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**HUMAN RIGHTS IN
THE ADMINISTRATION OF JUSTICE:
A Manual on Human Rights
for Judges, Prosecutors and Lawyers**

**Addendum
Major recent developments (2003-07)**



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NOTE

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HR/P/PT/9/Add.2

Chapter 1: *International Human Rights Law and the Role of the Legal Professions*

2.4 The sources of law (p. 6): The Council of Europe had 47 member States by the end of 2007. For more information about the Council of Europe, see <http://www.coe.int>.

2.5 International human rights law and international humanitarian law: common concerns and basic differences (p. 12): Israel has argued that human rights standards do not apply with respect to the treatment of Palestinians in the occupied Palestinian territories, reasoning that such standards do not apply beyond the territory of the State, and that the situation of armed hostilities in the occupied Palestinian territories makes international humanitarian law and not human rights law applicable. This argument has been rejected by the United Nations Human Rights Committee (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. I, para. 85 (11)), the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/1/Add. 90, para. 15) and the International Court of Justice (*advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (I.C.J. Reports 2004)*).

2.6 Reservations and interpretative declarations to international human rights treaties (p. 13): The United Nations compilation of general comments is updated regularly. The 2006 edition, *Compilation of general comments and general recommendations adopted by human rights treaty bodies (HRI/GEN/1/Rev.8 and Add.1)*, is available at <http://www.ods.un.org>.

Chapter 2: The Major Universal Human Rights Instruments and the Mechanisms for their Implementation

2.1.1 The undertakings of the States parties (p. 32): The Human Rights Committee has made it clear, in response to claims by Israel that the Covenant did not apply in the occupied Palestinian territories, that Israel remains responsible for the actions of its authorities and agents within occupied territories, even if it does not have complete jurisdiction or control there (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. I, para. 85 (11)).

The Committee issued general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant to replace general comment No. 3 (1981). The new comment clarifies and elaborates on States' obligations through their domestic legal systems (HRI/GEN/1/Rev.8, pp. 233–238). In particular, this new general comment provides that the obligations of the Covenant are binding on States parties as a whole, so that the executive branch (which usually represents the country internationally) cannot relieve the State party from responsibility for a breach of the Covenant by pointing out that the breach was caused by another branch of government. It also points out that reservations to article 2 are incompatible with the Covenant and that the positive obligation on parties to ensure Covenant rights applies to protection against violations by both agents of the Government and private individuals or entities.

The fact that the competence of the Human Rights Committee to receive and consider communications is restricted to complaints from individuals does not prevent those individuals from claiming that actions or omissions that concern legal persons of similar entities amount to a violation of their own rights. Covenant rights apply to all persons within a State's territory and to all persons subject to its jurisdiction. This means that the rights apply to persons who may not be within the State's territory but who are within the power or effective control of the State party, regardless of the circumstances in which the power or effective control was obtained. This includes, but is not limited to, the actions of armed forces, as the rights in the Covenant are complementary to any other rights or obligations under international humanitarian law.

In addition, the obligation to provide the Covenant rights to all persons within a State's territory means that a party must not extradite, deport or expel someone if there are substantial grounds for believing that there is a real risk of irreparable harm to the person in the country to which he or she is to be removed. The requirement under article 2 to take steps to give effect to the Covenant is unqualified and immediate in effect. A failure to do so cannot be justified by political, social, cultural or economic considerations within the State. Reparations for breach must be provided and may need to be more than victim-specific in order to avoid a recurrence of the breach.

2.1.3 Permissible limitations on the exercise of rights (p. 35): The Human Rights Committee stated in general comment No. 31 that “the legal obligation

under article 2, paragraph 1, is both negative and positive in nature. States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.” (HRI/GEN/1/Rev.8, pp. 233–238, para. 6.)

2.2.3 Permissible limitations on rights (p. 41): The obligations under the Covenant will apply even in cases where control is not unfettered. The Committee on Economic, Social and Cultural Rights has rejected an argument by Israel that the provisions of the Covenant do not apply to the actions of its agents in the occupied Palestinian territories where there are hostilities (E/C.12/1/Add.90, para. 15).

2.3 The Convention on the Rights of the Child, 1989, and its two Optional Protocols, 2000 (p. 43): At the end of 2007, there were 193 States parties to the Convention on the Rights of the Child. Its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography had 124 ratifications. Its Optional Protocol on the Involvement of Children in Armed Conflict had 119 ratifications. For more information about the Convention and its Optional Protocols, see the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR): <http://www.ohchr.org>.

2.3.2 The rights recognized (p. 45): The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance took place in Durban, South Africa, in 2001. For more information, see <http://www.un.org/WCAR/>. The Committee on the Rights of the Child, in its general comment No. 1 (2001) on the aims of education, clarified that a child’s education should be child-friendly, child-centred and empowering. The Committee recognized that the implementation of a comprehensive plan of action to meet the important goals of article 29 would require substantial human and financial resources, and urged all parties to interpret the goals of education as central to other issues and allocate resources accordingly (HRI/GEN/1/Rev.8, pp. 349–356).

2.4.3 International crimes: recent legal developments (p. 50): By the end of 2007, the Rome Statute of the International Criminal Court had been ratified or acceded to by 105 States, including 29 from Africa, 13 from Asia, 16 from Eastern Europe, 22 from Latin America and the Caribbean, and 25 from Western Europe and other States. The Court was inaugurated on 11 March 2003 and has its seat in The Hague, Netherlands. Further information about the International Criminal Court is available on its website: <http://www.icc-cpi.int>. For an analysis of its proceedings and its work in specific countries, see “ICC Monitoring and Outreach Programme” at <http://www.ibanet.org>.

2.6.3 The implementation mechanism (p. 56): The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 2002 and entered into force in 2006 (General Assembly resolution 57/199). It establishes a system of regular visits by independent international and national bodies. Article 4 states that “each State Party shall allow visits... to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence... These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.” Article 30 does not allow reservations, thus sending a strong message against unlawful detention. The Protocol also creates the Subcommittee on Prevention. Information about the Optional Protocol and its ratifications is available at <http://www.ohchr.org>.

2.7 The Convention on the Elimination of All Forms of Discrimination against Women, 1979, and its Protocol, 1999 (p. 58): By the end of 2007, the number of States parties to the Convention on the Elimination of All Forms of Discrimination against Women had reached 185 and 89 States had ratified its Optional Protocol. Further information about the Convention and its Optional Protocol is available on the United Nations Division for the Advancement of Women’s website, at <http://www.un.org/womenwatch/daw/cedaw>, and on the OHCHR website: <http://www.ohchr.org>.

3. Other instruments adopted by the United Nations General Assembly (p. 61): The 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 were adopted by the General Assembly on 16 December 2005 (resolution 60/147). They are discussed in more detail in the addendum notes to chapter 15.

5. United Nations extra-conventional mechanisms for human rights monitoring (p. 67): The Human Rights Council replaced the Commission on Human Rights, which was formally abolished in June 2006. The General Assembly voted overwhelmingly to replace the Commission in response to criticism over double standards and politicization in the Commission. The Council is composed of 47 States and meets at least three times a year. The Council places special emphasis, with regard to the election of its members, on “the contribution of candidates to the promotion and protection of human rights...” The General Assembly may “suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights” (General Assembly resolution 60/251, para. 8). The web page for the Human Rights Council can be found on the OHCHR website: <http://www.ohchr.org>.

Chapter 3: The Major Regional Human Rights Instruments and the Mechanisms for their Implementation

2.1 The African Charter on Human and Peoples' Rights, 1981 (p. 72): In January 2004 the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force. At a summit in June 2004, the Assembly of Heads of State and Government of the African Union decided to merge the African Court on Human and Peoples' Rights with the African Court of Justice of the African Union. In 2005 the African Commission urged member States to ratify or accede to the Protocol and make the Court operational. (Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, ACHPR/Res.76 (XXXVII) 05.) By the end of 2005 the African Union had agreed to begin operationalization of the Court, pending a merger with the African Court of Justice. The African Union appointed judges to the Court in January 2006 and the Court met for the first time in July 2006.

(p. 72): The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa entered into force in 2005. Details about the Protocol are available on the African Union's website: <http://www.africa-union.org>.

(p. 72): The African Commission on Human and Peoples' Rights adopted the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (ACHPR/Res.61 (XXXII) 02). Also known as the Robben Island Guidelines, they are designed to prevent torture on the African continent by assisting States "to meet their national, regional and international obligations for the effective enforcement and implementation of the universally recognized prohibition of torture." (The Robben Island Guidelines are available on the website of the Association for the Prevention of Torture, Africa Programme: <http://www.apt.ch>.) Also at its thirty-second session, the Commission adopted the Declaration of Principles on Freedom of Expression in Africa (ACHPR/Res.62 (XXXII) 02), which declares this freedom to be indispensable for democracy, and recommends that there be a diverse, independent private broadcasting sector and emphasizes the obligation of States to take effective measures to ensure that victims of a breach of this right have effective remedies. (See also Sixteenth Activity Report of the African Commission on Human and Peoples' Rights 2002–2003.)

2.1.6 The implementation mechanism

Communications from sources other than those of States parties (p. 76): The African Commission on Human and Peoples' Rights does accept individual communications, provided local remedies have been exhausted. For example, in 2005, in response to a communication from the organization Lawyers for Human Rights in Swaziland, it held that royal decrees in Swaziland which banned political parties and ousted the jurisdiction of the courts in several matters were a breach of the African Charter (Eighteenth Activity Report of the African Commission on

Human and Peoples' Rights, annex III, communication No. 251/2002, *Lawyers for Human Rights/Swaziland*).

3.1 The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990 (p. 80): The American Convention now has 25 States Parties. The Protocol of San Salvador now has 14 ratifications.

There is also a Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. A convention against all forms of racial discrimination is being drafted.

3.1.4 Permissible derogations from legal obligations (p. 86): Article 27 has been interpreted quite narrowly by both the Commission and the Court. See *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, Series C, No. 52; *Loayza Tamayo v. Peru*, Judgement of 17 September 1997, Series C, No. 33.

3.1.5 The implementation mechanism (p. 87): Note that the Commission is not restricted to hearing individual petitions only in relation to countries that have ratified the Convention; it can also hear individual petitions relating to violations in countries that have not ratified it but are a part of the OAS system. In this case the Commission can apply the American Declaration.

3.3 The Inter-American Convention on Forced Disappearance of Persons, 1994 (p. 91): By the end of 2007, 13 States had ratified the Inter-American Convention on Forced Disappearance of Persons. See the website of the Organization of American States: <http://www.oas.org>.

4.1 The European Convention on Human Rights, 1950, and its Protocols Nos. 1, 4, 6 and 7 (p. 95): In April 2005, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 177) entered into force. By the end of 2007, it had been ratified by 15 member States. Protocol No. 12 extends the limited protection against discrimination provided by article 14 of the Convention, which prohibits discrimination only in the enjoyment of one of the other rights guaranteed by the Convention. The new Protocol guarantees that no one shall be discriminated against on any ground by any public authority. By the end of 2007, 46 member States had ratified Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (ETS 194), which inter alia makes changes to the admissibility criteria and introduces a new mechanism for the enforcement of judgements by the Committee of Ministers. The Protocol will enter into force once it has been ratified by all 47 Council of Europe member States. Information about European treaties is available on the Council of Europe's website, at <http://conventions.coe.int>.

The Group of Wise Persons was established in May 2005 at the Third Council of Europe Summit in Warsaw. The Group's task is to draw up a comprehensive strategy to secure the long-term effectiveness of the European Convention of Human Rights and its control mechanism. The Group presented its report to the Committee of Ministers in January 2007. In December 2005, the British judge

Lord Woolf published his Review of the Working Methods of the European Court of Human Rights, which considers what steps should be taken to deal with the Court's enormous and ever-growing caseload. The Review is available at <http://www.echr.coe.int>.

4.2.5 The implementation mechanism (p. 104): By the end of 2007, 22 Council of Europe member States had ratified the 1991 Protocol amending the European Social Charter (ETS 142), leaving it short of the number required to enter into force. The Protocol improves the control machinery of the Charter and will enter into force when it has been ratified by all 47 member States. Information about European treaties is available on the Council of Europe's website, at <http://conventions.coe.int>.

4.3 The European Social Charter (revised), 1996 (p. 106): By the end of 2007, 24 Council of Europe member States had ratified the European Social Charter (revised) (ETS 163). It includes the recognition of a number of new social and economic rights and provides for additional enforcement mechanisms.

4.4 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 (p. 107): By the end of 2007, all 47 Council of Europe member States had ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS 126).

Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers

4.4.2 Independence as to financial matters (p. 121): For a collection of papers detailing the Arab perspective on the separation of powers and other judicial issues, see the Arab Judicial Forum White Papers at http://www.arabjudicialforum.org/ajf_wp_overview.html.

4.5.1 Appointment (p. 127): The English translation of the case of the Constitutional Court is now also available on the website of the Inter-American Court of Human Rights: <http://www.corteidh.or.cr>.

4.5.6 Freedom of expression and association (p. 133): Professional judicial associations, such as the American Judges Association and the Commonwealth Magistrates' and Judges' Association, are becoming more common manifestations of the notion of freedom of association among judges. See <http://aja.ncsc.dni.us> and <http://www.cmja.org>, respectively.

4.5.8 The right and duty to ensure fair court proceedings and give reasoned decisions (p. 134): In 2003 the African Commission on Human and Peoples' Rights adopted the Directives and Principles on the Right to a Fair Trial and Legal Assistance in Africa. Described as not legally binding per se, the document "will serve as an important normative reference and interpretational aid for the relevant provisions on the right to a fair trial under the ACHPR." (Mashood A. Baderin, "Recent developments in the African regional human rights system", *Human Rights Law Review*, vol. 5, No. 1 (2005), p. 117.) The declaration is available on the website of the African Commission on Human and Peoples' Rights, at <http://www.achpr.org>.

4.6 The notion of impartiality (p. 136): See also the decision of the African Commission in *Lawyers for Human Rights/Swaziland* (communication No. 251/2002), where it was found that entrusting judicial powers, including the power of removal, to the Head of State seriously undermines the independence of the judiciary and potentially abuses the doctrine of the separation of powers.

(p. 138): Impartiality under article 6 applies to judges involved in personal contempt proceedings as well. In the case of *Kyprianou v. Cyprus*, the applicant, a lawyer, was held in contempt for challenging the behaviour of judges at a trial in which he was an advocate. In his contempt hearing, he faced the same judges whose behaviour he had challenged. The Grand Chamber of the European Court of Human Rights found that this raised objectively justified doubts as to the impartiality of the judges. The Court explained that, since the contempt in issue was directly aimed at the judges' behaviour, there was a breach of the principle of impartiality when the same judges heard the contempt matter, on the basis of both the objective and subjective tests. (European Court of Human Rights, *Kyprianou v. Cyprus*, No. 73797/01, Judgement of 15 December 2005.)

Chapter 5: *Human Rights and Arrest, Pretrial Detention and Administrative Detention*

2. Arrests and detention without reasonable cause: a persistent problem (p. 161): The notion of unlawful detention in states of emergency is expanded upon in the Report of the Working Group on Arbitrary Detention (E/CN.4/2004/3).

4.2 The notions of lawfulness and arbitrariness: their meaning (p. 165): The detention of prisoners by the United States of America at Guantánamo Bay, Cuba, has fuelled considerable controversy. It was the subject of a 2006 report to the Commission on Human Rights, Situation of detainees at Guantánamo Bay (E/CN.4/2006/120, available at <http://www.ods.un.org>). In November 2005, the Council of Europe launched an investigation into allegations of the existence in its member States of secret detention centres of the Central Intelligence Agency (CIA) and the inter-State transport of prisoners. Information about its investigation, including its Secretary-General's Report, can be found at <http://www.coe.int/T/E/Com/Files/Events/2006-cia/>.

(p. 166): The Human Rights Committee addressed the notion of proportionality under article 9 (1) in *Anthony Michael Emmanuel Fernando v. Sri Lanka*. The author was sentenced to one year of “rigorous imprisonment” for contempt of court on the grounds of repetitious filing of motions, raising his voice and refusing to apologize to the court. The Committee concluded a fine would have sufficed and held that this “draconian penalty” without adequate explanation violated the prohibition of arbitrary arrest and detention under article 9. (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. II, annex V, sect. Y, communication No. 1189/2003, *Fernando v. Sri Lanka*.)

4.7.3 Deprivation of liberty of asylum-seekers and for purposes of deportation and extradition (p. 179): The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which entered into force in 2003, provides added protection for migrant workers and their families from arbitrary arrest and detention (General Assembly resolution 45/158). Information about the Convention and its ratifications is available on the OHCHR website: <http://www.ohchr.org>.

**Chapter 6: The Right to a Fair Trial:
Part I – From Investigation to Trial**

6.1.1 Wiretapping (p. 226): The European Court of Human Rights also held that the telephone tapping of prison detainees is a violation of article 8 (2). (European Court of Human Rights, *Doerga v. the Netherlands*, No. 50210/99, Judgement of 27 April 2004.)

6.1.2 Searches (p. 227): The Human Rights Committee in *Coronel et al. v. Colombia* has stated that raids on the homes of victims and their families, or in houses where victims are present, by soldiers without search warrants is illegal and in violation of article 17 (1) of the International Covenant on Civil and Political Rights. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. II, annex V, sect. C, communication No. 778/1997, *Coronel et al. v. Colombia*, para. 9.7.)

6.4 The right to legal assistance (p. 237): In a series of more recent cases, the Human Rights Committee has reiterated the principle that the accused must be assisted effectively by a lawyer at all stages of the proceedings and the lawyer must be able to meet privately with his client to prepare his defence. (See, e.g., *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. U, communication No. 964/2001, *Saidov v. Tajikistan*, para. 6.8., and sect. N, communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3.)

(p. 239): The Grand Chamber of the European Court of Human Rights reemphasized the importance of the right to private counsel in a case involving an applicant who had found it impossible to confer with his lawyers out of the hearing of members of the security forces. The Court held this was a violation of the right to a fair trial under article 6. (European Court of Human Rights, *Öcalan v. Turkey*, No. 46221/99, Judgement of 12 May 2005, para. 133.) Having held in *Ezeh and Connors v. the United Kingdom* that article 6 was applicable to disciplinary proceedings brought against prisoners, the Grand Chamber of the European Court of Human Rights found a violation of the applicants' right to a fair trial because they had been denied the right to legal representation for their hearings before the prison governor. (European Court of Human Rights, *Ezeh and Connors v. the United Kingdom*, Nos. 39665/98 and 40086/98, Judgement of 9 October 2003.)

(p. 239): The Inter-American Commission on Human Rights held that, under article 8 of the American Convention on Human Rights, "every person accused of a criminal offence has the right to defend himself personally or to be assisted by legal counsel of his own choosing" and this right applies at all stages of a defendant's criminal proceedings, from preliminary proceedings to the trial itself. In *Myrie v. Jamaica*, the Commission found that this right was violated when the defendant's attorney left the courtroom for portions of the trial, including when potentially significant evidence against the defendant was presented. (Inter-American Commission on Human Rights, *Myrie v. Jamaica*, Case 12.417, 12 October 2004, paras. 61–65, at <http://www.cidh.org>.)

6.5 The right not to be forced to testify against oneself/The right to remain silent (p. 240): The Human Rights Committee, in *Nallaratnam v. Sri Lanka*, explained that the wording in article 14, paragraph 3 (g), that no one shall “be compelled to testify against himself or confess guilt,” must be understood as “the absence of any direct or indirect physical or psychological coercion” in order to obtain a confession. Furthermore, it is “implicit in this principle that the prosecution prove that the confession was made without duress.” (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. AA, communication No. 1033/2001, *Nallaratnam v. Sri Lanka*, para. 7.4.)

**Chapter 7: The Right to a Fair Trial:
Part II – From Trial to Final Judgement**

3.2.2 The right to equality of arms and adversarial proceedings (p. 258): The Human Rights Committee explained that the term “equality of arms” implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, including access to documents to prepare such arguments. However, the right to adequate preparation of one’s defence does not equate with adequate preparation of an appeal. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. Z, communication No. 1015/2001, *Perterer v. Austria*, para. 10.6.)

(p. 259): In the case of *Domsett v. the United Kingdom*, the European Court of Human Rights held that the entitlement to disclosure of relevant evidence is not an absolute right. “In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused.... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6 §1.” (European Court of Human Rights, *Domsett v. the United Kingdom*, No. 39482/98, Judgement of 24 June 2003, para. 42.) In the case of *Steel and Morris v. the United Kingdom*, the Court found that the denial of legal aid to the applicants in defence of defamation proceedings, which had been brought against them by the fast-food chain McDonald’s, deprived them of the opportunity to present their case effectively before the court and contributed to a unacceptable inequality of arms. (European Court of Human Rights, *Steel and Morris v. the United Kingdom*, No. 68416/01, Judgement of 15 February 2005, para. 72.)

3.4 The right to be tried “without undue delay” or “within a reasonable time” (p. 269): The Human Rights Committee, in *Deisl v. Austria*, found there was not an undue delay in a case involving proceedings that totalled eleven years and eight months, based on all the circumstances involved. The Committee considered “(a) the length of each individual stage of the proceedings; (b) the fact that the suspensive effect of the proceedings vis-à-vis the demolition orders was beneficial, rather than detrimental, to the authors’ legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors,” which outweighed any detrimental effects the protracted proceedings may have caused to the authors. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. CC, communication No. 1060/2002, *Deisl v. Austria*, para. 11.6.)

(p. 269): The Human Rights Committee addressed the impact of applicants' conduct on the reasonableness and length of proceedings in *Smirnova v. Russian Federation*, where the author deliberately evaded the authorities. The Committee found no violation of article 14 (3) (c), despite the proceedings exceeding three years. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. A, communication No. 712/1996, *Smirnova v. Russian Federation*, para. 10.4.)

(p. 269): In *Tibi v. Ecuador*, the Inter-American Court of Human Rights determined that the appraisal of the principle of reasonableness of time should take into account the entire duration of the proceedings. Reasonableness should be determined based on the complexity of the case, the procedural activity of the interested party, and the conduct of the judicial authorities. The Court held that the length of domestic proceedings in the case, which had been continuing for almost nine years, was a violation of article 8 (1) of the Convention. (Inter-American Court of Human Rights, *Tibi v. Ecuador*, Judgement of 7 September 2004, Series C, No. 114, paras. 175–177; see also Sixth Progress Report of the Special Rapporteurship on Migrant Workers and their Families, in Annual Report of the Inter-American Commission on Human Rights 2004 (OEA/ser. L/V/II.122, doc. 5, rev. 1, chap. VI, paras. 77, 87 and 90), at <http://www.cidh.org>.)

3.5.1 The right to effective legal assistance in death penalty cases (p. 274): Note advisory opinion OC-16/99 of the Inter-American Court of Human Rights, which places the right to information on consular assistance in the context of guarantees of the due process of law (1 October 1999, Series A, No. 16).

3.7.1 Prohibition on the use of evidence obtained through unlawful means/treatment (p. 283): The Human Rights Committee held that, under article 14 (3) (g), the author does not have the burden of proving that his confession was made under duress. Rather, it is implicit in the provision that the burden is on the prosecution to prove that the confession was made without duress. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. AA, communication No. 1033/2001, *Nallaratnam v. Sri Lanka*, para. 7.4.)

3.8 The right to call, examine, or have examined, witnesses (p. 288): The European Court considered the special features of criminal proceedings concerning sexual offences in *S.N. v. Sweden*. The Court noted that these proceedings “are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor.” In assessing whether the accused receives a fair trial, “the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.” (European Court of Human Rights, *S.N. v. Sweden*, No. 34209/96, Judgement of 2 July 2002, para. 47.)

3.9 The right to free assistance of an interpreter (p. 291): The Human Rights Committee determined that article 14 (3) (f) provides for the right to an interpreter during the court hearing only. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. AA, communication No. 1033/2001, *Nallaratnam v. Sri Lanka*, para. 7.2.)

3.10 The right to a reasoned judgement (p. 293): Although article 8 (1) of the American Convention does not expressly contain this provision, decisions of the Court and the Commission have made it clear that there should be a reasoned judgement. See, for example, *García Astos and Ramírez Rojas v. Peru*, where the Court deals with the issue by way of article 7 (3) in cases of preventive detention. (Inter-American Court of Human Rights, *García Astos and Ramírez Rojas v. Peru*, Judgement of 25 November 2005, Series C, No. 136, paras. 127–129.)

4.2.1 Corporal punishment (p. 302): In *Pryce v. Jamaica*, the Human Rights Committee considered that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment regardless of the nature and brutality of the crime being punished. The Committee found a sentence of whipping with a tamarind switch to be a violation of article 7. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. B, communication No. 793/1998, *Pryce v. Jamaica*, para. 6.2.)

(p. 302): The Inter-American Court of Human Rights emphasized that States parties to the American Convention are obliged to abstain from imposing, and to prevent the administration of, corporal punishment constituting cruel, inhuman or degrading treatment or punishment. It held in the case of *Caesar v. Trinidad and Tobago* that “corporal punishment by flogging constitutes a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected.” The Court explained that “the very nature of this punishment reflects an institutionalization of violence, which, although permitted by the law, ordered by the State’s judges, and carried out by its prison authorities, is a sanction incompatible with the Convention.” (See Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago*, Judgement of 11 March 2005, Series C, No. 123, para. 73.)

(p. 302): The African Commission held that corporal punishment is a violation of article 5 of the African Charter on Human and Peoples’ Rights. In *Doebbler/Sudan*, eight Sudanese students were sentenced to fines and/or lashes on the grounds that they violated public order because of allegedly improper dress and immoral behaviour. The Commission stated that “there is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.” (Sixteenth Activity Report of the African Commission on Human and Peoples’ Rights 2002–2003, annex VII, communication No. 236/2000, *Curtis Francis Doebbler/Sudan*, para. 42.)

4.2.2 Capital punishment (p. 303): By the end of 2007, the Second Optional Protocol to the International Covenant on Civil and Political Rights had 64 States parties. Information on this treaty and its ratifications is available on the OHCHR website: <http://www.ohchr.org>.

(p. 304): Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances (ETS 187) entered into force in 2003 and, at the end of 2007, had 40 ratifications. Information about this and other European treaties is available through the Council of Europe's website, at <http://www.conventions.coe.int/>.

Chapter 8: *International Legal Standards for the Protection of Persons Deprived of their Liberty*

2.2 Legal responsibilities of States (p. 322): In 2005 the General Assembly adopted the 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. Although they do not create new State obligations, they “identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations.” (General Assembly resolution 60/147, annex, preamble.)

2.3.1 Rape as torture (p. 325): In *Ana, Beatriz and Celia González Pérez v. Mexico*, the Inter-American Commission on Human Rights found allegations pertaining to illegal detention, torture and rape of the petitioners by military personnel were admissible under the facts alleged in the case, and further found that the exception to the requirement of exhaustion of domestic remedies in article 46 (2) of the American Convention was applicable. (Inter-American Commission on Human Rights, *Ana, Beatriz and Celia González Pérez v. Mexico*, Report No. 129/99, case 11.565, in Annual Report of the Inter-American Commission on Human Rights 1999.)

2.3.2 Treatment of detainees and prisoners (p. 237): In 2004, the Human Rights Committee clarified in its general comment No. 31 that States parties have an “obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm” (HRI/GEN/1/Rev.8, pp. 233–238, para. 12).

2.3.3 Corporal punishment (p. 330): In March 2005, the Inter-American Court of Human Rights “condemned, for the first time, judicially sanctioned corporal punishment,” according to an interim report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/60/316, para. 25). The Court had held that “the punishment of flogging with the ‘cat-o’-nine-tails’ is, by its very nature, intention and effects, inconsistent with the standards of humane treatment” under articles 5.1 and 5.2 of the American Convention on Human Rights. (Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago*, Series C, No. 123, Judgement of 11 March 2005, para. 50 (*m*).)

3.1 Official recognition of all places of detention (p. 335): The Committee against Torture held for the first time that detainees may not be moved to a country where they are likely to face torture. In *Agiza v. Sweden*, the complainant alleged he was tortured after being expelled from Sweden to Egypt because of suspected terrorist involvement. The Committee determined that the transfer was a breach of article 3 of the Convention on the grounds that it was “known, or should have been known... that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.” It added that “the procurement of diplomatic assurances [of protection from torture], which,

moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.” (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 44 (A/60/44)*, annex VIII, sect. A, communication No. 233/2003, *Agiza v. Sweden*, para. 13.4.)

4.2 Accommodation (p. 340): In 2003 the Inter-American Commission on Human Rights granted precautionary measures on behalf of patients at Paraguay’s Neuro-psychiatric Hospital, where investigators found, for example, that some teenagers were detained in six-by-six-foot units, naked and without the use of functional bathroom facilities for four years; minors had been detained with adults; and female patients had been raped. The decision marked the first time such emergency relief had been granted involving the conditions of a psychiatric hospital. (Annual Report of the Inter-American Commission on Human Rights 2003 (OEA/Ser.L/V/II.118, Doc. 5 rev. 2, chap. III, para. 60) and Alison A. Hillman, “Human rights and deinstitutionalization: a success story in the Americas”, *Pan American Journal of Public Health*, vol. 18, No. 4/5 (2005), p. 374.)

In 2003, in a series of judgements against Ukraine, the European Court of Human Rights found violations of article 3 as a result of the conditions in which the applicants were being held in prison on death row, which included overcrowded cells, being locked up 24 hours a day, poor sanitary conditions, restrictions on family visits and the absence of natural light in the cell. The Court found these conditions to have caused the applicants considerable mental suffering, thereby diminishing their dignity, and reiterated that the State’s socio-economic problems and lack of resources could not justify such conditions. (See, for example, European Court of Human Rights, *Poltoratskiy v. Ukraine*, No. 38812/97, Judgement of 29 April 2003.)

4.6.1 Incommunicado detention (p. 355): In his interim report to the General Assembly in September 2004, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reiterated that “the maintenance of secret places of detention should be abolished under law and it should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.... [P]rolonged incommunicado detention could facilitate the perpetration of torture and could in itself constitute a form of torture. ...[T]here is no uncertainty as to the international obligations, standards and protections that apply to [detainees].” (A/59/324, para. 22.)

The Inter-American Court of Human Rights expanded and reiterated the principles established in *Velásquez Rodríguez v. Honduras*, declaring in *Juan Humberto Sánchez v. Honduras* that “[a]n individual who has been deprived of his liberty with no judicial control, as occurs in some cases of extralegal executions, must be released or immediately brought before a judge, because the essential content of article 7 of the [American] Convention is protection of the liberty of the individual against interference by the State.” (Inter-American Court of Human Rights, *Juan Humberto Sánchez v. Honduras*, Judgement of 7 June 2003, Series C, No. 99, para. 84.)

6.1 Inspection of places of detention (p. 365): A new Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 2002 by the General Assembly. It entered into force in June 2006 and is intended “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment” (art. 1). Information on the Optional Protocol is available on the OHCHR website: <http://www.ohchr.org>.

(p. 365): Further details on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are presented in a manual jointly released by the Inter-American Institute for Human Rights and the Association for the Prevention of Torture, entitled *The Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment - A Manual for Prevention* (2004). It is available through the Human Rights Education Association’s website at: http://www.hrea.org/erc/Library/display.php?doc_id=2243&category_id=9&category_type=3&group.

Chapter 9: *The Use of Non-custodial Measures in the Administration of Justice*

4.1 Non-custodial measures at the pretrial stage (p. 384): In the case of *J.G. v. Poland*, the European Court of Human Rights considered the circumstances in which non-custodial measures would be more appropriate than detention. The Court determined that “continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in article 5 of the Convention.” The Court noted in its decision that the authorities failed to consider “the possibility of ensuring [the applicant’s] presence at trial by imposing on him other ‘preventive measures’ – such as bail or police supervision.” (European Court of Human Rights, *J.G. v. Poland*, No. 36258/97, Judgement of 6 April 2004, paras. 50 and 56.)

Chapter 10: The Rights of the Child in the Administration of Justice

1. Introduction (p. 399): The *Implementation Handbook for the Convention on the Rights of the Child* was fully revised in 2002 (New York, UNICEF, 2002). In 1999, the Inter-American Court of Human Rights found in favour of several “street children” who had been murdered and ruled that Guatemala had violated various provisions of the American Convention. The case was the first concerning the rights of street children and their families to be brought before the Court. (Inter-American Court of Human Rights, *the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Judgement of 19 November 1999, Series C, No. 63.)

3.2 The age of criminal responsibility (p. 403): The European Court of Human Rights acknowledged in *S.C. v. the United Kingdom* that the “attribution of criminal responsibility to... an 11-year-old child does not in itself give rise to a breach of the Convention, as long as he or she is able to participate effectively in the trial”. However, the Court distinguished the treatment of children in criminal proceedings when “the decision is taken to deal with a child... who risks not being able to participate effectively because of his young age and limited intellectual capacity... [I]t is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.” (European Court of Human Rights, *S.C. v. the United Kingdom*, No. 60958/00, Judgement of 15 June 2004, paras. 27 and 35.)

4.2 The best interests of the child (p. 405): The Inter-American Court of Human Rights gave an advisory opinion on the due process rights of children. The Court clarified, inter alia, that the phrase “the best interests of the child” “entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.” (Inter-American Court of Human Rights, *advisory opinion OC-17/02*, 28 August 2002, Juridical condition and human rights of the child, Series A, No. 17, para. 137 (2).) In 2004, the Court reiterated that the measures of protection required by article 19 of the American Convention should be based on the principle of the best interests of the child. (Inter-American Court of Human Rights, *the Gómez-Paquiyaury Brothers v. Peru*, Judgement of 8 July 2004, Series C, No. 110, paras. 163–164.)

4.3 The child’s right to life, survival and development (p. 406): In 2002 the General Assembly adopted a document entitled “A world fit for children”, which sets a new world agenda with four key priorities for children: promoting healthy lives; providing quality education; protecting children against abuse, exploitation and violence; and combating HIV/AIDS (resolution S-27/2). The Inter-American Court of Human Rights stressed that the requirement to protect the right to life entails special obligations in the cases of minors, and determined that Peru had failed to honour such obligations when in 1991 its State agents had seized, tortured and summarily executed two brothers aged 14 and 17. (Inter-American Court of

Human Rights, *the Gómez-Paquiyaury Brothers v. Peru*, Judgement of 8 July 2004, Series C, No. 110, para 124.)

7.3.6 The right to review (p. 417): By 2005 Denmark had taken some steps to restrict the scope of its reservation to article 40 limiting the right to appeal, but the Committee on the Rights of the Child recommended continued efforts towards full withdrawal of the reservation (CRC/C/153, paras. 480–481).

8.3.2 The right of the child to be separated from adults (p. 423): By 2003 Canada had enacted new crime prevention legislation and alternatives to judicial procedures. However, the Committee on the Rights of the Child expressed ongoing concern about “the expanded use of adult sentences for children as young as 14; that the number of youths in custody is among the highest in the industrialized world; that keeping juvenile and adult offenders together in detention facilities continues to be legal; that public access to juvenile records is permitted and that the identity of young offenders can be made public” (CRC/C/133, para. 106).

(p. 423): In 2005 the Committee on the Rights of the Child welcomed Bolivia’s legislative improvements in the rules applicable to children in conflict with the law. However, it expressed concern over the juvenile justice system’s “shortcomings in practice, such as the lack of adequate alternatives to pretrial and other forms of detention, the very poor living conditions of juveniles detained in police stations or other institutions, the length of pretrial detention and the fact that according to the information provided in the written replies thousands of persons below the age of 18 are detained with adults” (CRC/C/146, para. 660).

8.3.6 The rights of the child and disciplinary measures (p. 427): In 2005, the Committee on the Rights of the Child reiterated its concern that corporal punishment in Yemen is “still used as a disciplinary measure in schools despite its official prohibition” and that “corporal punishment, including flogging, is still lawful as a sentence for crime” (CRC/C/150, para. 771).

9. The rights of the child and penal sanctions (p. 429): In 2005 the Committee on the Rights of the Child welcomed “the abolition of the death penalty in mainland China for persons who have committed an offence when under the age of 18,” but remained concerned that such youths may still face life imprisonment, albeit infrequently (CRC/C/153, para. 370).

13. The rights of the child and adoption proceedings (p. 441): In 2005, the Committee on the Rights of the Child welcomed measures taken by Nicaragua to combat sexual exploitation and human trafficking, but also emphasized the need for further legislation. It expressed concern that “a consistent number of children are victims of sexual violence, pornography, paid sexual activity and sexual tourism” and that “sexual abuse and exploitation in its various forms, including trafficking, pornography and sexual tourism, have not been classified yet as crimes in the Penal Code” (CRC/C/150, para. 660).

Chapter 11: Women's Rights in the Administration of Justice

3.2 The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (p. 450): By the end of 2007, 185 countries were parties to this Convention. In addition, 89 States had ratified its Optional Protocol. The Optional Protocol provides a communications procedure that gives individuals and groups of individuals a means to report complaints about violations of the Convention. It also provides a procedure that allows the Committee to conduct inquiries regarding grave or systemic abuses. For more information about the Convention and its Optional Protocol, see the OHCHR website: <http://www.ohchr.org>, or the Division for the Advancement of Women's website, at <http://www.un.org/womenwatch/daw/cedaw/>.

4.2.3 Female genital mutilation (p. 464): A report of the Secretary-General entitled *Traditional or customary practices affecting the health of women and girls (A/58/169)* provides information on legal and policy measures taken by Member States to address traditional and customary practices such as female genital mutilation. The report also identifies areas in which further efforts are needed.

(p. 464): In 2003 Egypt launched the National Council for Childhood and Motherhood, aimed at supporting advocacy, empowerment for girls at risk and addressing the socio-cultural roots of female genital mutilation. The National Syndicate of Egyptian Doctors also issued a ruling prohibiting doctors from performing female genital mutilation (A/58/169, para. 6).

4.2.4 Abortion (p. 465): In its first case involving abortion, the Human Rights Committee held that the refusal by State medical authorities to authorize a therapeutic abortion, after a gynaecologist and obstetrician recommended the procedure, violated the International Covenant on Civil and Political Rights. In *K.N.L.H. v. Peru*, the Committee determined that the refusal to grant the abortion, which caused the author to witness her newborn daughter's deformities and subsequent death shortly following birth, as well as to suffer a deep state of depression, constituted violations of articles 7, 17 and 24, in conjunction with article 2 of the Covenant. (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. BB, communication No. 1153/2003, *K.N.L.H. v. Peru*.)

4.3.3 Violence against women and the girl child in families and the community in general (p. 474): The Special Rapporteur on violence against women issued a report expressing concern that, despite progress, violence against women continues to be the most serious violation of women's human rights, bodily integrity and dignity. The report emphasizes "the universality of violence against women, the multiplicity of its forms and the intersectionality of diverse kinds of discrimination against women and its linkage to a system of domination that is based on subordination and inequality. HIV/AIDS is highlighted as the single most devastating epidemic experienced in modern history and that embodies

the intersectionality of diverse forms of discrimination” (E/CN.4/2004/66, summary).

(p. 475): In 2002 the Human Rights Committee welcomed various initiatives taken by Egypt, noting the creation of the National Council for Women and the introduction of legal reforms, particularly the passage of a law allowing women to end marriages unilaterally, and the revocation of a law that “offered the accused the opportunity of escaping liability for abduction and rape if he married the victim”. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. I, para. 77.)

Systematic violence against women has been held to be a breach of the due diligence requirements of the Convention of Belém do Pará by the Inter-American Commission on Human Rights (The situation of the rights of women in Ciudad Juárez, Mexico: the right to be free from violence and discrimination, OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003) and in 1994 the Inter-American Commission designated a Special Rapporteur on the rights of women, who has undertaken, inter alia, a study on access to justice for women.

(p. 475): Portugal recently adopted new measures removing the need for a formal complaint by victims of domestic violence as a precondition for prosecution and introducing a system of indemnification for victims. (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 38* (A/57/38), para. 313.)

(p. 475): The European Court of Human Rights held in *M.C. v. Bulgaria* that positive State obligations require Bulgaria to penalize and prosecute non-consensual sexual acts, regardless of proof of physical resistance by the victim. The case involved allegations of sexual assault upon a minor where the investigation was terminated for lack of evidence that the applicant was unwilling to have sex and that the men involved used threats or force. The Court observed that historically the presence of physical force or resistance was required for a finding of criminal liability, but noted the changing trend omitting the requirement of physical resistance as proof of lack of consent. It explained that girls below the age of majority, in particular, “often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.” The Court concluded that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual’s sexual autonomy.” (European Court of Human Rights, *M.C. v. Bulgaria*, No. 39272/98, Judgement of 4 December 2003, paras. 64, 164 and 166.)

(p. 475): The African Commission has expressed concern about the stoning of women under sharia law (Eighteenth Activity Report of the African Commission on Human and Peoples’ Rights, annex III, communication No. 269/2003, *Interights on behalf of Safia Yakubu Husaini et al./Nigeria* – the complaint was withdrawn).

4.4 Violence against women in crimes against humanity and war crimes (p. 477): In May 2004 the Trial Chamber of the Special Court for Sierra Leone determined for the first time in international law that forced marriage is a crime against humanity. (Press release of the Special Court for Sierra Leone (7 May 2004), available at <http://www.sc-sl.org>.)

5.1.1 Slavery, the slave trade and servitude (p. 478): In *Siliadin v. France*, the European Court of Human Rights affirmed States' positive obligation to criminalize actions prohibited under article 4 of the Convention (prohibiting slavery and servitude). The applicant, a national from Togo, was recruited to serve as a housekeeper in France. Upon arrival in France, however, her passport was taken and she was forced to work up to 15 hours a day without pay. At trial, the French court could find the perpetrators guilty only of withholding payment of wages, as there was no legislation prohibiting domestic servitude. The State's failure to provide adequate protection under existing legislation during the time at issue was found to be a violation of article 4. (European Court of Human Rights, *Siliadin v. France*, No. 73316/01, Judgement of 26 July 2005.)

5.1.3 Trafficking (p. 480): The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children entered into force in December 2003. The Convention against Transnational Organized Crime also entered into force in December 2003. Further information about these treaties is available through the website of the United Nations Office on Drugs and Crime (UNODC): <http://www.unodc.org>.

(p. 480): The Commission on Human Rights appointed, for a three-year period, a Special Rapporteur on trafficking in persons, especially women and children, with a view to further protecting the rights of actual and potential victims of trafficking (decision 2004/110, at <http://www.ohchr.org>).

(p. 480): In 2005, the General Assembly adopted a resolution on trafficking in women and girls, which addresses the increased globalization of trafficking and need for domestic and international cooperation. It expressed concern over the use of "new information technologies, including the Internet, for purposes of exploitation of the prostitution of others and for child pornography, paedophilia and any other forms of sexual exploitation of children, trafficking in women as brides and sex tourism" (resolution 59/166, preamble).

(p. 480): The Organization of American States Anti-Trafficking in Persons Section was established in 2004 to support anti-trafficking policies regionally. Further information about the OAS Anti-Trafficking in Persons Section is available on its website: www.oas.org. The Council of Europe's Convention on Action against Trafficking in Human Beings (ETS 197) was adopted by the Committee of Ministers in May 2005. The Convention requires 10 ratifications, including 8 from Council of Europe member States, to enter into force. At the end of 2007, the Convention had 11 ratifications and it was scheduled to enter into force in February 2008. Information about European treaties is available at the Council of Europe's website, at <http://conventions.coe.int>.

5.2 The practice of slavery, forced and compulsory labour, and trafficking in women (p. 482): The Secretary-General, in the 2004 World Survey on the Role of Women in Development (A/59/287), addressed issues related to women and international migration. The report notes a number of factors found to contribute to women and children being particularly vulnerable to trafficking: development processes marked by class, gender and ethnic concerns that marginalize women; displacement as a result of natural and human-made catastrophes; dysfunctional families; and gendered cultural practices, gender discrimination and gender-based violence in families and communities (para. 63).

(p. 483): The Secretary-General's report on Trafficking in women and girls (A/59/185), issued in July 2004, provides an overview of developments in the effort to combat trafficking in women and girls nationally, regionally and internationally. It concludes with a series of recommendations for future action.

6.3 The equal right to a name (p. 496): In *Unal Tekeli v. Turkey*, the European Court of Human Rights rejected Turkey's argument that the difference in treatment between married men and married women was founded on "family unity" and "ensuring public order," and held that there was no objective or reasonable justification for the disparity in treatment. The case involved a Turkish civil code requirement that a married woman should bear her husband's name. The Court agreed with the applicant's argument that the law amounted to unjustifiable interference with her private life and was discriminatory against her because married men were permitted to preserve their family name after marriage. (European Court of Human Rights, *Unal Tekeli v. Turkey*, No. 29865/96, Judgement of 16 November 2004, paras. 57–58.)

9.3 Freedom of thought, conscience, belief, religion, opinion, expression, association and assembly (p. 514): The European Court of Human Rights found no violation of rights with regard to the regulation of Islamic headscarves in *Leyla Sabih v. Turkey*. The case involved a student who was punished by the university for refusing to remove her headscarf. The applicant argued that the regulations violated her right to freedom of thought, conscience and religion under article 9. The Court disagreed, holding that the interference did not constitute a human rights violation. Given the margin of appreciation to which States are entitled, the Court explained that the university's regulations and measures reflected Turkey's goal of maintaining a secular way of life, and were justified in principle and proportionate to their aims. (European Court of Human Rights, *Leyla Sabih v. Turkey*, No. 44774/98, Judgement of 10 November 2005, paras. 112–123.)

Chapter 12: Some Other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly

3.4 Article 13 of the American Convention on Human Rights (p. 565): The General Assembly of the Organization of American States passed a resolution in 2004 reaffirming that under article 13, “everyone has the freedom to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.” It also reiterated “that States are obliged to respect and promote respect for everyone’s access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.” (Access to public information: strengthening democracy, AG/RES. 2057 (XXXIV-0/04), 8 June 2004, paras. 1–2.) In *Marcel Claude Reyes and Others v. Chile*, the Inter-American Court considered that article 13 guaranteed the right of access to information held by public bodies. In repeatedly denying the applicants’ requests for information regarding a massive logging project being undertaken by a foreign company, the Court found that Chile had violated that right. (Inter-American Court of Human Rights, *Marcel Claude Reyes and Others v. Chile*, Judgement of 19 September 2006, Series C, No. 151.)

(p. 565): The Office of the Special Rapporteur for freedom of expression submitted a report in 2004 expressing concern that “monopolistic and oligopolistic practices in mass media ownership have a serious detrimental impact on the freedom of expression and on the right to information of the citizens of the member States.” It reported that continuous complaints of such practices in the region were cause for grave concern about concentrations of media ownership and their impact on “pluralism as an essential element of the freedom of expression.” It recommended that OAS member States “take measures to impede monopolies and oligopolies in media ownership, and adopt effective mechanisms for implementing them.” (Report of the Office of the Special Rapporteur for Freedom of Expression (2004), chap. V, conclusions, paras. 1–3.)

Chapter 13: The Right to Equality and Non-discrimination in the Administration of Justice

1.1 Discrimination: a persistent serious human rights violation (p. 633): With the proliferation of computer systems, the dissemination of racist and xenophobic communications via the Internet poses an even greater challenge for law enforcement. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 189) came into force in March 2006. By the end of 2007 it had been ratified by 11 European States. Further information is available on the Council of Europe’s website, at <http://conventions.coe.int>.

2.2 Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (p. 637): On appeal, the International Criminal Tribunal for the former Yugoslavia found General Krstic not guilty as a perpetrator of genocide, but rather found him guilty of aiding and abetting genocide. He was sentenced to 35 years in prison. (International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, 19 April 2004.)

2.5 International Convention on the Elimination of All Forms of Racial Discrimination 1965 (p. 640): The Committee on the Elimination of Racial Discrimination adopted general recommendation No. 30 (2004) on discrimination against non-citizens, which replaces general recommendation No. 11 (1993). While the older recommendation focused on the rights of non-citizens, the scope of the new one is broader, covering the rights of refugees and asylum-seekers, “including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live” (HRI/GEN/1/Rev.8, pp. 272–277, preamble).

3.3 American Convention on Human Rights, 1969 (p. 644): The Inter-American Court of Human Rights recognizes that migrant workers are particularly vulnerable to human rights violations. In response to Mexico’s concerns for millions of its migratory workers, the Court issued an advisory opinion in 2003, asserting that “States must ensure strict compliance with the labour legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct de jure discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level.” Furthermore, a State’s failure to do so gives rise to international responsibility. (Inter-American Court of Human Rights, advisory opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, Series A, No. 18, 17 September 2003, para. 149.)

3.6 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999 (p. 646): By the end of 2007, 17 States had ratified this Convention. For access to this and other American

legal instruments, see the website of the Organization of American States: <http://www.oas.org>.

4. The prohibition of discrimination and public emergencies (p. 650): The African Charter on Human and Peoples' Rights has, in many of its provisions, clawback clauses which allow States "to restrict the proclaimed rights to the extent permitted by domestic law." In effect, they give each Government the discretion to infringe upon various rights. (African Charter on Human and Peoples' Rights: an interpretative analysis of its substantive provisions, Centre for Human Rights, University of Pretoria, sect. 6.2, available at <http://www.chr.up.ac.za>.)

6.1.1 Racial slurs (p. 657): In *Stephen Hagan v. Australia*, the Committee on the Elimination of Racial Discrimination provided insight into the evolution of language and its contemporary implications. The case involved the name of a sporting facility, "E.S. 'Nigger' Brown Stand." The author, an Australian of Aboriginal origin, complained that the name of the facility was extremely offensive. The Committee examined the historical context of the name and noted that "the offending term was not designed to demean or diminish its namesake, who in fact had been of white complexion. Nevertheless, the Committee considered that the use and maintenance of the offending term could, at the present time, be considered offensive and insulting. The Convention had to be interpreted and applied taking into account contemporary circumstances. In this context, the Committee considered it to be its duty to recall the increased sensitivities in respect of words such as the offending term in a contemporary context" and recommended the removal of the offending term. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18 (A/58/18)*, para. 575, and annex III, sect. A, communication No. 26/2002, *Stephen Hagan v. Australia*.)

6.1.3 Racial and ethnic discrimination in law enforcement (p. 658): The Committee on the Elimination of Racial Discrimination also expressed concern over the disproportionate number of foreigners facing the death penalty in Saudi Arabia. It encouraged the Government to work with the Special Rapporteur on extrajudicial, summary and arbitrary executions regarding several cases of migrant workers facing the death penalty who had not received legal assistance. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18 (A/58/18)*, para. 218.)

In *Nachova and Others v. Bulgaria*, a case involving the fatal police shootings of two Roma men, the Grand Chamber of the European Court of Human Rights unanimously held that article 14 of the Convention had a procedural component, which required the State to investigate whether discrimination might have played a role in the killings. The Court found that the failure to do so in the case, despite indications of racist motivation, amounted to discrimination and a violation of article 14. (European Court of Human Rights, *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, Judgement of 6 July 2005.)

6.1.4 Racial discrimination in ensuring economic, social and cultural rights (p. 659): The Committee on the Elimination of Racial Discrimination also

expressed concern over discrimination against Roma citizens in education, employment, housing and health in various parts of Europe. In response to a report on Slovakia, for instance, it was “alarmed by de facto discrimination against Roma as well as by the very high rate of unemployment among members of the Roma community.” (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18* (A/59/18), para. 386. See also, e.g., *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 543.)

(p. 659): In addition, the Committee has been concerned over “the existence [in Nepal] of segregated residential areas for Dalits, social exclusion of inter-caste couples, restriction to certain types of employment, and denial of access to public spaces, places of worship and public sources of food and water, as well as at allegations that public funds were used for the construction of separate water taps for Dalits” and urged the Government to “take measures to prevent, prohibit and eliminate private and public practices that constitute segregation of any kind.” (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18* (A/59/18), para. 127.)

6.3 Language (p. 665): In general, the Human Rights Committee discourages States from practising discrimination through language requirements such as language proficiency exams for employment and encourages States to provide opportunities for minorities to use their own languages in official communications. (See, e.g. *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. I, paras. 79 (16) and 82 (16), and *ibid.*, *Sixtieth Session, Supplement No. 40* (A/60/40), vol. I, paras. 82 (22) and 85 (20).)

6.4.1 Conscientious objection to military service (p. 666): In addition to the principle of non-discrimination, the Human Rights Committee calls on States to guarantee that alternative service not be punitive. (See, e.g., *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, paras. 67 (17) and 71 (17).)

6.6.2 Inheritance rights (p. 673): The European Court of Human Rights examined a case involving the evolution of adoption and its contemporary implications with regard to wills. The case of *Pla and Puncernau v. Andorra* involved a dispute between adoptive and non-adoptive descendants over a 1939 will that devised the “remainder to a son or grandson of a lawful and canonical marriage.” An appellate court ruled that because adoption was uncommon in the first half of the twentieth century, the testator could not have meant for her property to be passed to her adopted grandchild. However, the Court considered this ruling incompatible with article 14 in conjunction with article 8, stating that interpretation cannot “be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix’s death... particularly where a period of 57 years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities.” (European Court of Human Rights, *Pla and Puncernau v. Andorra*, No. 69498/01, Judgement of 13 July 2004, para. 62.)

6.8 Sexual orientation (p. 676): In *Goodwin v. the United Kingdom*, the European Court of Human Rights found reason to depart from precedent in the light of societal developments related to transsexuals. The Court held that States had a positive obligation to ensure the rights of transsexuals to be recognized under their new gender identity. The Court explained that “in the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.” (European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, No. 28957/95, Judgement of 11 July 2002, para. 90.)

Chapter 14: The Role of the Courts in Protecting Economic, Social and Cultural Rights

4.1.1 International Covenant on Economic, Social and Cultural Rights, 1966 (p. 697): Since 2002, interpretations of the right to water (arts. 11 and 12), the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), the right to work (art. 6), and the right to the protection of the moral and material interests of authors (art. 15 (1) (c)) have been adopted by the Committee on Economic, Social and Cultural Rights. General comment Nos. 15 (2002), 16 (2005), 18 (2005) and 17 (2005), respectively (HRI/GEN/1/Rev.8).

4.2.1 African Charter on Human and Peoples' Rights, 1981 (p. 697): On 7 December 2004, the African Commission on Human and Peoples' Rights adopted the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (ACHPR /Res.73 (XXXVI) 04). It recognizes the indivisibility of all human rights, but notes that economic, social and cultural rights remain marginalized due to inadequate recognition by States parties. It establishes a working group composed of members of the African Commission and NGOs to develop and propose draft principles and guidelines on economic, social and cultural rights, including State reporting.

4.2.2 American Convention on Human Rights, 1969, including the Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988 (p. 698): There have been several pronouncements of both the Commission and the Court supporting economic, social and cultural rights (for example, *María Mamérita Mestanza v. Peru* (forced sterilization); precautionary measures granted on behalf of patients at a mental health hospital in Paraguay in 2003).

4.2.3 European Social Charter, 1961, and European Social Charter (Revised), 1996 (p. 699): By the end of 2007, the European Social Charter had also been ratified by Croatia and the former Yugoslav Republic of Macedonia, increasing the total to 27 States parties. Further information about the Charter is available on the Council of Europe's website, at <http://conventions.coe.int>.

(p. 700): The total number of States that have ratified the 1988 Additional Protocol had risen to 13 by the end of 2007. Croatia and Hungary were the latest countries to ratify it. Further information about the 1988 Additional Protocol is available on the Council of Europe's website, at <http://conventions.coe.int>.

(p. 700): The total number of States that have ratified the revised version of the European Social Charter adopted in 1996 had risen to 24 by the end of 2007. Further information is available on the Council of Europe's website, at <http://conventions.coe.int>.

8.1.1 The normative content of article 12 (1) (p. 732): The Committee on Economic, Social and Cultural Rights in its general comment No. 15 (2002) on the

right to water has described this right as “inextricably related to the right to the highest attainable standard of health” (HRI/GEN/1/Rev.8, p. 105–122, para. 3).

Chapter 15: Protection and Redress for Victims of Crime and Human Rights Violations

1. Introduction (p. 752): There have been a number of important developments in the area of redress for victims of human rights violations, including the publication of several international documents that bring together legal standards, principles, guidelines and best practices, which underline the importance of providing redress and also highlight the various forms that redress can take. The main documents in this respect are:

- Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1)
- Report of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/2006/52)
- Study on the right to the truth (E/CN.4/2006/91)
- 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 (General Assembly resolution 60/147)
- International Convention for the Protection of All Persons from Enforced Disappearance (General Assembly resolution 61/177)

The Convention on Cybercrime (ETS 185) entered into force in July 2004 and had been ratified by 21 States, including one non-member, by the end of 2007. It is now supplemented by the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 189), which entered into force in 2006 and by the end of 2007 had been ratified by 11 States. Further information is available on the Council of Europe's website, at <http://conventions.coe.int>.

2.1.1 The universal level (p. 754): The Convention against Transnational Organized Crime came into force in 2003 and by the end of 2007 it had 138 parties. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children also came into force in 2003 and by the end of 2007 had 116 parties. Further information is available through the UNODC website: <http://www.unodc.org>.

2.1.2 The regional level (p. 754): By the end of 2007, there were 21 parties to the European Convention on the Compensation of Victims of Violent Crimes (ETS 116). Further information is available on the Council of Europe's website, at <http://conventions.coe.int>.

2.2 The notion of victim (p. 757): The 1985 Recommendation of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure (No. R (87) 21) has become increasingly obsolete. "Since the adoption of Recommendation No. R (87) 21, there have been significant developments in

the field in Europe. Member States' legislation and practice have evolved, as documented in several surveys conducted in this connection.... The Committee of Ministers has adopted Recommendations Nos. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults and R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, both of which provide for assistance to particular categories of victims. The European Ministers of Justice have invited the Committee of Ministers, where necessary, to adopt new rules concerning the improvement of, inter alia, the support of victims of terrorist acts and their families.... The Council of the European Union has issued a Framework Decision on the standing of victims in criminal proceedings, article 13 of which concerns specialist services and victim-support organizations. Moreover, the European Forum for Victim Services has been established." (Council of Europe, European Committee on Crime Problems, Specific Terms of Reference of the Group of Specialists on Assistance to Victims and Prevention of Victimization (PC-S-AV (2005) 1).)

2.4.4 Assistance (p. 772): In 2005 the Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime to address their special needs (resolution 2005/20, annex).

3.1 The notion of victim (p. 774): Paragraph 8 of the 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 defines victims as:

“persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

It is important to note that, in addition to the immediate victim, a victim, as recognized in this definition, can also be a family member or dependant of the direct victim or a person who has suffered harm in intervening to assist.

Under article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance, a “victim” has been defined as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

The notion of victim has also been developed in case law. In *the Moiwana Community v. Suriname*, which involved a massacre in the village of Moiwana, Suriname, the Inter-American Court found that the “victims” included the survivors of the event and the next of kin of those who were killed. (Inter-American Court of Human

Rights, *the Moiwana Community v. Suriname*, Judgement of 15 June 2005, Series C, No. 124.)

3.2.1 The universal level (p. 776): As noted above, the obligation to respect and ensure arises under article 2 (1) of the International Covenant on Civil and Political Rights. In addition to treaty law, section I of the Basic Principles and Guidelines on the Right to a Remedy further notes that this obligation arises from customary international law and domestic law, and provides that States shall:

“2. ...as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.”

NOTE: with regard to footnote 71, general comment No. 3 has been replaced by general comment No. 31 on the nature of the general legal obligation imposed on State parties to the Covenant (HRI/GEN/1/Rev.8, pp. 233–238).

3.2.2 The regional level (p. 776): The African Commission clarified in *Lanyers for Human Rights/Swaziland* that the term “‘other measures’ in article 1 provides State parties with a wide choice of measures to use to deal with human rights problems.... [B]y ratifying the Charter without at the same time taking appropriate measures to bring domestic laws in conformity with it, [a] State’s action defeat[s] the very object and spirit of the Charter” in violation of article 1. (Eighteenth Activity Report of the African Commission on Human and Peoples’ Rights, annex III, communication No. 251/2002, *Lanyers for Human Rights/Swaziland*, paras. 50–51.)

(p. 779): In *Siliadin v. France*, the European Court of Human Rights affirmed the right to be free from slavery and labour exploitation contained in article 4 of the European Convention gave rise to positive obligations on States consisting in the adoption and effective implementation of criminal law provisions making the practices set out in article 4 a punishable offence. (European Court of Human Rights, *Siliadin v. France*, No. 73316/01, Judgement of 26 July 2005.)

3.3.1 The universal level (p. 780): Recognizing the negative impact of corruption on development, democracy, ethical values and justice, the United Nations Convention against Corruption was adopted on 31 October 2003 “[t]o promote and strengthen measures to prevent and combat corruption more efficiently and effectively” (General Assembly resolution 58/4, article 1 (a)). It entered into force

in December 2005. Details about the Convention and its signatories are available on the UNODC website: <http://www.unodc.org>.

(p. 780): In its general comment No. 31, the Human Rights Committee has further elaborated the scope of the obligation to respect and ensure arising under article 2 (1) of the Covenant:

“The positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.” (para. 8)

In addition, paragraph 3 of the Basic Principles and Guidelines on the Right to a Remedy provides that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes the duty to: “(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations....”

(p. 780): In an effort to prevent, repress and eliminate terrorism, the General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism (resolution 59/290). Article 6 calls on States to adopt whatever measures are necessary to ensure that criminal acts “intended or calculated to provoke a state of terror... are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.”

3.3.2 The regional level (p. 781): The African Union adopted the Convention on Preventing and Combating Corruption, which entered into force on 5 August 2006. By the end of 2007, 24 countries had ratified it. Information about this and other conventions is available through the African Union’s website: <http://www.africa-union.org>.

3.4 The duty to provide domestic remedies (p. 783): In 2004, the Human Rights Committee clarified in its general comment No. 31 that “the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State.... There may be circumstances in which a failure to ensure Covenant rights... would give rise to violations by States parties of those rights, as a result of States parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.” (HRI/GEN/1/Rev.8, pp. 233–238, para. 8.)

3.4.1 The universal level (p. 785): In *Thabti v. Tunisia*, the Committee against Torture observed that “article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national

law or an express statement of intent to institute and sustain a criminal action arising from the offence... [I]t is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated....” (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44 (A/59/44)*, annex VII, sect. A, communication No. 187/2001, *Dhaou Belgacem Thabti v. Tunisia*, para. 10.6.)

(p. 786): The Committee on the Elimination of Racial Discrimination also emphasized the responsibility of States to be proactive in efforts to fight discrimination and promote public education on legal rights and remedies, noting that “the mere absence of complaints and legal action by victims of racial discrimination may be mainly an indication of the absence of relevant specific legislation, or of a lack of awareness of the availability of legal remedies, or of insufficient will on the part of the authorities to prosecute.” (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18 (A/58/18)*, para. 343.)

(p. 786): Principle 31 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity provides that: “Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”

Paragraph 3 of the Basic Principles and Guidelines on the Right to a Remedy also provides that the scope of the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes the duty to:

“(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

“(d) Provide effective remedies to victims, including reparation, as described below.”

3.4.2 The regional level (p. 787): In another case involving Nigeria, the African Commission clarified that “States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations. The international bodies do recognize however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust them. The African Commission has held that the local remedies to be exhausted must be available, effective and sufficient. If the existing domestic remedies do not fulfil these criteria, a victim may not have to exhaust them before complaining to an international body.” (Eighteenth Activity Report of the African Commission on Human and Peoples’ Rights, annex III, communication No. 268/2003, *Ilesanmi/Nigeria*, paras. 44–45.)

(p. 787): The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa specifically addresses the right to a domestic remedy for women in Africa. Its article 25 requires States to "provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; [and] ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law." The Protocol can be found on the website of the African Commission on Human and Peoples' Rights: <http://www.achpr.org>.

3.5.1 The universal level (p. 794): The Human Rights Committee has also expressed concern at "persistent allegations of serious human rights violations [in Thailand], including widespread instances of extrajudicial killings and ill-treatment by the police and members of armed forces... and the extraordinarily large number of killings during the 'war on drugs' which began in February 2003. Human rights defenders, community leaders, demonstrators and other members of civil society continue to be targets of such actions, and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a culture of impunity." The Committee urged Thailand to investigate and prosecute such crimes, ensure redress for victims, continue training law enforcement personnel, and "actively pursue the idea of establishing an independent civilian body to investigate complaints filed against law enforcement officials." (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. I, para. 95 (10).)

Clearly, the duty to provide domestic remedies is not, in itself, sufficient to protect and ensure human rights. Principle 1 of the Updated Set of principles to combat impunity, for example, recognizes the importance of action to investigate, prosecute and punish violations. It states that, in addition to failing to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered: "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished...."

Similarly, paragraph 3 of the Basic Principles and Guidelines on the Right to a Remedy also provides that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes the duty to: "(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."

Furthermore, in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, paragraph 4 of the Basic Principles and Guidelines on the Right to a Remedy provides that: "...States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly

responsible for the violations and, if found guilty, the duty to punish him or her....”

The International Convention for the Protection of All Persons from Enforced Disappearance also provides in article 3 that: “Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.”

3.5.2 The regional level (p. 796): The relationship between the duty to investigate, prosecute and punish, and impunity has also been considered in case law. In *Barrios Altos v. Peru*, for example, the Inter-American Court found that Peru’s domestic amnesty laws were incompatible with the American Convention on Human Rights and therefore lacked legal effect and that Peru should investigate the facts to determine the identity of those responsible for the human rights violations, publish the results of the investigation and punish those responsible. (Inter-American Court of Human Rights, *Chumbipuma Aguirre et al. (Barrios Altos) v. Peru*, Judgement of 14 March 2001, Series C, No. 75.)

3.5.3 The role of victims during investigations and court proceedings (p. 799): Victims of human trafficking are particularly vulnerable to further human rights violations as witnesses. Despite the establishment of laws and policies to combat human trafficking in Thailand, it continues to be a country of origin, transit and destination for victims of trafficking. The Human Rights Committee has called on Thailand “to adequately protect the human rights of all witnesses and victims of trafficking, in particular by securing their places of refuge and opportunities to give evidence.” (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. I, para. 95 (20).)

With regard to the treatment of victims during such proceedings, paragraph 10 of the Basic Principles and Guidelines on the Right to a Remedy provides that:

“Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”

3.6.1 Restitution and compensation (p. 801): Although many international human rights treaties do not specify how a breach of a legal obligation should be remedied, this issue has been addressed internationally in a number of documents. For example, in paragraph 16 of its general comment No. 31, the Human Rights Committee recognizes that “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of the human rights violations.”

Principle 34 of the Updated Set of principles to combat impunity also provides that: “The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.”

The Basic Principles and Guidelines on the Right to a Remedy also recognize that there are forms of reparation that, depending on the circumstances of the case, may be more appropriate in providing redress than restitution or compensation. According to paragraph 18, forms of reparation include rehabilitation, satisfaction and guarantees of non-repetition, in addition to restitution and compensation.

Article 24 (4) of the International Convention for the Protection of All Persons from Enforced Disappearance also requires that a State party “shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.”

According to article 24 (5) of the Convention, the right to obtain reparation in article 24 (4), in addition to material and moral damages, covers: restitution; rehabilitation; satisfaction, including restoration of dignity and reputation; and guarantees of non-repetition.

The issue of redress has also been addressed in the case law of the regional systems. In the *Assanidze* case, for example, the European Court of Human Rights found that “a judgement in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.” (European Court of Human Rights, *Assanidze v. Georgia* [GC], No. 71503/01, Judgement of 8 April 2004, para. 198.)

The Inter-American Court of Human Rights gives specific parameters for compliance with its decisions on restitution, stating that “the State must comply with the judgement within one year... [and] should the State fall in arrears with the payments, it must pay interest on the amount owed corresponding to bank interest on payments in arrears in [that country]...” (Annual Report of the Inter-American Court of Human Rights (2003) (OEA/Ser.L/V/III.61, chap. II), 9 February 2004.)

3.6.3 Satisfaction and guarantees of non-repetition (p. 804): In addition to redress in the forms of restitution, compensation and rehabilitation, paragraphs 22 and 23 of the Basic Principles and Guidelines on the Right to a Remedy provide for satisfaction and guarantees of non-repetition, which include a wide range of mechanisms for effectively addressing violations.

Paragraph 22 provides that satisfaction should include any, or all, of the following:

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

“(b) 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;

“(c) 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;

“(d) 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;

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

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

“(g) Commemorations and tributes to the victims;

“(h) 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.”

Paragraph 23 provides that guarantees of non-repetition should include:

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

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

“(c) Strengthening the independence of the judiciary;

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

“(e) 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;

“(f) 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;

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

“(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”

Many of these forms of redress have been considered at the regional level. The Inter-American Court, for example, has addressed the question of reparations, in

the form of both satisfaction and guarantees of non-repetition (in addition to compensation) under the heading “other forms of reparation”. A good example of this use of a range of reparatory measures is the case of *Myrna Mack Chang v. Guatemala* (Inter-American Court of Human Rights, Judgement of 25 November 2003, Series C, No. 101), where the Court found that in order to completely redress the violations:

“...the State must effectively investigate the facts in the instant case, so as to identify, try, and punish all the direct perpetrators and accessories, and the other persons responsible for the extralegal execution of Myrna Mack Chang, and for the cover-up of the extralegal execution and of the other facts in the instant case, aside from the person who has already been punished for these facts. The outcome of the proceeding must be made known to the public, for Guatemalan society to know the truth” (para. 275).

The State must “abstain from resorting to legal concepts such as amnesty...” (para. 276) and “must also remove all de facto and legal mechanisms and obstacles that maintain impunity in the instant case...” (para. 277).

Furthermore, the Court required that the State must “carry out a public act of acknowledgment of its responsibility regarding the facts in this case...” (para. 278). It also found that “the armed forces, the police corps, and the security and intelligence agencies of the State acted exceeding their authority by applying means and methods that were not respectful of human rights” (para. 281).

As a result, and in order to avoid recidivism, the Court required that the State adopt “the necessary provisions for this and, specifically, those tending to educate and train all members of its armed forces, the police and its security agencies regarding the principles and rules for protection of human rights, even under state of emergency. The State must specifically include education on human rights and on international humanitarian law in its training programmes for the members of the armed forces, of the police and of its security agencies” (para. 282).

Finally, the Court held that “as part of public recognition of the victim, the State must establish a scholarship, in the name of Myrna Mack Chang, to cover the complete cost of a year of study in anthropology at a prestigious national university. Said scholarship must be granted by the State permanently every year” (para. 285) and that “the State must also name a well-known street or square in Guatemala City in honour of Myrna Mack Chang, and place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out. This will contribute to awakening public awareness to avoid recidivism of facts such as those that occurred in the instant case and to maintain remembrance of the victim” (para. 286).

3.7.1 Impunity from a legal perspective (p. 807): As noted above, principle 1 of the Updated Set of principles to combat impunity recognizes that: “Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly

in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”

3.7.2 Justice, impunity and reconciliation

The right to the truth (p. 808): The right to the truth, or the right to know, is fundamental in relation to States’ obligations and duties to investigate, punish, provide redress, prevent impunity and guarantee non-repetition. The right has been recognized at both the international and the regional level.

At the international level, the right is recognized in principle 2 of the Updated Set of principles to combat impunity:

“Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”

The right to the truth is also analysed in the report of Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers (E/CN.4/2006/52, paras. 14–39), and in the study on the right to the truth (E/CN.4/2006/91).

According to paragraph 22 (*b*) of the Basic Principles and Guidelines on the Right to a Remedy, reparation, by way of satisfaction, should include, where applicable: “Verification of the facts and full and public disclosure of the truth....”

The International Convention for the Protection of All Persons from Enforced Disappearance also specifically recognizes the right to the truth. According to its article 24 (2):

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”

At a regional level, the right has been recognized in several cases under the European and inter-American systems, for example in the case of *Myrna Mack Chang*, above, where the Court held that “every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations” (Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, Judgement of 25 November 2003, Series C, No. 101, para. 274).

Chapter 16: The Administration of Justice during States of Emergency

3.7.1 The prohibition of ex post facto laws (p. 840): The Human Rights Committee has expressed concern over Estonia's overly broad interpretation and Israel's overly vague interpretation of terrorism and their adverse effects in the light of the prohibition in article 15 of the International Covenant on Civil and Political Rights of applying criminal law ex post facto. It has called on both countries to bring their laws in conformity with the Covenant. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. I, paras. 79 (8) and 85 (14).)

(p. 840): Similarly, the Committee was concerned about a recently declared state of emergency in Thailand, which also lacked clarity. The Committee said that the decree which established the state of emergency in three southern provinces "does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant that may be made in emergencies and... provides for officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the problem of impunity." The Committee urged Thailand to come into compliance with the Covenant. (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. I, para. 95 (13).)

4.4 The right to a fair trial and special tribunals (p. 871): The applicant in *Kavanagh v. Ireland* was not afforded a new trial and, as of March 2005, remained in prison. In rejecting his appeal, the Irish Supreme Court reasoned that "neither the Covenant nor the Committee's Views could be given domestic effect in Irish law.... [T]he Committee's Views could not prevail over the Offences against the State Act, or over a conviction by a court established under its provisions." Since there were no new factual developments in the case, the Human Rights Committee could not review it. (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. II, annex VI, sect. CC, pp. 598–602, communication No. 1114/2002, *Kavanagh v. Ireland*, para. 2.5. See also *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. II, annex VII.)