military', the Special Rapporteur refers in para. 31 of her report to the assimilation of civilians: "by virtue of their function and/or geographical presence or the nature of the alleged offence. These may include civilians who are employed by the armed forces or are stationed at or in proximity of a military installation, persons who have committed crimes that are treated as military offences and persons who have committed crimes in complicity with military personnel." See Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), para. 31.

⁵⁵ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), paras. 46-56, 101-102. See also: Human Rights Committee, 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), para. 22; and Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 28. The Special Rapporteur has clarified that: "The burden of proving the existence of such exceptional circumstances rests with the State. Such reasons must be substantiated in each specific case, since it is not sufficient for national legislation to allocate certain categories of offence to military tribunals in *abstracto*. Such cases should be expressly provided for by the law": see Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (UN Doc A/68/285 (2013)), para. 103.

⁵⁶ General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para 22. *Madani v. Algeria*, Human Rights Committee Communication No. 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007), para. 8.7. See also: *Benhadj v. Algeria*, Human Rights Committee Communication No. 1173/2003, UN Doc CCPR/C/90/D/1173/2003 (2007), para. 8.8; and *Akwanga v. Cameroon*, Human Rights Committee Communication No. 1813/2008, UN Doc CCPR/C/101/D/1813/2008 (2011), para. 7.5. The High Commissioner for Human Rights has further stressed that: "Where the regular criminal justice system is considered to be inadequate to meet the challenges of trying terrorist cases, efforts should be made to

Committee found the requirements that it said might hypothetically allow for such an exception, to have been satisfied in practice.

7. Non-derogability / peremptory norm

The Working Group has already concluded in Deliberation no 9 that, "The prohibition of arbitrary deprivation of liberty and 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, known in some jurisdictions as habeas corpus, are non-derogable under both treaty law and customary international law."⁵⁷

Non-derogability of the right to challenge detention before a court under treaties, both where it is explicitly provided and where the relevant treaty has been interpreted by competent bodies to the same effect, is suggestive that the right to challenge constitutes a peremptory norm of general international law.⁵⁸ Further, the specific legal reasoning that the Human Rights Committee and Inter-American Court followed to find the right to challenge to be non-derogable under their particular treaties – that judicial procedures that are inherent to the protection of non-derogable rights (for instance, the prohibition of torture and other ill-treatment) must themselves be non-derogable – may apply by analogy to the question of peremptory norm status under customary international law.

The Human Rights Committee, for instance, reasoned as follows:

It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. ...

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. ... 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.⁵⁹

strengthen these rather than to establish special courts": see Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 46.

⁵⁷ Deliberation no 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/22/44 (2012), para 47.

⁵⁸ See e.g. Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add. 11(2001), para 16. Articles 4(2) and 14(6) of the Arab Charter on Human Rights. Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (1987), Advisory Opinion OC-8/87 of 30 January 1987, paras 13, 42-44.

⁵⁹ General Comment no 29, paras 15 and 16. See similarly paras 35 and 36 of Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (1987), Advisory Opinion OC-8/87 of 30 January 1987.

The prohibition of torture and other cruel, inhuman or degrading treatment, and, as the Working Group has already recognised, the prohibition of arbitrary detention, are peremptory norms of customary international law.⁶⁰ The right to challenge detention before a court is a judicial procedural guarantee that is inherent in these two *jus cogens* prohibitions.

⁶⁰ Deliberation no 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/22/44 (2012), para 75. See also Human Rights Committee, General Comment no. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 11; Restatement (Third) of Foreign Relations Law of the United States § 702 comment n (1986); L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status (Helsinki, 1988), pp. 425 ff., T. Meron, "On a Hierarchy of International Human Rights", 80 (1986) AJIL 1.