




Human Rights Handbook



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Foreword by the Chairperson of the National Human Rights Commission

Since its establishment in 2019, the Commission has made significant strides in its quest to promote and protect human rights in The Gambia. Its key achievements include timely responses to human rights violations, consideration of complaints, and advising the State on a range of human rights issues. Promotional activities the Commission has engaged in include building the capacity of law enforcement officials, awareness raising across the country. Commissioners and staff have also been invited to radio and TV stations to speak on a range of human rights issues.

The development of this Human Rights Manual will build on these important accomplishments, by aiding and informing the Commission's activities. Beyond the document's function as a tool to support the Commission's promotional activities, the Manual will also serve as a reference document to support programme development and inform the work of thematic committees.

The Manual's development is grounded in Article 12 of the National Human Rights Act, which mandates the Commission to promote and protect human rights in The Gambia. The Act also mandates the Commission to conduct public awareness of, and respect of human rights through education programmes and to promote a culture of human rights in The Gambia.

The Manual draws from the national, regional and international instruments. It also references international standards, case law and experiences from a range of jurisdictions. It is divided into six parts and considers an introduction to human rights, the UN and African human rights systems. It examines political and civil rights and consider economic, social and cultural rights including the right to development, SDGs and climate change. The last part of the Manual considers the rights of marginalised groups.

The use of this Manual by Commission staff will anchor the Commission's activities and strengthen its contributions to the Gambia's governance and democratic reforms. I call on staff to make use of this document as we scale the heights in fulfilment of our vision and mission.

Emmanuel Daniel Joof
Chairperson of the National Human Rights Commission

Part 1: WHAT ARE HUMAN RIGHTS?

1. Introduction

Principles relating to the Status of National Human Rights Institutions (The Paris Principles) require national human rights institutions to promote human rights, through education, outreach, the media, publications, training and capacity building, as well as through advising and assisting the government.¹ This notion is reflected in Article 12 of the National Human Rights Commission Act 2017, the establishing statute of the National Human Rights Commission (NHRC), which highlights the promotional component of the Commission's mandate. Since its establishment in 2019, the NHRC has undertaken a range of promotional activities across the Gambia. These events, which took the form of awareness-raising initiatives, trainings, and media engagement were tailored to the needs of communities, civil society groups, and law enforcement officials. These events introduced the Commission to the public, and built the capacity of key stakeholders on a range of human rights issues. The Commission's promotional activities have been critical to building trust between the Commission, stakeholders and the public.

The NHRC's work contributes to the rule of law and democratic governance in the Gambia through its oversight functions and engagement with the three arms of government. A human rights-based approach to government requires ministers and administrators to tailor activities and programmes to meet fundamental human rights standards; legislators to scrutinise legislation and review executive action for compatibility; and an independent and impartial judiciary to control excesses. This type of proactive, front-loaded approach to human rights protection aims to remove the onus from individual victims of human rights abuse to seek legal redress and to reduce the risk will happen at all.

Scrutiny for human rights compliance dovetails neatly with the work of National Human Rights Institutions in democratic States to promote and protect good governance and the rule of law within their democratic States.² The rule of law creates the presumption that everyone is equal before the law, including the State. It acts as a guarantee for individuals and limits State power: individual activities can only be restricted as far as an accessible stable system of law provides.

¹GANHRI, Paris Principles, <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx> accessed 16 November 2020

²Office of the United Nations High Commission on Human Rights (UNHCHR) 'Good Governance Practices for the Protection of Human Rights', 2007 illustrating examples of how good governance supports the protection of human rights www.ohchr.org/Documents/Publications/GoodGovernance.pdf accessed 16 November 2020.

The rule of law creates a basic minimum standard for the operation of good governance within a State so that law must be clear, accessible, stable, consistent and capable of being followed. Individuals must be treated equally by the law, which therefore must be applied impartially and independently.

The tools used to ensure good governance according to the rule of law, which can inform and support the Commission's work to promote and protect individual rights include:

- transparency in government;
- personal and institutional accountability of decision-makers;
- effective public participation and responsiveness to people's needs; and
- responsibility for the impact of democratic, executive and administrative decisions.

Each of these elements of good governance is necessary to ensure the effective implementation of minimum human rights standards in practice. Without understanding individual needs, it would be impossible to understand whether rights are endangered. Without transparency in government, it would be difficult to identify decisions, which may breach constitutional rights. Lastly, the Commission can credibly promote challenges to human rights abuse through personal and institutional accountability.

The Commission's promotional activities are therefore critical to ensure the necessary elements of good governance are in place and key stakeholders have the capacity to undertake their roles in line with the State's obligations under constitutional, regional and international human rights standards. To do this effectively, the Commission requires a structured manual to underpin its activities. The Manual will also guide the work of the Commission's Thematic Committees, and inform programme development.

This Manual was drafted by Judy Oder, a Human Rights Expert, deployed by the African Union to support the National Human Rights Commission from 2019-2020 in collaboration with the Directorate of Legal and Investigation of the Commission.

1.2 How to use this human rights training manual

This Human Rights Manual is divided into six parts. Part 1 considers the definition of human rights, introduces the international framework and delves into principles such as the universality, inalienability, indivisibility and interdependence of human rights. Part 2 looks at the UN human rights system while Part 3 considers the African human rights system. Part 4 examines civil and political rights while Part 5 focuses on economic, social and cultural rights. Part 6 explores the human rights of marginalised groups.

Specific rights in Parts 4 and 5 are presented as individual chapters. Similarly, each of the marginalised groups in Part 6 are considered separately. Each chapter references relevant international standards and, if applicable the Gambian constitutional provision. Brief analyses of key principles pertaining to each right or group are examined in each of the chapters followed by discussion questions to inform group work and discussions sessions. All the substantive chapters in Parts 4 – 6 include a section with resources for further reading.

1.3 What are human rights?

Human rights are rights we have simply because we exist as human beings; they are not granted by any State. These universal rights are inherent to us all, regardless of nationality, sex, and national or ethnic origin, colour, religion, language, or any other status. They range from the most fundamental, such as the right to life, to those that make life worth living, such as the rights to food, education, work, health, and liberty.³

Since the Second World War, the fundamental human rights enjoyed by us all by virtue of our humanity have increasingly been enshrined in national constitutions and international agreements. At a basic level, these rights designed to ensure that everyone – regardless of national or ethnic origin, socio-economic background, race, gender, sexual orientation or other status – enjoys the fundamental entitlements of being human and the basic standards required to ensure our human dignity.

International human rights law and constitutional guarantees place obligations on the State to refrain from acting in a way, which violates those basic standards, but they also create positive obligations on States to act to protect, promote and fulfil the practical enjoyment of rights.

³ OHCHR, What are human rights, <https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

For example, without access to a functioning system of sanitation, it would be challenging for individuals to enjoy the right to health. Equally, without a functioning, independent and impartial judiciary, the constitutional right to a fair trial would be pointless.

2. Protecting human rights: Introducing the international framework

Human rights are concrete legal standards recognised in international human rights law and in domestic constitutional guarantees across the world. This global legal regime routinely circumscribes the bounds of acceptable State action. In this section, we consider the international human rights legal framework and its implementation in domestic constitutional guarantees.

2.1 International human rights instruments

The Universal Declaration of Human Rights⁴ (UDHR) establishes the fundamental principles and standards of human rights, which form the basis of subsequent developments in both global and regional human rights law. The UDHR is comprehensive in its scope, setting out a catalogue of civil, political, economic, social and cultural rights, but it is only declaratory, as it has no legal force.

The principles of the UDHR are given binding force in international law in two principal treaties:

- the International Covenant on Civil and Political Rights (ICCPR) and the
- the International Covenant on Economic, Social and Cultural Rights

Seven subsequent UN treaties designed to address specific human rights problems or to provide particular protection for the rights of marginalised groups further develop the UDHR's standards:

- the Convention on the Elimination of all forms of Racial Discrimination (CERD)
- the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

⁴ United Nations General Assembly (UNGA) Res 217 A(III) (10 December 1948, Paris)

- the Convention Against Torture (UNCAT)
- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- International Convention for the Protection of All Persons from Enforced Disappearances
- Convention on the Rights of Persons with Disabilities.⁵

The Gambia has ratified all the above treaties including the following optional protocols⁶:

- Optional Protocol to the Convention Against Torture
- Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty.
- Interstate communication procedure under Convention for the Protection of All Persons from Enforced Disappearances
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women

The Gambia has accepted individual complaint procedures of the Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Rights of all Persons with disabilities.⁷

2.2 Reservations and declarations: can States opt-out of minimum human rights standards?

There are very limited opportunities for States to opt-out of the minimum human rights standards in international human rights law once they become a party to a treaty. These restrictions are designed to ensure adequate flexibility to open up international human rights treaties to as many parties as possible, while maintaining the integrity of the universal minimum standards agreed.

⁵ OHCHR, The Core International Human Rights Instruments and their monitoring bodies <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 16 Nov 2020.

⁶ OHCHR, UN Treaty Body Database https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=64&Lang=EN accessed 16 Nov 2020.

⁷ Ibid.

In limited circumstances, States may enter a reservation if it is not incompatible with the treaty's purpose. Other States Parties may object to any reservation and reservations may be withdrawn at any time. In practice, reservations are published and are subject to scrutiny not only by States Parties but also by civil society and international and domestic human rights commentators.

After ratification, States may generally only derogate from their international human rights obligations in times of national emergency. This test is strict and applies only when:

- a treaty permits derogation;
- a state of national emergency exists;
- any specific derogation is strictly required by the situation;
- that derogation is reported to the relevant international organisation and other States Parties; and
- the derogation is lifted as soon as the circumstances permit.

The Gambia's reservation to Article 14 (3) of the ICCPR reads: "For financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only. The Government of the Gambia therefore wishes to enter a reservation in respect of article 14 (3) (d) of the Covenant in question."⁹

In light of the recent COVID-19 pandemic, the Office of the High Commissioner for Human Rights (OHCHR) issued guidance pertaining to extraordinary measures invoked to protect the right to health.¹⁰

Some absolute rights – including the right to life and the prohibition of torture, inhuman and degrading treatment and punishment – generally do not permit any form of derogation. International human rights law recognises that not all rights are absolute. By necessity, some rights inherently recognise that they can justifiably be limited in order to preserve the rights of the community or the competing rights of others.¹¹ For example, the right to liberty may be limited in order to impose a lawful and proportionate custodial sentence after a serious crime has been committed. International treaties and domestic constitutions recognise these limitations either through specific limitation clauses or in the language of individual, limited or qualified rights.

⁹ OHCHR, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec accessed 16 Nov 2020.

¹⁰ OHCHR, Emergency measures and COVID-19 Guidance https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf accessed 16 November 2020.

¹¹ Article 4 of the ICCPR.

Rights, freedoms and prohibitions that are not subject to derogation even in times of a public emergency, which threatens the life of the nation, under the ICCPR¹² are:

- Right to life
- Prohibition of torture, or cruel, inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of detention for debt
- Prohibition of retroactive criminal laws
- Right to recognition as a person before the law
- Freedom of thought, conscience, religion and belief.

The African Charter on Human and Peoples' Rights does not contain a derogation provision; however, States Parties may derogate from certain rights in times of emergency.¹³

In practice, the obligation to give effect to a treaty can have a number of implications for domestic law and practice. These include checking whether domestic law complies with the obligations in the treaty; considering whether any reservations or declarations made by the State (limiting the effect of the treaty) are compatible with its object and purpose; amending or repealing any laws and administrative practices, which are incompatible with the treaty. The obligations may also include taking positive steps to ensure that the rights guaranteed are enjoyed in practice (for example, by allocating funds to support programmes for social housing where standards of housing available fall short of the requirements of the ICESCR). National governments and National Human Rights Institutions may also have a responsibility to respond effectively to judgments of international courts and international monitoring mechanisms.

2.3 Human rights are universal, indivisible and interdependent

'[T]he inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'
Preamble, Universal Declaration of Human Rights.

¹² Ibid.

¹³ The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

2.4 Human rights are universal

International human rights law stems from the shared values and experiences of human dignity. Fundamental human rights apply to us all irrespective of our race, colour, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic.¹⁴ Rights accepted by states must apply equally to all.¹⁵ In practice, States take responsibility for ensuring respect for rights within their own jurisdiction; they are also permitted a 'margin of appreciation' in their approach to certain rights to ensure their effective application within local conditions.¹⁶

However, despite this degree of discretion, someone travelling across international borders and between States, that both accept the obligations of the international human rights legal framework should enjoy equal protection despite his or her border crossing. Later in the Manual, we will explore the nature of absolute rights and rights which permit some justified restrictions.

2.4.1 Popular myths about human rights

'Human rights are a western concept.'

International human rights law protects everyone regardless of nationality, sex, ethnicity, economic status, sexual orientation, abilities. The universal nature of human rights law is detailed in the provisions of the ICCPR and the ICESCR, which are also mirrored by later human rights treaties.

2.4.1.1 The myth that human rights laws ignore local cultures and practices

Universal human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. The flexibility of human rights to be relevant to diverse cultures is facilitated by minimum standards and the incorporation of cultural rights in regional and international instruments. Within this framework, States have maximum room for cultural variation without diluting or compromising the minimum standards of human rights established by law.

¹⁴ Article 2 UDHR.

¹⁵ Preamble and Article 1 Vienna Declaration and Programme of Action (VDPA) (adopted 25 June 1993) UN DOC A/CONF 157/23.

¹⁶ Article 5 VPDA.

The Vienna Declaration and Programme of Action (1993)¹⁷ provides explicit consideration for culture in human rights promotion and protection, stating that: ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’. This is acknowledged in the context of the State’s duty to promote and protect human rights regardless of prevalent cultural systems. Cultural considerations should in no way diminish States’ human rights obligations.

Cultural rights are embodied in international standards such as the International Bill of Rights; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the Declaration on Race and Racial Prejudice; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. They are reflected in the Declaration on the Principles of International Cultural Cooperation; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Declaration on the Right to Development. Cultural rights are also included in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and ILO Convention No 169 on the Rights of Indigenous and Tribal Peoples.

Human rights on cultural diversity and integrity encompass a wide range of protections, including the right to cultural participation; the right to enjoy the arts; conservation, development and diffusion of culture; protection of cultural heritage and freedom for creative activity. They also include protection of persons belonging to ethnic, religious or linguistic minorities; freedom of assembly and association; the right to education; freedom of thought, conscience or religion; freedom of opinion and expression; and the principle of non-discrimination.¹⁸

2.4 Human rights are inalienable, indivisible and interdependent

No individual can be deprived of his or her rights except if the limitation is recognised, justifiable and legally defined. For example, a person’s right to liberty may be restricted if he or she is convicted of a crime by a recognised and legitimate court and a custodial sentence is proportionate and necessary.¹⁹

¹⁷ OHCHR | Vienna Declaration and Programme of Action

¹⁸ UN Department for Public Information.

¹⁹ Article 9(1) ICCPR.

‘The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’

Vienna Declaration and Programme of Action 1993²⁰

Although rights can be labelled civil, political, economic or social rights, rights are by their very nature indivisible and interdependent.²¹ Without the right to health and an adequate standard of living, the right to life is endangered. Similarly, without the right to a clean environment, our right to personal integrity and private life and our right to health may be undermined. Civil, political, economic and social rights together form a holistic package of rights, which underpin basic human dignity. They are complementary and each is essential to individual integrity and development.

2.5 Everyone is equal in human rights law

States are required to implement human rights standards without discrimination on any grounds including gender, race, colour, nationality, religion, political or other opinion, ethnic or social origin, age, disability, sexual orientation or other status.²²

2.6 States obligations to respect, protect and fulfil human rights

States are under an obligation to implement international human rights law. In practice, States have a tripartite obligation to respect, protect and fulfil individual rights.²³ While States are the primary duty bearers in international human rights law, it is broadly recognised that individual rights are not only endangered by State behaviour, but by the actions of other individuals and legal persons.²⁴ So, for example, our right to work and safe working conditions may be most directly affected by private employers. Our rights in human rights law are generally enforceable only against the State. However, the State may be under a positive duty to create economic and regulatory conditions to prevent poor working conditions and to protect individuals’ right to work in practice.²⁵

²⁰ Article 5 VPDA.

²¹ Ibid.

²² Article 2 UDHR

²³ Articles 1 and 13 VPDA.

²⁴ Article 23 VPDA.

²⁵ Article 2(1) ICESR.

The duty to respect requires the State to refrain from actively violating a right.²⁶ For example, the right to liberty includes a right to be free from arbitrary arrest. The obligation to protect recognises that the State may have positive obligations to take steps to protect a right from interference by others.²⁷ For example, the right to personal integrity and security²⁸ includes an obligation on the State to adopt a system of effective criminal justice to protect individuals from criminal violence, including assault. The obligation to fulfil acknowledges that more promotion that is constructive may be required to ensure that individual rights are enjoyed in an effective practical way.²⁹ In order to meet the obligation to secure the highest attainable standard of health with the available resources,³⁰ States are required to instigate plans for national health including through health services and health education.

The obligation to respect, protect and fulfil may give rise to a different combination of positive and negative obligations for the State depending on the right in play. Some examples of the obligations imposed by the right to life are set out below.

Examples of State obligations to respect, protect and fulfil the right to life³¹

The right to life

Respect

- Individuals are free from the threat of arbitrary State killing
- The death penalty is imposed only in the limited circumstances recognised by international law
- Deaths where State authorities are involved are subject to a full, open and effective investigation involving the family of the deceased.

Protect

A fully functioning and non-arbitrary criminal justice system operates to protect individuals from violent crime.

Fulfil

- Where a real risk to human life exists, measures are taken to reduce the threat. For example, does the State have a strategy to protect human life in the event of a major terrorist attack or to deal with epidemics and other public health emergencies? Are education and awareness programmes in necessary to prevent such risks?

²⁶ CCPR 'General Comment 31' (29 March 2004) CCPR/C/21/Rev1/ Add 13.

²⁷ Ibid, at para 8

²⁸ Article 9 ICCPR.

²⁹ Human Rights Committee, General Comment No 31, , para 16.

³⁰ Article 11(1) ICESCR.

³¹ Committee on Civil and Political Rights (CCPR) 'General Comment No 6' 16 Session 1982 (30 April 1982).

2.7 Absolute, non-derogable, derogable and qualified rights

The principle of universality applies to all rights.³² Some rights are absolute and States cannot impinge upon them or derogate from them in any circumstances. For example, the prohibition on torture applies regardless of any perceived threat to public safety or national or global security.³³

By contrast, international and domestic human rights law generally recognises that in some circumstances, certain rights must inherently be limited. The right to liberty may lawfully be limited when individuals who have committed serious criminal offences are lawfully convicted and sentenced to a prison term. Equally, the State may derogate from certain minimum standards where derogation is temporarily justified and proportionate to a state of emergency. Finally, certain rights are by their nature qualified and may be limited in order to meet certain narrowly defined legitimate public interests or to respect the competing rights of others.

Limitation clauses in international treaties or constitutions generally identify those rights, which are absolute, limited or qualified, and those, which are derogable. Some treaties are drafted to ensure that rights are limited or qualified by their text. Regardless of the model operating, the principle remains the same. Absolute rights remain absolute. Some rights are qualified and expressly permit the State to justify limitations – or interferences – to meet legitimate aims in the interests of the community or to protect the rights of others. In addition, any limitation or qualification must be reasonably and objectively justified by the State in accordance with the law and supported by credible evidence.

2.8 The right to an effective remedy

The very notion of rights entails, in addition to a substantive claim, the availability of recourse to a national judicial or administrative authority – including courts and National Human Rights Institutions (NHRIs) – in the event that a right is violated. Every person who claims that his or her rights have not been respected, protected or fulfilled must be able to seek an effective remedy before a competent and independent domestic body vested with the power to order reparations and to have its decisions enforced.

³² Article 1 Vienna Declaration and Programme of Action 1993.

³³ Article 1 CCPR General Comment No 7 'Torture or cruel, inhuman or degrading treatment or punishment (Article 7)', 16 Session 1982 (30 May 1982).

According to the Human Rights Committee (the UN body in charge of monitoring implementation of the ICCPR; see Chapter 5) Article 2(3)(a) of the ICCPR obliges States to take effective steps to investigate violations of human rights “promptly, thoroughly and effectively through independent and impartial bodies.”³⁴ Failure to do so may amount to a violation of the ICCPR.³⁵ Further, the Human Rights Committee has held that States are obliged to “bring to justice” perpetrators of certain violations, including torture, cruel, inhuman or degrading treatment, summary and arbitrary killing and enforced disappearance.³⁶

Furthermore, 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 Law³⁷ specify that States have an obligation to investigate alleged violations and take further action where appropriate. They should take appropriate legislative and administrative measures to prevent violations; and provide victims with effective remedies and equal and effective access to justice.³⁸ Amnesties that prevent prosecution of individuals for international crimes or gross violations of human rights would interfere with the right to an effective remedy, including reparations.³⁹

According to Article 2 (3) of the ICCPR, States Parties undertake “to ensure that (a) ... any person whose rights or freedoms ... are violated shall have an effective remedy” and that (b) persons claiming such a remedy shall have their “right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”; and “to develop the possibilities of judicial remedy”.

2.9 The right to reparation for harm suffered

As mentioned above, the right to reparation is an essential element of the right to an effective remedy. Where the State is responsible for a human rights violation through its acts or omissions, it is under an obligation to provide adequate, effective and prompt reparation to the victim(s). Indeed, where reparation is not provided, “the obligation to provide an effective remedy ... is not discharged.”⁴⁰ The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide for the following forms of reparation:

³⁴ Human Rights Committee, general comment No. 31 (26 May 2004), paragraph 15.

³⁵ Ibid.

³⁶ Ibid, para 18.

³⁷ UN Doc. A/RES/60/147 (16 December 2005).

³⁸ Ibid, principle 3.

³⁹ OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties, New York and Geneva, United Nations, 2009, at p. 11.

⁴⁰ Human Rights Committee, general comment No. 31, paragraph 16.

Right of victims to reparation after gross human rights violations⁴¹

In accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, which includes the following forms:

Restitution entails, where appropriate and desirable, restoring the victim to the situation existing before the occurrence of the human rights violation concerned. Restitution may include restoration of liberty, return to one's place of residence, restoration of employment and return of property.

Rehabilitation includes legal, medical, psychological and social measures to help victims recover (for instance, setting up rehabilitation centres for torture victims). Compensation refers to indemnification for financial or non-financial damages, including physical or mental harm; lost opportunities (such as employment, education or social benefits); material damages; loss of earnings or earning potential; and moral damage.

Satisfaction refers to public apologies; acceptance of responsibility; victim commemorations and tributes; verification of facts with full and public disclosure of the truth where possible and appropriate; an official declaration or judicial decision; judicial and administrative sanctions against the perpetrators of gross human rights violations; search for disappeared persons; identification and reburial of bodies in accordance with victim and family wishes; and inclusion of an accurate account of gross human rights violations in educational material at all levels. Guarantee of non-recurrence entails measures to help prevent future human rights violations. These may include legislative and institutional reforms (such as to strengthen the independence of the judiciary); programmes to vet the integrity and suitability of individuals for public employment; and efforts to improve the observance of codes of conduct by public servants.

⁴¹ UN Doc. A/RES/60/147 (16 December 2005), principles 19–23.

PART 2: THE UNITED NATIONS HUMAN RIGHTS SYSTEM

3. United Nations human rights treaty monitoring bodies

Treaty bodies⁴² monitor state compliance with obligations detailed in core UN human rights instruments and relevant optional protocols. They are:

- Human Rights Committee;
- Committee on Economic, Social and Cultural Rights (CESCR-Committee);
- Committee on the Elimination of Racial Discrimination (CERD-Committee);
- Committee on the Elimination of Discrimination against Women (CEDAW-Committee);
- Committee against Torture (CAT-Committee);
- Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is established by Article 1 of the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, (OPCAT).⁴³
- Committee on the Rights of the Child (CRC-Committee);
- Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW Committee);
- Committee on the Rights of Persons with Disabilities (CRPD-Committee);
- Committee on Enforced Disappearances (CED-Committee).

With the exception of the CESCR-Committee, which was created by a resolution of the Economic and Social Council in 1985, the above bodies were established by their respective instruments, and were set up as soon as the respective treaties entered into force.⁴⁴

⁴² The UN human rights system generally distinguishes between charter-based and treaty-based bodies. Treaty based bodies derive from specific human rights treaties. Charter-based bodies are established according to provisions contained in the UN Charter. They include the Human Rights Council, which replaced the former Commission on Human Rights, and Special Procedures.

⁴³ Optional Protocol to the Convention against Torture, Mandate of the Sub-committee on the Prevention of Torture OHCHR | The SPT in Brief, See videos of treaty bodies in action including the SPT OHCHR | Treaty Bodies.

⁴⁴ The core international human rights instruments and their monitoring bodies <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 18 November 2020.

3.1 Reporting procedure

Obligations of States

The State reporting procedure is the only mandatory procedure common to all nine core human rights treaties. Governments have an obligation to submit to each treaty monitoring body an initial report, followed by periodic reports and, in some cases, emergency or other reports requested by the treaty-monitoring body. The treaty bodies provide States with guidelines aimed at assisting them in the preparation of the reports. The reports are expected to provide the following minimum information:

- all measures adopted by a State to give effect to the rights provided for in the treaty;
- progress made in the enjoyment of those rights;
- relevant empirical information, including statistical data;
- all problems and difficulties affecting the domestic implementation of the treaty.⁴⁵

State reports are drafted by governments. However, to ensure completeness and objectivity it is advisable that other State institutions and partners, including parliament, national human rights commissions and ombudsmen, relevant non-governmental organizations (NGOs) and civil society organizations, also assist in preparing State reports.

3.2 Examination of State reports

Treaty bodies analyse State reports and discuss them in public sessions, in the presence of State representatives and members of the public. Although the Committees aim at a constructive dialogue with governments, State representatives may be confronted with highly critical questions and remarks formulated by Committee members. At the end of the examination of each State report, the treaty bodies adopt concluding observations and recommendations that are released at the end of the session. States are expected to implement those recommendations and provide information in their next reports on the measures taken to that end. Some Committees occasionally request specific reports, particularly in relation to serious human rights violations.

⁴⁵ Ibid

3.2.1 The role of National Human Rights Institutions and other stakeholders in the treaty reporting procedures

National Human Rights Institutions (NHRIs) may encourage States to comply with their reporting obligations. Indeed, recent studies have shown that countries with NHRIs have ratified one-third more international human rights treaties than States without NHRIs. Furthermore, States with NHRIs tend to submit more reports to human rights Treaty Bodies, with a reporting rate 20% higher than States without NHRIs.⁴⁶ NHRIs should familiarize themselves with the Treaty Body reporting guidelines and assist governments in understanding and following them when developing their periodical reports. In this sense, NHRIs may also provide training for state officials regarding reporting procedures, collection of data for reports and other relevant issues relating to the reporting process.⁴⁷

Treaty bodies have developed modalities for interaction with NGOs, inviting them to submit relevant written and oral information. United Nations specialized agencies, such as ILO and UNESCO, and other United Nations entities are invited to assist in monitoring treaty implementation. For instance, the United Nations Children's Fund (UNICEF), in particular, with its worldwide network of country offices, provides the CRC-Committee, the CRPD Committee and other treaty bodies with active and valuable assistance in the ambitious task of monitoring compliance with treaty obligations relating to children in States Parties.

3.3.2 General comments issued by treaty-monitoring bodies

Treaty bodies adopt and publish general comments or general recommendations concerning the provisions and obligations contained in their respective treaties. These documents reflect the committees' experience in the reporting procedure and constitute an authoritative source of interpretation of human rights instruments.⁴⁸

3.3 Individual complaints procedures

The Optional Protocols to ICCPR, CEDAW, CRPD, ICESCR and CRC, and specific articles in CERD, CAT, and International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and ICRMW provide for optional individual complaints (called "communications") procedures for consideration by the relevant treaty bodies.

⁴⁶ CARDENAS, Sonia. Adaptive States: The Proliferation of National Human Rights Institutions. The Carr Center for Human Rights Policy Working Paper T-01-04, p. 19.

⁴⁷ OHCHR, Information Note, NHRIs interaction with the UN treaty body system, p.6

⁴⁸ OHCHR, Human Rights Treaty Bodies- General Comments <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> accessed 18 November 2020.

Under those provisions, which are accepted by an ever-greater number of States Parties, any individual subject to the jurisdiction of a State Party who (a) claims to be a victim of a human rights violation and (b) has exhausted all available domestic remedies is entitled to file a complaint with the competent treaty-monitoring body.⁴⁹

The Committees examine such complaints under a quasi-judicial, confidential procedure culminating in a final, non-binding decision (called “final views”, “suggestions” or “recommendations”) that declares the complaint either inadmissible (if formal requirements are not met) or admissible, and – in the latter case – issues an opinion on the merits (determining whether the complainant’s human rights have been violated). These views are subsequently made public. Under Article 30 of ICCPED, the CED-Committee is competent to receive and consider requests that a disappeared person should be sought and found as a matter of urgency. Such requests for urgent action are only admissible if the enforced disappearance has occurred in a country that is a State Party to the Convention.⁵⁰

3.4 state complaints procedure

ICCPR, CERD, CAT, CEDAW, CED, CRPD and ICRMW provide for inter-State complaints procedures, under which a State Party is entitled to submit a complaint to the relevant committee, claiming that another State Party is not fulfilling its treaty obligations. The procedure is based on the principle that every State Party to a human rights treaty has a legal interest in the fulfilment of the obligations of every other State Party.⁵¹

This collective interest is, for instance, reflected in General Comment No. 31 of the Human Rights Committee on the nature of the general legal obligation imposed on States Parties to the ICCPR. The Committee commends to States Parties the view that violations of the rights guaranteed under the ICCPR deserve the attention of all States Parties. It points out that “to draw attention to possible breaches of Covenant obligations by other State Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest”.

⁴⁹ OHCHR, Human rights bodies, complaints procedures <https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrtbpetitions.aspx> accessed 18 November 2020.

⁵⁰ Ibid.

⁵¹ OHCHR, Treaty based bodies, <https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> accessed 19 November 2020.

3.5 Inquiry procedures

CAT, The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and the Optional Protocols to CRPD, ICESCR, CEDAW and CRC provide for a procedure of suo motu inquiry by the respective treaty bodies (also known as “inquiry of its own motion”). These procedures may be initiated by relevant treaty bodies, if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State Party. A treaty body that launches such an inquiry may carry out a fact-finding mission to the country concerned, subject to approval by its government, whose cooperation it must seek throughout the entire procedure. All proceedings are confidential, but the committees may include a summary account of the results of their inquiries in their annual reports.

3.6 The system of regular visits to detention centres established under the Optional Protocol to Convention against Torture

The Optional Protocol to CAT of December 2002, which entered into force in 2006, provides for a system of regular visits to places of detention by an international body, the Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), and by national bodies, National Preventive Mechanisms (NPMs). The system is designed to prevent torture and other cruel, inhuman or degrading treatment or punishment. The SPT and the NPMs formulate recommendations and issue them to concerned governments. While the recommendations of the NPMs may be published in their annual reports, SPT reports are confidential. However, States are encouraged to publish these reports. The SPT may also request CAT-Committee to make a public statement or to publish the SPT report if a State refuses to cooperate or fails to take steps to improve the situation in light of the SPT’s recommendations.⁵²

3.7 Follow-up to treaty body recommendations

In order to assist States in implementing their recommendations, some treaty bodies have introduced procedures to ensure effective follow-up. Some request, in their concluding observations, that States report back to the country rapporteur or follow up rapporteur within one year (sometimes two) on the measures taken in response to specific recommendations or “priority concerns” that are rapidly implementable.

⁵² OHCHR, Guidelines on national preventive mechanisms https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en accessed 19 November 2020.

The rapporteur reports to the Committee. Similarly, all treaty bodies with a mandate to consider individual communications request follow-up information, within a specified time-frame, from the State Party concerned in all cases in which a breaches of a treaty are found.⁵³

4. Charter-based system of human rights: the United Nations Human Rights Council and its mechanisms

This section examines key institutions founded by the UN Charter.

4.1 Commission on Human Rights

The United Nations Commission on Human Rights was established in 1946 to weave the international legal fabric that protects our fundamental rights and freedoms. Composed of 53 States members, its brief expanded over time to allow it to respond to the whole range of human rights problems and it set standards to govern the conduct of States. It also acted as a forum where countries large and small, non-governmental groups and human rights defenders from around the world voiced their concerns.⁵⁴

After an initial period governed by the doctrine of “no power to take action” during the 1950s and 1960s, the Commission gradually developed both a public and a confidential procedure based on ECOSOC Resolutions 1235 (XLII) of 6 June 1967 and 1503 (XLVIII) of 27 May 1970 to deal with gross and systematic human rights violations in particular countries. The confidential “1503 procedure” permitted the Commission to examine individual complaints and the public “1235 procedure” allowed for public consideration of country situations.⁵⁵

As a political body composed of States, negotiations in the Commission were always subject to political consideration, in particular during the Cold War. With the increasingly active role of NGOs and individual experts, discussions became more objective, notably during the 1990s.

⁵³ OHCHR, Follow up to concluding observations <https://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx> accessed 19 November 2020.

⁵⁴ OHCHR, Introduction-Human Rights Council <https://www.ohchr.org/EN/HRBodies/CHR/pages/commissiononhumanrights.aspx> accessed 19 November 2020.

⁵⁵ Ibid.

However, at the turn of the millennium, ideological debates tainted by accusations of double standards and finger-pointing led to harsh criticism from many quarters. Finally, the then UN Secretary-General Kofi Annan, in his report on the reform of the United Nations,⁵⁶ proposed to replace the Commission by a more permanent Human Rights Council.

4.2 The Human Rights Council

The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. Since States could not agree on an amendment of the UN Charter, the Council does not constitute one of the permanent political UN bodies, as the Security Council and ECOSOC, but it has been elevated from a functional Commission of ECOSOC to a subsidiary body of the General Assembly.⁵⁷ The Human Rights Council meets at the UN Office in Geneva at least three times a year during its regular sessions in March (four weeks), June (three weeks) and September (three weeks). If one third of the Member States so request, the HRC can decide at any time to hold a special session to address human rights violations and emergencies.

4.3 The Universal Periodic Review

In order to ensure equal treatment of every country, the Universal Periodic Review (UPR), which involves a review of the human rights record of all 193 UN Member States once every four and a half years, was created in 2006. The UPR is a State-driven process, under the auspices of the Human Rights Council, in which each State's human rights performance is assessed by other States with the ultimate second cycle of the UPR was about to be completed. All UN Member States will then have been reviewed twice.⁵⁸

While the discussion among States in the framework of the UPR can be politicised, the review is based on a broad variety of information.

⁵⁶ In larger freedom: towards development, security and human rights for all. Report of the Secretary-General (A/59/2005); Addendum to the Secretary-General's Report: Explanatory Note on the Human Rights Council (A/59/2005/Add.1).

⁵⁷ For further details of the Human Rights Council see OHCHR, Welcome to the Human Rights Council <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 19 November 2020.

⁵⁸ OHCHR, Universal Periodic Review <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 19 November 2020

Besides the report presented by the State under review, the Office of the United Nations High Commissioner for Human Rights (OHCHR) compiles two reports: one based on information provided by NGOs and other stakeholders, such as NHRIs, and another based on a compilation of conclusions and recommendations made by treaty monitoring bodies and special procedures.⁵⁹ In August 2020, the Office of the High Commissioner for Human Rights published practical guidance on how UN entities at country level – acting jointly or individually – can engage in the Universal Periodic Review (UPR) process to support progress by Member States on human rights. The document also considers the implementation of the Sustainable Development Goals (SDGs), and the prevention and sustaining peace agendas.

⁶⁰The Gambia's UPR process, for its third cycle, took place on 19 November 2019. ⁶¹

4.4 Special procedures

The special procedures system of the HRC is made up of independent human rights experts with mandates to report and advise on human rights issues from a thematic or country-specific perspective. The system is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political and social. The HRC has progressively established new country mandates. As of December 2020, there were 44 thematic and 12 country mandates.⁶²

Special procedures consist of either an individual (called “Special Rapporteur” or “Independent Expert” or a five-member working group (one from each of the five United Nations regional groupings). The special rapporteurs, independent experts and working group members are appointed by the Human Rights Council, and serve in their personal capacities. They undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith. They are not United Nations staff members and do not receive financial remuneration. Their independent status is crucial to their ability to fulfil mandates impartially. A mandate holder's tenure, whether for a thematic or a country mandate, is limited to a maximum of six years. ⁶³

⁵⁹Ibid.

⁶⁰OHCHR, Maximizing the use of the Universal Periodic Review at country level, Practical Guidance https://www.ohchr.org/Documents/HRBodies/UPR/UPR_Practical_Guidance.pdf accessed 19 November 2020.

⁶¹See relevant documents at OHCHR, Universal Periodic Review Gambia <https://www.ohchr.org/EN/HRBodies/UPR/Pages/GMIndex.aspx> accessed 19 November 2020.

⁶²OHCHR, Special Procedures of the Human Rights Council <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 19 November 2020.

⁶³Ibid.

With the support of the OHCHR special procedure, mandate holders carry out a variety of tasks, including to:

- undertake country visits;
- act on individual cases and concerns of a broader, structural nature by sending communications to States and other stakeholders bringing alleged violations or abuses to their attention;
- conduct thematic studies and convene expert consultations;
- contribute to the development of international human rights standards;
- engage in advocacy;
- provide advice for technical cooperation.

Special procedure mandate holders report annually to the Human Rights Council; most also report to the General Assembly. Their tasks are defined in resolutions creating or extending their mandates.⁶⁴

The UN Human Rights System is complemented by regional human rights systems in Africa, the Americas and Europe.

⁶⁴ Ibid.

PART 3: The AFRICAN HUMAN RIGHTS SYSTEM

5. Introduction to the African Union

The African Union (AU) was launched in July 2002 in Durban, South Africa, following a decision in September 1999 by its predecessor, the Organization of African Unity (OAU), to create a new continental organisation to build on its work.

The AU vision is an integrated, prosperous and peaceful Africa, driven by its citizens and representing a dynamic force in the global arena. Agenda 2063, officially adopted by the AU Assembly in 2015, provides a collective vision and roadmap to build a prosperous and united Africa based on shared values and a common destiny.⁶⁵ The African human rights system is composed of several human rights treaties—or agreements between African Union member states—and the mechanisms that monitor compliance with these treaties.

5.1 African human rights treaties adopted by the Africa Union

The African Union has adopted several treaties on a range of themes to assist states meet their obligations. Below are the region's main human rights instruments.

5.1.i African Regional Human Rights Treaties

African Charter on Human and Peoples' Rights (Banjul Charter)

- The Banjul Charter protects both civil and political rights and economic, social, and cultural rights.
- It also recognizes people's rights, such as the right to development and self-determination.
- The Banjul Charter guarantees that all individuals are entitled to the protected rights and freedoms on an equal basis and without discrimination, including based on sex or "other status," which has been interpreted to include disability (Art. 2).¹
- The Banjul Charter also provides special protection to women, children and persons with disabilities. (Art. 18).

⁶⁵ African Union, Agenda 2063: The African we want <https://au.int/en/agenda2063/overview> accessed 20 November 2020.

5.1.ii Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

- The Maputo Protocol complements the African Charter by providing an explicit definition of discrimination against women and addressing traditional values and practices that can impede gender equality, including forced marriage and female genital mutilation.
- The Maputo Protocol was the first human rights agreement to protect a right to sexual and reproductive health (Art. 14).
- Besides general provisions that apply to all women and girls, the Maputo Protocol addresses special protection of women with disabilities, requiring State Parties to facilitate their access to employment, vocational training, and participation and to ensure that women with disabilities are free from violence, sexual abuse and discrimination (Art. 23).

5.1.iii African Charter on the Rights and Welfare of the Child (ACRWC)

- The ACRWC requires States Parties to ensure children's rights to survival and development (Art. 5), education (Art. 11), health (Art. 14), family protection (Art. 18), among others, and to fulfil obligations to protect children from abuse (Art. 16), exploitation (Art. 27), armed conflicts (Art. 22) as well as harmful social and cultural practices (e.g. child marriage) (Art. 21).
- The ACRWC also calls on States to ensure "special measures of protection" of children with disabilities in terms of physical accessibility and access to training and recreation (Art. 13).
- Article 44 of the Charter allows any person or group to submit a complaint on children's rights violations to the Committee against a State Party to the Children's Charter.

5.1. vi Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Disability Protocol)

- The Disability Protocol, the newest human rights treaty in the African system, is still awaiting enough ratification to enter into force. Once 15 States ratify this protocol, it will be binding on those states that have ratified it.

- The Disability Protocol was developed in line with the U.N. Convention on the Rights of Persons with Disabilities. It prohibits discrimination against persons with disabilities on all grounds (Art. 5), including denial of reasonable accommodations (Art. 1), and recognizes their full legal capacity (Art. 7).
- The Disability Protocol addresses harmful practices such as witchcraft, abandonment, concealment, ritual killings or the association of disability with omens that infringe on the rights of persons with disabilities (Art. 11).
- The Disability Protocol also recognizes intersectional forms of discrimination and includes separate articles specifically addressing rights of women (Art. 27), children (Art. 28), youth (Art. 29) and older persons with disabilities (Art. 30). It provides that women with disabilities should be ensured full participation in society, “protected” from sexual and gender-based violence, and guaranteed sexual and reproductive rights. It also requires integration of gender perspectives into all policies, legislation and programs.

5.1. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)

- Like the 1951 UN Convention Relating to the Status of Refugees, the OAU Convention defines a refugee as someone with a well- founded fear of persecution based on his or her race, religion, nationality, membership of a particular social group or political opinion.
- The Convention broadens definition of the term refugee to apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality. The definition covers one compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
- While the 1951 Convention does not establish any right to asylum, of origin or nationality’, it significantly ‘strengthens the institution of asylum’ ⁶⁶ by providing that Member States, ‘shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country.’⁶⁷

⁶⁶ Rainer Hofmann, ‘Refugee Law in the African Context’ (1992) 52 Heidelberg Journal of International Law 318, 324.

⁶⁷ 1969 Convention (n 1) art II (1).

- Article V of the 1969 Convention addresses voluntary repatriation. Its first paragraph articulates the core principle: '[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will'. This is an important corollary of article II's provisions on asylum, particularly article II (3) on non-refoulement.
- The sending state, in collaboration with the receiving state, must 'make adequate arrangements for the safe return of refugees who request repatriation',⁶⁹ while the country of origin must 'facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations'.⁶⁸
- The Convention mandates countries of asylum, countries of origin, voluntary agencies and international and inter-governmental organisations to assist refugees with the process of return,⁶⁹ providing in particular that states of origin should use the news media and the AU to invite refugees home and provide assurances regarding the circumstances prevailing there, and host countries should ensure that such information is received.⁷⁰ Article V also provides that upon return, refugees must not be penalised for having fled.⁷¹
- The 1969 Convention is the first and remains the only international legal instrument to formally insist on the voluntariness of refugee repatriation, however, it is worth noting that the concept appears in UNHCR's statute,⁷² the result of a UN General Assembly resolution adopted 19 years prior to the 1969 Convention.

5.1 v. Convention for the Protection and Assistance of Internally Displaced Persons in Africa

- The ground-breaking treaty obliges African governments to protect the rights of people who are forced to flee their homes because of armed conflict, violence, human rights violations and natural disasters.
- By establishing State responsibilities, the Convention is an important step towards protecting the almost 12 million internally displaced people (IDPs) across the continent.

⁶⁸ OAU 1969 Convention (n 1) art V (3).

⁶⁹ OAU 1969 Convention (n 1) art V (5).

⁷⁰ Ibid (n 1) art V(4).

⁷¹ Ibid.

⁷² Jean-Francois Durieux and Agnes Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influx of Refugees' (2004) 47 German Yearbook of International Law 105, 130.

- It urges States Parties to protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, among others, sexual and gender-based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices.⁷³

5.1. vi The African Charter on Democracy Elections and Governance

This AU treaty calls on member States to, among other things:

- Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights;
- Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the States Parties;
- Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;
- Prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development;
- Promote and protect the independence of the judiciary.

The Gambia has ratified all the above instruments.

A significant African Union instruments yet to be ratified by the Gambia is the African Youth Charter and the African Union Protocol on the Rights of Older Persons.

5.2 Standards developed by the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples Rights (the African Commission) has interpreted provisions, in the form of General Comments and Guidelines, Principles and Declarations to assist states implement their human rights obligations. All these documents are available on the Commission websites

⁷³ The Kampala Convention Article 9 (1)(2).

5.2.1 General Comments

- General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)), 2019
- General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) 2017
- General Comment No. 3: The African Charter On Human and Peoples' Rights: The Right to Life (Article 4)
- General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- General Comments No.1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

5.2.2 Guidelines, Principles and Declarations

- Indicative Questions To State Parties In Respect Of Article 5 Of The African Charter
- State Reporting Guidelines And Principles On Articles 21 And 24 Of The African Charter Relating To Extractive Industries, Human Rights And The Environment
- Principles On The Decriminalisation Of Petty Offences in Africa
- The Guidelines On Combating Sexual Violence And Its Consequences in Africa
- Guidelines On Freedom Of Association And Assembly In Africa September
- Guidelines On The Conditions Of Arrest, Police Custody And Pre-Trial Detention In Africa
- Guidelines And Principles On Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights
- State Party Reporting Guidelines For Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights (Tunis Reporting Guidelines)

- Resolution On Guidelines And Measures For The Prohibition And Prevention Of Torture, Cruel, Inhuman Or Degrading Treatment Or Punishment In Africa (Robben Island Guidelines),
- Guidelines For National Periodic Reports

5.3 Standards developed by African Committee of Experts on the Rights and Welfare of the Child

Like the African Commission, the African Committee of Experts on the Rights and Welfare of the Child (the Committee) has the power to issue authoritative interpretation of the Charter, in order to clarify its meaning and scope. It has developed General Comments to provide substantive elaboration of treaty provisions, as well as in-depth analyses of procedural concerns regarding the human rights treaties. As indicated below, the Committee has developed General Comments on a range of thematic issues:

- General Comment on Article 22 on the African Charter on Human and Peoples' Rights: Children in Situations of Armed Conflict.
- General Comment on Article 30: Children of incarcerated and imprisoned parents and primary caregivers.
- General Comment on Article 6: Name and nationality.
- General Comment on Article 31: "Responsibilities of the Child"
- Joint General Comment on Ending Child Marriage: This General Comment was developed in collaboration with the African Commission on Human and Peoples' Rights. This General Comment interprets provisions of the African Charter and the Maputo Protocol and the African Children's Charter.
- General Comment no 5 on article 1 of the African Children's Charter on "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection.

5.4 African human rights system mechanisms

The implementation of African human rights treaties is overseen by three key institutions-- the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

5.4.1 African Court on Human and Peoples' Rights

The African Court on Human and Peoples Rights⁷⁴ (the African Court) is a regional human rights tribunal with advisory and contentious jurisdiction concerning the interpretation and application of the African Charter on Human and Peoples' Rights ("Banjul Charter") and other instruments. The 11 Judges of the Court are elected for renewable, six-year terms. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, along with the African Court Rules of Court, set out the Court's functions and operating procedures.

The Court's jurisdiction extends to those States that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Court has jurisdiction to hear complaints concerning human rights violations allegedly committed by any one of those States, when those complaints are submitted by the African Commission, a State party, or an African intergovernmental organization. The Court's issues advisory opinions concerning the interpretation of the Charter and other human rights instruments, and issues provisional measures to prevent imminent, irreparable harm to an individual or group.

The Gambia has made a declaration allowing individuals to petition the Court, as required by Article 34(6) of the Court Protocol.

5.4.2 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACHPR) promotes and protects human rights in the 54 Member States of the African Union that have ratified the African Charter on Human and Peoples' Rights. Morocco re-joined the African Union in 2017, becoming its 55th Member State, but it has not yet ratified the African Charter.

⁷⁴Details of the African Court's work and jurisprudence can be found on the Court's website African Court on Human and Peoples' Rights (african-court.org).

The African Charter and the Commission's Rules of Procedure establish its composition and procedures. The Commission is composed of 11 Commissioners, who are elected in their individual capacity and do not represent any State. The Commission accepts and considers complaints from individuals, groups of individuals, non-governmental organizations, and States concerning alleged violations of the African Charter on Human and Peoples' Rights.

The ACHPR holds two ordinary sessions a year and may hold extraordinary sessions upon the request of the Chairperson of the Commission or a majority of Commissioners. During the biannual ordinary sessions, the ACHPR considers periodic reports submitted by States parties, as well as reports from members of the Commission and its Special Mechanisms (rapporteurs, committees, and working groups). During the ordinary sessions, the Commission also considers individual complaints and reports concerning country visits ("Special Missions"). The Commission also holds two extraordinary sessions in a year. Details of the Commission's activities can be found on its website.⁷⁵

5.4.3 The African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (the African Committee) is charged with protecting human rights in Africa and interpreting the African Charter on the Rights and Welfare of the Child. The Committee is based in Addis Ababa, Ethiopia, where it generally holds its biannual ordinary sessions. It is made up of 11 individuals elected by the Assembly of the African Union to serve for one term of five years and may not be re-elected.

The Committee's activities include issuing "general comments," guidance and interpretation regarding the ACRWC; monitoring the ACRWC's implementation; reviewing reports by States and civil society organizations concerning States parties' implementation of the ACRWC and issuing recommendations ("concluding observations") and deciding "communications," complaints that allege violations of the ACRWC by States parties. The Committee conducts fact-finding and promotional missions concerning systematic violations of child rights in States parties; and formulates standards and guidelines to guide States parties in fulfilling their obligations. Further details of the Committee's work can be found here.⁷⁶

⁷⁵ African Commission on Human and Peoples' Rights (achpr.org)

⁷⁶ ACERWC - African Committee of Experts on the Rights and Welfare of the Child .

5.4.5 The role of National Human Rights Institutions before African human rights treaty bodies

In 2017, the African Commission adopted Resolution 370,⁷⁷ which empowers it to grant Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa. National Human Rights Institutions can collaborate with African human rights institutions on various human rights issues, including supporting the implementation of decisions and concluding observations at the national level.⁷⁸ They can play an important role by litigating or submitting amicus or third party briefs in relation to litigation before African treaty bodies.⁷⁹

⁷⁷ African Commission on Human and Peoples' Rights Sessions (achpr.org)

⁷⁸ Role of NHRIs in the Implementation of the Decisions of the African Commission on Human and Peoples Rights and the Judgments of the African Court on Human and Peoples Rights Role of NHRIs in Implementation ACHPR judgments.pdf

⁷⁹ Litigation Capacities, Gaps and Opportunities for African National Human Rights Institutions Litigation Capacities, Gaps and Opportunities for African National Human Rights Institutions-Web | NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS (nanhri.org)

PART4: CIVIL AND POLITICAL RIGHTS

6.1 Introduction to civil and political rights

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, commits States Parties to respect and protect the civil and political rights of individuals and groups, including the right to freedom of religion, freedom of opinion and expression, freedom of assembly, participation in public affairs, and the right to due process of law and a fair trial.

6.2 The right to life

The right to life is protected in international, regional and national standards.

6.3 The right to life under international, regional standards and the Gambian constitution

Article 3, UDHR

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

Article 6(1), ICCPR

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

Article 18(1) Constitution of the Republic of the Gambia

'No person shall be deprived of his or her life intentionally except in the execution of a sentence of death imposed by a court of competent jurisdiction in respect of a criminal offence for which the penalty is death under the laws of The Gambia as they have effect in accordance with subsection (2) and of which he or she has been lawfully convicted.'

The right to life is fundamental, but not absolute. There can be no derogation from the right to life in states of emergency,⁸⁰ but it is recognised that in certain circumstances, the right to life is legitimately limited:

- Where a person dies in war, as a combatant, there is no violation of the right to life.

⁸⁰Article 4(2) ICCPR.

- Death resulting from the use of force by State authorities is lawful if the use of force was necessary for the legitimate purpose of self-defence or the defence of others; to affect a lawful arrest; to prevent the escape of a person lawfully detained or to put down a riot or insurrection.
- International human rights law does not prohibit capital punishment entirely. The death penalty may be applied, in very limited, defined circumstances.

The global move to end capital punishment was buttressed by the General Assembly's adoption of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty in 1989.⁸¹

Where the State is involved or has responsibility in circumstances where a death occurs, a person is 'disappeared' or a near-death situation arises, the State has a number of specific obligations. These include:

- that an effective investigation into the circumstances of the case takes place;⁸²
- that the victim's family are closely involved;⁸³
- that there are appropriate procedures for punishing those responsible; and
- to learn lessons to prevent future deaths occurring.⁸⁴

The obligations of the State include a number of positive obligations over and above this investigative duty. These include:

- Homicide must be punished by law and must carry appropriate penalties in domestic law.⁸⁵
- A functioning criminal justice system must exist in order to prevent and punish violent crime and to bring alleged perpetrators to justice.⁸⁶
- Systems – including criminal law, guidance and training – must be in place to prevent arbitrary and unlawful killing by State agents, including military, police and prison authorities.⁸⁷

⁸¹OHCHR | Second Optional Protocol to the International Covenant on Civil and Political Rights.

⁸²Herrera Rubio v Colombia (Communication No 161/1983) (2 November 1987) CCPR [CCPR/ C/31/D/161/1983], para 10.3 www.worldlii.org/int/cases/UNHRC/1987/9.html.

⁸³UN Human Rights Council 'National Activity Plan 2006: Burkina Faso'; Communication No 1159/2003: Burkina Faso (11 April 2006) CCPR [CCPR/C/86/D/1159/2003]; Jordan v UK (App No 24746/94) (4 August 2001) ECHR.

⁸⁴Bautista de Arellana v Colombia (Communication No 563/1993) (13 November 1995) CCPR [CCPR/ C/55/D/563/1993] paras 8.3 and 10 www.worldlii.org/int/cases/UNHRC/1995/28.html.

⁸⁵¹ Ibid, para 8.4.

⁸⁶Ibid.

⁸⁷McCann v UK, App No (2008) ECHR para 385; Suarez de Guerrero v Columbia (Application No. 11/45) (31 March 1982), Human Rights Committee; Bautista de Arelliana v Columbia (Communication No. 563/1993) (11 October 1994) CCPR, [CCPR/ C/55/D/563/1993 (1995)]; Burrell v Jamaica (Communication No. 546/1993)(4 April 1995) CCPR [CCPR/C/53/D/546/1993 (1996)], p181.

- Programmes, strategies, policies and plans should be adopted to address threats and risks to human life and life expectancy, including dealing with poverty, malnutrition and other public health risks.⁸⁸ This duty includes an obligation to take steps to investigate and prevent threats of mass violence, including war, genocide and terrorist attacks.⁸⁹

6.4 Counter-terrorism policies and human rights

‘The promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.’ UN Global Counter-terrorism Strategy, GA Res, 60/288176

States face serious challenges in preventing acts of terrorism and safeguarding the security of individuals within their jurisdiction.⁹⁰ The scale and complexity of terrorism has evolved, as shown by the growth in the reach of terrorists and terrorist organizations and the changes in their *modus operandi*.⁹¹ Civilians continue to suffer the dire consequences of armed conflict between States and non-State armed groups designated as terrorist, with a wide-reaching negative impact on the human rights of victims, their families and communities.⁹² The burden on State authorities to prevent extremist violence and acts of terrorism and hold those responsible to account is significant, and the need for effective international and cross-border cooperation is greater than ever.⁹³

In his address to the Human Rights Council in February 2017, the Secretary-General said that the best prevention tool is the Universal Declaration of Human Rights and the international treaties that derive from it. The rights set out in the Universal Declaration provide a framework for real-world solutions through real change on the ground.⁹⁴ The United Nations human rights system was developed in response to catastrophic violent conflict and was designed to address the very factors that drive violence, conflict and insecurity. Human rights thus possess inherent preventive power and, combined in a framework of universal, indivisible, interdependent and interrelated rights, they can be considered a powerful tool for conflict prevention.

⁸⁸Article 5 CCPR General Comment No 6 ‘The right to life (Article 6)’ Sixteenth Session (30 April 1982), [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument).

⁸⁹5 UN Human Rights Committee ‘General Comment 6’, para 2; *Mahmut Kaya v Turkey* (App No 22535/93) ECHR; *EHP v Canada* (Application No. 67/80) CCPR, p185; *Plotnikov v Russian Federation* (Application No 784/97) CCPR, p186.

⁹⁰UNGA, Protecting human rights and fundamental freedoms while countering terrorism A/72/316 A/72/316 - E - A/72/316 -Desktop (undocs.org)

⁹¹See the fifth report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (S/2017/467).

⁹²See A/HRC/34/30.

⁹³See A/HRC/34/61.

⁹⁴See www.un.org/sg/en/content/sg/speeches/2017-02-27/secretary-generals-human-rights-councilremarks.

International and regional human rights mechanisms, which complement national processes for the prevention of human rights violations, can serve as early warning mechanisms and important tools for accountability.⁹⁵

A focus on the prevention of human rights violations can also contribute directly to preventing violent extremism and countering terrorism by avoiding individual experiences of human rights violations, such as torture and other ill-treatment, or violations of due process rights, which have been identified as playing a role in an individual's path to radicalization.⁹⁶ As recognized in the Plan of Action to Prevent Violent Extremism, the creation of open, equitable, inclusive and pluralist societies, based on respect for human rights and with economic opportunities for all, represents the most tangible and meaningful alternative to the recruitment strategies of violent extremists, and the most promising strategy for rendering their efforts unattractive.⁹⁷ Research has also shown that societies that respect women's rights are less prone to violent extremism.⁹⁸

At the regional level, the African Commission on Human and Peoples Rights has adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. The document guides States to ensure that they respect their human right obligations while combating terrorism.⁹⁹

6.5 The death penalty

At the time when most international human rights instruments were adopted, the death penalty was generally accepted by most States. Despite its widespread use, the ICCPR places strict limits on its operation. These include:

- The death penalty is exceptional punishment and can only be applied in relation to the 'most serious crimes'. The UN has explained that this should be limited to 'intentional crimes, those with lethal or other extremely grave consequences';¹⁰⁰
- The sentence must be required by domestic law at the time of the offence;
- The sentence may only be carried out after conviction by a competent court;
- A pardon or commutation must be open and the offender must have the right to seek pardon;

⁹⁵Supra n. 56.

⁹⁶See A/70/674, para. 33; A/HRC/31/65, para. 32; and Human Rights Council resolution 30/15.

⁹⁷A/70/674, para. 7; and A/HRC/33/29, para. 14.

⁹⁸See global study on the implementation of Security Council resolution 1325 (2000), p. 222, available from http://wps.unwomen.org/pdf/en/GlobalStudy_EN_Web.pdf.

⁹⁹African Commission, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org).

¹⁰⁰UN Human Rights Committee 'General Comment 6', para 2; Mahmut Kaya v Turkey (App No 22535/93) ECHR; EHP v Canada (Application No. 67/80) CCPR, p185; Plotnikov v Russian Federation (Application No 784/97) CCPR, p186.

6.4.1 Specific categories of offenders that are or should be exempt from capital punishment

They include:

- Juveniles: the ICCPR and the CRC clearly state that a person under 18 years of age at the time he or she commits an offence should not be subjected to the death penalty. That rule has become part of customary international law.
- Older persons: neither the ICCPR nor the ECOSOC Safeguards make any exemption from capital punishment for older persons, although in 1988 ECOSOC urged States to establish a maximum age for sentencing or execution: Article 4 (5) of American Convention on Human Rights provides that capital punishment shall not be imposed on persons who, at the time the crime was committed, were over 70 years of age.
- Pregnant women: the safeguards preclude the execution of pregnant women, given their status. • Persons with intellectual disabilities: the principle that persons who are not mentally competent, including those with an intellectual disability, should not be sentenced to death or be executed is absent from the ICCPR and the regional human rights treaties but is included in the ECOSOC Safeguards. Moreover, international law provides that fair trial guarantees must be respected in all States, including those that apply the death penalty. The Human Rights Committee has found that the imposition of a death sentence upon conclusion of a trial

in which the provisions of Article 14 of the ICCPR have not been respected constitutes a violation of the right to life (views adopted on communication No. 250/1987). A lawyer must effectively assist those accused of capital offences at all stages of the proceedings. Under Article 6 (4) of the ICCPR, executions should not take place when an appeal or other recourse is pending, and it must be possible for the individual concerned to seek amnesty, pardon or commutation of the sentence.

6.6 Movement towards the abolition of capital punishment

At the end of the Second World War, when international human rights standards were being drawn up, the death penalty was still applied in most States. Consequently, Article 6 of the ICCPR, Article 2 of the ECHR, and Article 4 of the ACHR provide for an exception to the principle of the right to life in the case of capital punishment. Since then, however, a clear trend for abolishing and prohibiting the death penalty has emerged.

The drafters of the ICCPR were already paving the way for the abolition of the death penalty in Article 6 of the Covenant, which provides that “nothing in this article shall be invoked to delay or prevent the abolition of capital punishment in any State Party to the Covenant”. As the United Nations General Assembly affirmed in its resolution 2857 in 1971, the right to life can be fully guaranteed only if the number of offences for which the death penalty may be imposed is progressively restricted, “with a view to the desirability of abolishing it in all countries”.

As early as 1982, the Human Rights Committee noted in its general comment on the right to life that “all measures of abolition should be considered as progress in the enjoyment of the right to life”. To this end, the Second Optional Protocol to the ICCPR was adopted in 1989 to promote the universal abolition of the death penalty. In December 2007, the General Assembly adopted a ground-breaking resolution calling for a moratorium on the use of the death penalty (A/RES/62/149), with a clear majority of States in favour. Several more resolutions on this issue have been adopted since (see 63/138, 65/206, 67/176 and 69/186), with an increasing majority in favour of abolition. These resolutions call on States to progressively restrict the death penalty’s use and not impose capital punishment for offences committed by pregnant women or anybody under 18 years of age. States are also asked to reduce the number of offences subject to the death penalty. Global UN action on the abolition of capital punishment has also focused on the problem of wrongful convictions, the failure of the death penalty to act as a deterrent to violent crime and the discriminatory application of capital punishment to people from marginalized groups.¹⁰¹

6.7 Deaths in custody

International humanitarian law and international human rights law provide for the obligation to investigate deaths occurring in custody, but there is no one internationally accepted document that offers practical guidance to detaining authorities and humanitarian workers on the standards and procedures to be followed when a death occurs in custody. The ICRC’s Guidelines for Investigating Deaths in Custody¹⁰² fills this gap.

One of the most basic obligations on the State is to refrain from State sanctioned killing. This extends beyond arbitrary killing on the streets by State agents, to include any circumstances where the State takes responsibility for the health and well-being of an individual and the actions of State agents – or their inactions – lead to death.

¹⁰¹See the OHCHR web page on the death penalty, www.ohchr.org/EN/Issues/DeathPenalty.

¹⁰²ICRC, Guidelines for investigating deaths in custody Guidelines for Investigating Deaths in Custody (icrc.org).

The most obvious example is the use of force against offenders either in police custody or in prisons. Less obvious is the need to ensure safe conditions in mental health institutions and hospitals or the need to ensure effective training for individuals who take responsibility for children either at school or in State institutions such as orphanages or youth offenders' institutes.¹⁰³ These positive obligations illustrate the broad nature of the right to life and its implications for government. The obligation to respect and protect life does not begin with the actions of an individual police officer or an individual soldier, but arises far earlier in the policy and planning process, when strategic measures can be taken to prevent loss of life.¹⁰⁴

6.8 Abortion and the right to life

Under Article 14 (2) (c) of the Maputo Protocol, States Parties are called upon to take all appropriate measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”. Despite this provision, the African Commission has noted that in many countries are yet to undertake the necessary legislative reforms towards domesticating the relevant provisions, including in the area of women's sexual and reproductive rights.

Related challenges include limited access by women and girls to family planning, criminalization of abortion, and difficulties faced by women in accessing safe and available abortion services, including in cases where abortion is legalised. As move to reverse this trend, the African Commission adopted General Comment No. 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women¹⁰⁵ in May 2014. The General Comment provides interpretive guidance on the overall and specific obligations of States Parties towards promoting the effective domestication and implementation of Article 14 of the Maputo Protocol.

Only the American Convention on Human Rights (ACHR) determines that the right to life applies from the point of conception.¹⁰⁶ This approach is inconsistent with other international and regional human rights treaties, which explicitly do not determine the point at which life begins.

¹⁰³Herczegfalvy v Austria (1992) 15 EHRR 437; Calvelli & Ciglio v Italy (App No 32967/96) (7 January 2002) ECHR (para 49); Savage v South Essex NHS Trust [2008] UKHL 74; CCPR 'General Comment 6'.

¹⁰⁴McCann v UK; Osman v United Kingdom (1998) 29 EHRR 245.

¹⁰⁵African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)

¹⁰⁶Article 4(1) American Convention on Human Rights (ACHR)

No case law under the ECHR or the ICCPR has ever determined that an abortion provided lawfully under domestic arrangements has violated the right to life.¹⁰⁷ However, the Protocol on the Rights of African Women requires States to take all appropriate measures to 'protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.¹⁰⁸ The ICCPR and ECHR exclude certain domestic restrictions on the right to access lawful abortion which violate women's rights to respect for private life and physical integrity.¹⁰⁹

6.9 Discussion questions on the right to life

- Does a law, practice or policy operate in a way which could create or address a threat to human life?
- In particular, does it authorise the use of force by State agents or others?
- Does it create conditions where individual lives may be in danger from the activities of the State or third parties?
- Does the State assume particular responsibility for the health and well-being of specific individuals?
- Is the government aware of a specific significant threat to human life, which is not yet being addressed?
- If so, are adequate safeguards in place to protect the right to life?
- Is the use of force authorised in circumstances limited to self-defence or the defence of others or where necessary to arrest or prevent the escape of a prisoner?
- Is the law or practice adequately defined to ensure that force is only used in those circumstances?
- Is any discretion adequately restricted to prevent misunderstandings or arbitrary application of force in practice?

¹⁰⁷VO v France (Application No 53924/00) (8 July 2004), ECHR <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=abortion&sessionid=63445185&skin=hudoc-en>.

¹⁰⁸Article 14(2)(c) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa www.achpr.org/english/_info/women_en.html.

¹⁰⁹Tysi c v Poland (Application No 5410/03) (20 March 2007), ECHR <http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=abortion&sessionid=63445185&skin=hudoc-en>; KL v Peru (Communication No 1153/2003) (22 November 2005), CCPR [CCPR/C/85/D/1153/2003]

- Is any necessary guidance appropriately drafted in order to limit force to those circumstances where it is proportionate and justified?
- Is an appropriate degree of training in place to ensure that those working in circumstances where lives may be endangered understand how best to limit risk?
- Are procedures in place designed to minimise risk to life, including providing appropriate safeguards and resources to implement those safeguards in practice?
- Is there a procedure in place to provide for an effective investigation should a death occur?
- Can any victims' families participate in this investigation?
- Is proportionate punishment possible where an individual or group of individuals is directly responsible for a death or deaths?
- What measures does the government have in place to learn lessons from such investigations?
- Are these efforts adequate to prevent future failings?
- Are there other alternative mechanisms for review?

6.10 Further reading

- African Commission on Human and Peoples' Rights, General Comment No. 3 on The African Charter On Human And Peoples' Rights: The Right To Life (Article 4)General_Comment_Article_30_ACRWC_English.pdf (acerwc.africa)
- ICRC, Guidelines for investigating deaths in Custody <https://shop.icrc.org/guidelines-for-investigating-deaths-in-custody-pdf-en>
- Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa African Commission on Human and Peoples' Rights Legal instruments (achpr.org)
- Moving Away from the Death Penalty: Arguments, Trends and Perspectives, New York, OHCHR, United Nations, 2014. www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf

7. The prohibition of torture, inhuman and degrading treatment and punishment

7.1 The prohibition of torture in international, regional standards and the Gambian Constitution

Article 5 of UDHR

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 7 of ICCPR

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

Article 1 of CAT

‘...the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Article 5, African Charter on Human and Peoples’ Rights

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

Article 21, The Constitution of the Republic of the Gambia 1997

‘No person shall be subject to torture or inhuman or degrading punishment or other treatment.’

Freedom from torture, inhuman and degrading treatment is an absolute, non-derogable right.¹¹⁰ The principal international treaty for this right is UNCAT,¹¹¹ but torture is prohibited at international and regional levels by other human rights treaties and at domestic level by national constitutions. Freedom from torture is linked to the fundamental rights to life and personal integrity and dignity.

UNCAT defines an act of torture very broadly within Article 1, and permits even wider definitions by other applicable instruments, such as regional and national commitments.

By definition, an act of torture requires official involvement. The pain or suffering must be inflicted or instigated by a public official, or committed with the consent or acquiescence of one. This means that a government can be held responsible for torture even when no government agent has been directly involved in committing the act of torture, but where one has failed to prevent it from happening. The prohibition on torture creates a variety of obligations on States:

- To abstain from committing acts of torture through its agents;
- To take effective measures to protect people from being subjected to torture within their jurisdiction;
- To avoid putting people in situations where they may be subjected to torture in another jurisdiction; and
- To appropriately punish any act of torture.

As freedom from torture is an absolute right, there can be no justification for committing torture, as contained in Article 2 of the CAT. Torture is unjustifiable even in a state of emergency¹¹² or where an order to commit torture is given by a superior officer.¹¹³

7.2 Expansion of the definition of torture

In recent years, however, the Committee Against Torture has begun to use an expanded definition of the scope of torture to include crimes, such as domestic violence against women and children or the use of forced labour by private persons, that the State has failed to act with due diligence to prevent, investigate and remedy.

¹¹⁰See cited regional and international human rights instruments at the start of that section.

¹¹¹OHCHR | Convention against Torture

¹¹²Article 4(2) ICCPR and Article 2(2) UNCAT

¹¹³Article 2(3) UNCAT.

Similarly, the UN Special Rapporteur on torture underlines that the failure of States to eliminate such persistent practices as intimate partner violence, child and forced marriage, female genital mutilation and so-called “honour crimes”, and their failure to criminalize marital rape and to repeal legislation that exculpates rapists who marry their victims, violates the obligation to prevent and prosecute torture and cruel, inhuman and degrading treatment or punishment (see 2016 Report to the Human Rights Council of the UN Special Rapporteur on torture, Juan E. Méndez, on the gender dimension of torture and ill-treatment (A/HRC/31/57)).

Under the definition of torture contained in CAT, acts that result in suffering but lack one of the essential elements of torture – intent, specific purpose and powerlessness of the victim – may, depending on the form, purpose and severity of suffering, be considered to constitute cruel, inhuman or degrading treatment or punishment. Given that all forms of legal punishment inflict a degree of suffering and contain some element of humiliation, punitive acts cannot be regarded as cruel, inhuman or degrading unless some additional aspect is present. Examples of acts considered cruel, inhuman or degrading punishment by the Committee Against Torture include solitary confinement beyond seven days, routine strip-searching of detainees and the enforced wearing of name badges rating a person's proficiency in the local language, which was deemed both discriminatory and humiliating.¹¹⁴

7.3 What State obligations arise from the prohibition of torture?

Human rights monitoring bodies have received numerous complaints regarding torture and ill treatment that have occurred in police custody. The following procedural safeguards limit considerably the exposure of arrested persons to that risk:

- notification of custody: the right of arrested persons to have the fact of their detention notified to a third party of their choice (family member, friend or consulate);
- the right of detainees to have access to a lawyer and his/her presence during interrogation;

¹¹⁴CAT. See also UN News, Solitary confinement should be banned in most cases, UN expert says Solitary confinement should be banned in most cases, UN expert says | | UN News

- the right of detainees to request a medical examination by a physician of their choice (in addition to any medical examination carried out by a physician called by law enforcement authorities);
- availability of centralized registers of all detainees and places of detention;
- exclusion of evidence elicited through torture or other forms of coercion;
- audio- or videotaping of all police interrogations.

These prohibited forms of torture and ill-treatment may include restraining a person in a painful position, hooding, prolonged exposure to loud music or sleep deprivation, threats, violent shaking or use of cold air to chill the detainee. The absolute prohibition of torture and ill-treatment is founded on the premise that if any exceptions are permitted, the use of torture is likely to increase. States have an obligation to prevent, investigate, prosecute and punish any act of torture. They must provide reparation to victims, including medical and psychological rehabilitation and compensation for material losses and moral harm.

State obligations under the Convention against Torture and its Optional Protocol
States Parties to the Convention have a duty to:

- enact legislation to punish torture, empower the authorities to prosecute and punish the crime of torture wherever it has been committed and whatever the nationality of the perpetrator or victim, and prevent these practices (principle of universal jurisdiction contained in Article 5 of the Convention);
- ensure that education and information regarding the prohibition of torture are fully included in the training of civil or military law enforcement personnel, medical staff, public officials and other persons who may be involved in the custody, interrogation or treatment of arrested, detained or imprisoned individuals (Article 10 of the Convention);
- ensure that interrogation rules, instructions, methods and practices and the arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment are systematically reviewed by independent bodies (Article 11 of the Convention);
- ensure that complaints of torture and ill-treatment are investigated thoroughly by competent authorities, that persons suspected of torture are brought to justice, that effective remedies are available to victims, and that laws are drawn up to implement measures that prevent torture and ill-treatment during detention (Articles 12–14 of the Convention);

- refrain from expelling or returning (“refoulement”) or extraditing a person to another State where it is likely that he or she will be exposed to torture (principle of “non-refoulement”) (Article 3 of the Convention);
- submit periodic reports to the CAT-Committee on the measures taken to give effect to the Convention, or other reports that the Committee may request (Article 19 of the Convention);
- establish independent national preventive mechanisms to carry out visits to all places of detention (OPCAT, adopted in 2002).

7.4 Discussion questions for compliance with the prohibition on torture

- Does domestic criminal law expressly prohibit torture or other cruel, inhuman or degrading treatment or punishment within the jurisdiction?
- Could any part of the law be construed to authorise torture?
- Does domestic law, policy or practice ensure that no person can legally be ordered to carry out an act of torture, even by a superior office or public authority?
- Does domestic law, policy and practice ensure that no person can be expelled, returned or extradited to another State where there are substantial grounds for believing that person would be in danger of being tortured?
- Does domestic law ensure that all acts of torture are a criminal offence, including attempts to commit torture, complicity and assistance in torture?
- Are individuals enabled to challenge their treatment as incompatible with the prohibition on torture, inhuman and degrading treatment and punishment?
- Does this challenge provide for a public hearing before an independent and impartial court or tribunal?
- Does domestic law prohibit the admission in court of evidence obtained using torture, cruel, inhuman or degrading treatment and punishment?
- Does domestic law and practice ensure that all acts of torture are punished with a penalty appropriate to the grave nature of the offence?

7.5 Further reading

United Nations

- United Nations minimum standards in respect of detention and the conduct of law enforcement:
- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, 1948
- Standard Minimum Rules for the Treatment of Prisoners, 1955 (revised and adopted as the “Nelson Mandela Rules” in December 2015)
- Code of Conduct for Law Enforcement Officials, 1979
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982
- Safeguards guaranteeing Protection of the Rights of those facing the Death Penalty, 1984
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), 1985
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990 . Basic Principles for the Treatment of Prisoners, 1990
- United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”), 1990
- United Nations Standard Minimum Rules for Non-Custodial Measures (the “Tokyo Rules”), 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010
- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012

African Commission standards

- General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).
- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.
- Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).

Other standards

- Physician for human rights, Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment training8Rev1en.pdf (ohchr.org)

8. The right to personal liberty and security

8.1 The right to personal liberty and security in international, regional standards and the Gambian Constitution

Article 3 of UDHR

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

Article 9 of UDHR

“No one shall be subjected to arbitrary arrest, detention or exile.”

Article 9 (1) of ICCPR

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

Article 19 Constitution of the Republic of the Gambia

Every person shall have the right to liberty and security of right to person. No one shall be subjected to arbitrary, arrest or Personal liberty detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable and in any case within three hours, in a language that he or she can understand, of the reasons for his or her arrest or detention and of his or her right to consult a legal practitioner.

(3) Any person who is arrested or detained- (a) for the purpose of bringing him or her before a court in execution of the order of a court, or (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the Laws of The Gambia, and who is not released, shall be brought without undue delay before a court and, in any event, within seventy-two hours

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicions of his or her having committed or being about to commit an offence, he or she shall not thereafter be further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings which may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or proceedings preliminary to trial.

(6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that other person or from any other person or authority on whose behalf that other person was acting.

In its General Comment No. 35 (2014), the Human Rights Committee stated “Liberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.” The Human Rights Committee has defined liberty of person as “freedom from confinement of the body, not a general freedom of action”,¹¹⁵ and security of person as “freedom from injury to the body and mind”.¹¹⁶

The right to personal liberty and security provides protection against arbitrary or unlawful arrest and detention and against the intentional infliction of bodily or mental injury regardless of whether the victim is detained or not.

¹¹⁵Human Rights Committee, communication No. 854/1999, *Wackenheim v. France*, paragraph 6.3.

¹¹⁶Human Rights Committee, general comment No. 35 (2014), paragraph 3.

These basic guarantees apply to everyone, including persons held in prison or remand on criminal charges or on such grounds as mental illness, vagrancy, institutional custody of children or for the purposes of immigration control. Other restrictions on freedom of movement, such as confinement to a certain region of a country, curfews, expulsion from a country or prohibition to leave a country, do not constitute interference with personal liberty or security, although they may violate other human rights, such as freedom of movement and residence (Article 12, ICCPR).

8.2 When is arrest or detention lawful?

An individual may be deprived of his or her liberty only on legal grounds and under a procedure established by law. The procedure must conform not only to domestic law but also to international standards. The relevant domestic law must not be arbitrary, i.e. it must not be tainted by inappropriateness, injustice or unpredictability. Moreover, law enforcement in any given case must not be arbitrary or discriminatory, but should be proportionate to all of the circumstances surrounding the case. In addition, the Human Rights Committee noted in paragraph 12 of General Comment No. 35 (2014) “Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.”

According to the Human Rights Committee, pre-trial detention must be lawful, necessary and reasonable under given circumstances. The Human Rights Committee has recognized that the ICCPR allows authorities to hold a person in custody as an exceptional measure, if necessary to ensure that person’s appearance in court, but has interpreted the “necessity” requirement narrowly: suspicion that a person has committed a crime does not by itself justify detention pending investigation and indictment.¹¹⁷ The Human Rights Committee has also held, however, that custody may be necessary to prevent flight, avert interference with witnesses and other evidence or prevent the commission of further offences.¹¹⁸

8.3 What rights does a person in custody have?

- Arrested persons have the right to be informed promptly of the reasons for their arrest and detention and of their right to counsel. They must be promptly informed of any charges brought against them in order to be able to challenge the lawfulness of their arrest or detention and, if indicted, to prepare their defence (ICCPR, Article 9 (4)).

¹¹⁷Human Rights Committee, *A.W. Mukong v. Cameroon*, communication No. 458/1991

¹¹⁸Human Rights Committee, *Hill v. Spain*, communication No. 526/1993, paragraph 12.3

- Persons facing a possible criminal charge have the right to be assisted by a lawyer of their choice. If they cannot afford a lawyer, they should be provided with a qualified and effective counsel. Adequate time and facilities should be made available for communication with their counsel. Access to counsel should be immediate (ICCPR, Article 14 (3) (d)).

- Persons in custody have the right to communicate with the outside world and, in particular, to have prompt access to their family, lawyer, physician, a judicial official and, if the detainee is a foreign national, consular staff or a competent international organization. Communication with third parties is an essential safeguard against such human rights violations as secret and incommunicado detention, enforced disappearances, torture and ill-treatment and is vital to obtaining a fair trial (United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16). 138

- Persons arrested on suspicion of a criminal offence have the right to be brought promptly before a judge or other judicial officer, who must (a) assess whether there are sufficient legal grounds for the arrest, (b) assess whether detention before trial is necessary, (c) safeguard the well-being of the detainee and (d) prevent violations of the detainee's fundamental rights (ICCPR, Article 9).

- Persons in pre-trial detention have the right to be tried within a reasonable time or else be released. In accordance with the presumption of innocence, people awaiting trial on criminal charges should not be held in custody, as a rule (ICCPR, Article 9 (3)).

- Persons deprived of their liberty on whatever grounds have the right to habeas corpus, i.e. they may challenge the lawfulness of their detention before a court and have their detention regularly reviewed. The court must decide immediately, normally within a few days or weeks, on the lawfulness of the detention and order immediate release if the detention is unlawful. If detention for an unspecified period is ordered (for instance, in a psychiatric hospital), the detainee has a right to periodic review, normally every few months (ICCPR, Article 9 (4)).

- Any victim of unlawful arrest or detention has an enforceable right to compensation (ICCPR, Article 9 (5)).

8.4 Discussion questions on right to personal liberty security

- Has anyone been deprived of liberty?
- Are there lawful grounds for the detention?
- Is the law governing the detention legally certain?

- Is the detention proportionate in the circumstances?
- Is the detention arbitrary or applied in a discriminatory way?
- Have the relevant procedural standards been met?
- What are the conditions of detention?

8.5 Further reading

- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.
- General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).
- Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).

9. The right to a fair hearing

9.1 The right to a fair hearing in international, regional standards and the Gambian Constitution

Article 6 UDHR “Everyone has the right to recognition everywhere as a person before the law

Article 7 UDHR “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

Article 8 UDHR “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 10 UDHR “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Article 11 UDHR “(1) Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act that did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Article 14 ICCPR "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice,

the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Article 15 ICCPR "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal 141 according to the general principles of law recognized by the community of nations."

Article 16 ICCPR "Everyone shall have the right to recognition everywhere as a person before the law."

Article 7, African Charter on Human and Peoples' Rights

- 1. Every individual shall have the right to have his cause heard. This comprises:
 - i. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
 - ii. The right to be presumed innocent until proved guilty by a competent court or tribunal;*
 - iii. The right to defence, including the right to be defended by counsel of his choice;*
 - iv. The right to be tried within a reasonable time by an impartial court or tribunal.**
- 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*

Article 24, The Constitution of the Republic of the Gambia

- (1) Any court or other adjudicating authority established by law for the determination of any criminal trial or matter, or for the determination of the existence or extent of any civil right or obligation, shall be independent and impartial; and*
 - (a) if any person is charged with a criminal offence, then, unless the charge is withdrawn; or*
 - (b) where proceedings are commenced for the determination or the existence of any civil right or obligation, the case shall be afforded a fair hearing within a reasonable time.*
- (2) All proceedings of every court and proceedings relating to the determination of the existence or extent of civil rights or obligations before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.*

Provided that the court or other authority may, to such extent as it may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or interlocutory civil proceedings, or to such extent as it may be empowered or required by law to do so in the interest of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings, exclude from its proceedings persons other than the parties thereto and their legal representatives.

- (3) Every person who is charged with a criminal offence—*
 - (a) shall be presumed innocent until he or she is proved, or has pleaded, guilty;*
 - (b) shall be informed at the time he or she is charged, in a language which he or she understands and in detail, of the nature of the offence charged;*
 - (c) shall be given adequate time and facilities for the preparation of his or her defence;*
 - (d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice;*

Provided that where a person is charged with an offence which carries a punishment of death or imprisonment for life, that person shall be entitled to legal aid at the expense of the State.

- (e) shall be afforded facilities to examine in person or by his or her legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and*
 - (f) shall be permitted to have without payment the assistance of an interpreter if he or she cannot understand the language used at the trial of the charge; and, except with his or her own consent, the trial shall not take place in his or her absence unless he or she so conducts himself or herself as to render the continuance of the proceedings in his or her presence impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence.*
- (4) When a person is tried for any criminal offence, the accused person or any person authorised by him or her in that behalf shall, if he or she requires and subject to the payment of such reasonable fee as may be prescribed by law, be given within a reasonable time, and in any event within thirty days after the end of the trial, a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.*
- (5) No person shall be charged with or held to be guilty of a criminal offence on account of any act or omission which did not at the time it took place constitute such an offence, and no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.*
- (6) No person who shows that he or she has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other offence of which he or she could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or revision proceedings relating to the conviction or acquittal:*

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorises any court to try a member of a defence force for a criminal offence notwithstanding any trial or conviction of the member under service law;

but any court so trying such a member and convicting him or her shall, in sentencing him or her to any punishment, take into account any punishment awarded him or her under service law.

(7) No person shall be tried for a criminal offence if he or she shows he or she has been pardoned for that offence:

(8) No person charged with a criminal offence shall be compelled to give evidence at the trial.

(9) A person charged with a criminal offence in the High Court shall have the right to elect to be tried by a jury.

(10) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—

(a) subsection (3) (a), to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(b) subsection (3) (e), to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds.

Articles 6–11 of the UDHR can be grouped under a common heading: administration of justice. The right to a fair trial, also guaranteed by the ICCPR and regional human rights treaties, is a basic human right and requires procedural guarantees.

9.2 Equality before the law and the courts

The right to equality before the courts and tribunals is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. The right to equality before the law means that laws must not be discriminatory and that judges and officials must not discriminate when enforcing the law. The right to equality before the law means that all persons must have equal access to legal and judicial systems and the right to equal treatment by legal and judicial authorities.

9.3 Additional elements of the right to a fair trial

The right to a fair trial applies to criminal or civil proceedings as defined by the Human Rights Committee in its general comment No. 32 (2007), and thus to criminal law, civil law and other types of proceedings falling within that definition. The basic elements of the right to a fair trial are the principle of “equality of arms” between the parties, and the requirement of a fair and public hearing before an independent and impartial tribunal.

- “Equality of arms” means that both parties – the prosecution and the accused in criminal proceedings, or the plaintiff and the defendant in civil proceedings – have equal rights and opportunities to be present at the various stages of the proceedings, to be kept informed of the facts and arguments of the opposing party and to have their arguments heard by the court (*audiatur et altera pars*).
- Court hearings and judgments must in general be public: not only the parties to the case, but also the general public, must have a right to be present. The idea behind the principle of a public hearing is transparency and oversight by the public, a key prerequisite for the administration of justice in a democratic society: “Justice must not only be done; it must be seen to be done”. It follows that, as a general principle, trials must not be conducted by a purely written procedure *in camera*, but by oral hearings to which the public has access. Not all stages of the proceedings, in particular at the appeal level, require public hearings; and the public, including the media, may be excluded for reasons of morals, public order, national security, private interests and, in exceptional cases, interests of justice. However, every judgment must be made public, by full oral delivery or by written announcement.

9.4 Independent and impartial tribunals

Independence of the Judiciary

Tribunals (courts) must be constituted in a way that ensures their independence and impartiality. Independence entails safeguards relating to the manner of appointment of judges, the duration of their office and the provision of guarantees against outside pressure. Impartiality means that, in hearing the cases before them, judges must not be biased or guided by personal interests or political motives. The United Nations Basic Principles on the Independence of the Judiciary provide clear guidelines in that area.

Appropriate measures to ensure the independence and impartiality of tribunals include the following:

- First and foremost, the independence of the Judiciary should be enshrined in the constitution or in national law.
- The method of selection of judicial officers should be characterized by balance between the Executive and an impartial body, many of whose members should be appointed by professional organizations, such as law societies.
- The tenure of judges should be guaranteed up to a mandatory retirement age or the expiry of their terms of office.
- Decisions on disciplinary action, suspension or removal of a judge should be subject to an independent review.

The rights of the accused in criminal trials

In addition to the right to “equality of arms” and to a public hearing, international human rights law provides for a number of specific rights that persons charged with a criminal offence should enjoy:

- the right to be presumed innocent: The prosecution must prove the person’s guilt, and, in case of doubt, the accused should not be found guilty, but must be acquitted (ICCPR, Article 14 (2));
- the right not to be compelled to testify or to confess guilt: This prohibition is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition of torture and ill-treatment. Evidence elicited by torture or ill-treatment may not be used in court (ICCPR, Article 14 (3) (g));
- the right to defend oneself in person or through counsel of one’s own choosing, and the right to be provided with legal assistance free of charge (ICCPR, Article 14 (3) (d));
- the right to have adequate time and facilities for one’s defence, and the right to communicate with one’s counsel (ICCPR, Article 14 (3) (b));
- the right to be tried without undue delay, as “justice delayed is justice denied”. In principle, criminal proceedings must be conducted more speedily than other proceedings, particularly if the accused is in detention (ICCPR, Article 14 (3) (c));
- the right to be present at one’s trial (ICCPR, Article 14 (3) (d));
- the right to call and examine witnesses (ICCPR, Article 14 (3) (e));

- the right to be provided with language interpretation free of charge if the accused cannot understand or speak the language used in court (ICCPR, Article 14 (3) (f));
- the right to appeal to a higher tribunal (ICCPR, Article 14 (5));
- the right not to be tried and sentenced twice for the same offence (prohibition of double jeopardy, or principle of ne bis in idem) (ICCPR, Article 14 (7));
- the right to receive compensation in the event of a miscarriage of justice (ICCPR, Article 14 (6));
- the principles of nullum crimen sine lege and nulla poena sine lege prohibit the enactment of retroactive criminal laws and ensure that convicted persons benefit from lighter penalties if they are enacted after the commission of the offence (ICCPR, Article 15).

9.5 Non-admission of evidence obtained by torture and ill-treatment

The effectiveness of a State's criminal justice system depends on the trust of the people it serves. The ways that the police and other law enforcement agencies investigate crime, interview suspects, witnesses and victims, and collect evidence are crucial to build and maintain that trust. Where torture and ill-treatment are used to achieve confessions or other information or evidence, that confidence can be broken. The rule of non-admission of evidence in any proceedings obtained by torture or ill-treatment (also known as the "exclusionary rule", and found in Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)) puts an important break on corrupt practices. It removes one of the primary incentives for abuse, and safeguards due process rights and the fairness of court proceedings. Applying this rule helps dismantle unreliable confession-based policing and results in better and more reliable evidence gathering and investigations.¹¹⁹

In a widely commented European Court judgment in the case of *Othman (Abu Qatada) v. the United Kingdom* (January 2012), concerning the deportation of terrorism suspect Mr. Othman from the United Kingdom to Jordan, a country he fled in 1993, the European Court of Human Rights ruled that his deportation would violate the right to fair trial.

¹¹⁹Convention against Torture Initiative, Non-Admission of Evidence Obtained by Torture and Ill-treatment: Procedures and Practices (2020) CTI (2020) Non-Admission of Evidence Obtained by Torture and Ill-treatment: Procedures and Practices • Page 1 • Atlas of Torture (atlas-of-torture.org)

The Court reasoned that there would be a real risk that evidence obtained through torture would be used against him during his retrial in Jordan. The Court held in particular that “no legal system based upon the rule of law can countenance the admission of such evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself”.

9.6 Special courts and military courts

Special, extraordinary or military courts have been set up in a number of countries to try specific types of offences. Frequently, such courts offer fewer guarantees of fair trial than ordinary courts as noted by the Human Rights Committee in its general comment No. 32 (2007). The establishment of special courts is not explicitly prohibited under general international law; however, human rights instruments require that all specialized courts comply with fair trial guarantees relating to their competence, independence and impartiality.

Military courts and the right to a fair trial

In a series of reports and resolutions, various UN human rights mechanisms, including the Human Rights Council¹²⁰ and the Special Rapporteur on the Independence of Judges and Lawyers,¹²¹ have highlighted that the establishment and functioning of military courts and special tribunals may pose significant challenges with regard to the full and effective realization of the fair trial rights. The act may also be contrary to guarantees set out in the ICCPR and other international and regional human rights instruments.

In her 2013 Annual Report to the UN General Assembly (A/68/285), the Special Rapporteur on the Independence of Judges and Lawyers noted that “In many countries, the use of military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses perpetrated by military regimes, the independence and impartiality of the judiciary and respect for fair trial guarantees for the defendant”.

The Rapporteur recommended that “the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel. States that establish military justice systems should aim to guarantee the independence and impartiality of military tribunals, as well as the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy.”

9.7 The right to fair trial in a state of emergency and in armed conflict

Some human rights may not be suspended or derogated from under any circumstances. In its general comment No. 29 (2001), paragraph 16, the Human Rights Committee stated, “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.

Only a court of law may try to convict a person for a criminal offence. The presumption of innocence must be respected.”

In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State Party’s decision to derogate from the Covenant.” It is precisely during a national emergency that States are most likely to violate human rights. Parliaments should use their powers to ensure that fair trial guarantees and the independence of the judiciary, which are vital to the protection of human rights, are upheld during states of emergency (see also Chapter 10). International humanitarian law governs the conduct of parties during armed conflict, although, as noted above, international human rights law also continues to apply in situations of armed conflict and crisis. The non-derogable right to a fair trial during international and internal armed conflicts is guaranteed in customary international humanitarian law as well as in international treaties such as the Geneva Conventions of 1949.¹²²

9.8 Discussion questions fair trial rights in criminal cases:

- Is the presumption of innocence set out in the Constitution?
- Does the burden of proof in criminal trials lie on the prosecution?
- What standard of proof does the prosecution have to meet?

¹²²Amnesty International, Fair Trial Manual (2nd Edition), 2014, 240.

- Does the accused have the right to choose their legal counsel?
- Is free legal advice available where the accused cannot afford his or her own counsel?
- Does the accused have the right to consult with his or her legal counsel in private?
- Does an accused person have the right to review the prosecution's evidence in order to prepare for their defence?
- Is the accused given sufficient time to prepare for trial?
- Is the accused tried soon after being charged?
- Does the accused have the right to attend their trial?
- Does the accused have the right to examine prosecution witnesses, and call and examine their witnesses?
- Can trials be held in a language the accused person understands?
- Is the accused provided with an interpreter without charge, where necessary?
- Are there any offences for which the individual does not have the right to appeal?
- On acquittal, is the prosecution barred from charging and prosecuting the individual for the same offence?
- Does the individual have the right to compensation in the event of wrongful conviction?
- Is the right to compensation made subject to conditions?
- Are offences, in principle, non-retroactive?
- Do provisions of the Criminal Code and the Criminal Procedure Code comply with regional and international human rights standards?

9.9 Discussion questions on special courts

- Do special courts, such as military tribunals, exist in the Gambia?
- Do the special courts respect the right to a fair hearing by an independent and impartial tribunal?
- How are they established, for example, by Act of Parliament or by Executive Order?
- What is their jurisdiction?
- Are they empowered to try civilians or non-military personnel?
- What are the rules of procedure and evidence applicable?
- Are these rules publicly available?
- Do individuals have the right to appeal judgments of the special courts?
- Do the non-special courts have the right to review judgments of the special courts?
- Does the executive have the right to review judgments of the special courts?

9.10 Further reading

- Principles and Guidelines on the right to Fair Trial and Legal Assistance in Africa
- Amnesty International Fair Trial Manual 2nd Edition, 2014.

10. The right to privacy and respect for private and family life

10.1 right to privacy and respect for private and family life in international and regional standards and the Gambian Constitution

Article 12 of UDHR “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 16 of UDHR

- “1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*
- 2. Marriage shall be entered into only with the free and full consent of the intending spouses.*
- 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”*

Article 17, ICCPR

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

.” Article 23 of ICCPR “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

Article 23 The Constitution of the Republic of the Gambia

- (1) *No person shall be subject to interference with the privacy of his or her home, correspondence or communications save as is in accordance with law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights and freedoms of others.*
- (2) *Searches of the person or the home of individuals shall only be justified- (a) where these are authorised by a competent judicial authority; (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest and such procedures as are prescribed by an Act of the national Assembly to preclude abuse are properly satisfied.*

The right to privacy is central to the notion of freedom and individual autonomy. Many of the controversial issues that have arisen in the context of privacy litigation, such as State regulation of same sex relationships, transgender and intersex persons, prostitution, abortion, (assisted) suicide, dress codes and similar codes of conduct, private communication, marriage and divorce, sexual and reproductive rights, genetic engineering, cloning and the forced separation of children from their parents, touch upon fundamental moral and ethical issues that are viewed differently in various societies.

10.2 The right to privacy: a complex and multifaceted human right

This right, sometimes also called the “right to be left alone” guarantees:

- respect for the individual existence of the human being, i.e. his or her particular characteristics, appearance, honour and reputation;
- protection for individual autonomy, entitling persons to withdraw from public life into their own private spheres in order to shape their lives according to their personal wishes and expectations. Certain institutional guarantees, such as protection of home, family, marriage and the secrecy of correspondence, support this aspect of the right to privacy;
- the right to be different and to manifest one’s difference in public by behaviour that runs counter to accepted morals in a given society and environment. Government authorities and international human rights bodies, therefore, face a delicate and difficult task of striking a balance between the right to privacy and legitimate public interests, such as the protection of public order, health, morals and the rights and freedoms of others.

The following paragraphs touch upon a selection of issues that arise in connection with the right to privacy. In view of the controversial nature of most of the issues involved, it is often impossible to provide generalized answers, as conclusions are usually reached only by carefully weighing countervailing interests on a case-by-case basis, taking into account the special circumstances prevailing in a given society.

10.3 Major aspects of the right to privacy

10.3.1 Preservation of individual identity and intimacy

Privacy starts with respect for an individual’s specific identity, which includes one’s name, appearance, clothing, hairstyle, gender, feelings, thoughts and religious and other convictions. Mandatory clothing or hairstyle rules, a forced change of one’s name, or non-recognition of a name change, religion or gender (for instance, a State’s refusal to alter the birth registration of a transgender person) or any form of indoctrination (“brainwashing”) or forced personality change interfere with the right to privacy.

The intimacy of a person must be protected by respecting generally acknowledged obligations of confidentiality (for instance, those of physicians and priests) and guarantees of secrecy (for instance, in voting), and by enacting appropriate data protection laws with enforceable rights to information, correction and deletion of personal data.

10.3.2 Protection of individual autonomy

The concept of individual autonomy is also part of the right to privacy. Individual autonomy – i.e. the area of private life in which human beings strive to achieve self-realisation through action that does not interfere with the rights of others – is central to the liberal concept of privacy. In principle, autonomy gives rise to a right to one's own body, including in relation to sexuality and sexual conduct. International human rights bodies have affirmed that adult consensual sexual conduct is covered by the concept of privacy (See Toonen case, paragraph 8.2, Human Rights Committee). They also found a violation of the right to privacy when access to legal abortion services is denied and a woman's decision to terminate her pregnancy is interfered with (see *KL v. Peru*, *VDA v. Argentina*, Human Rights Committee). Central to the concept of privacy is the ability of individuals to make decisions about the most intimate spheres of their lives, including whether, with whom and when to have sex; whether, whom and when to marry; whether, with whom and how often to have children; and how to express one's gender or sexuality. Protection of individual autonomy also comprises a right to act in a manner injurious to one's health, including taking one's own life. Nevertheless, some societies have deemed such behaviour to be harmful, and have often prohibited its manifestations (for instance, suicide, passive euthanasia and drug, alcohol and nicotine consumption).

10.4 The human right to privacy in the digital age

The rapid development of communication technologies has opened up new opportunities for individuals, including parliamentarians, human rights defenders and civil society organizations, to participate in online communications. But the internet has also enabled States, corporations and others to invade the private sphere, including through mass surveillance, and make use of the extensive personal data being transferred for commercial and other purposes. The protection of personal data is crucial for parliamentarians all over the world who increasingly use digital networks to receive and share information.

OHCHR, in its report to the 27th Human Rights Council, noted “any capture of communications data is potentially an interference with privacy and, further, that the collection and retention of communications data amounts to an interference with privacy whether or not those data are subsequently consulted or used.

Even the mere possibility of communications information being captured creates an interference with privacy, with a potential chilling effect on rights, including those to free expression and association. The very existence of a mass surveillance programme is itself an interference with privacy. The onus would be on the State to demonstrate that such interference is neither arbitrary nor unlawful” (A/HRC/27/37, paragraph 20).

10.5 Protection of the family

Protection of the family is essential to the right to privacy. Institutional guarantees for the family (i.e. its legal recognition and specific benefits deriving from that status, and the regulation of the legal relationship between spouses, partners, parents and children, etc.) is intended to protect the social order. It preserves specific family functions (such as reproduction or bringing up children) – considered indispensable to a society’s survival – rather than condone their transfer to other social institutions or the State. The human rights to marry and found a family, sexual and reproductive rights, equality between spouses, protection of motherhood and the special rights of children, as laid down in the CRC and CEDAW, are directly linked to the institutional guarantees relating to the family. Both parents have the same right to decide freely and responsibly on the number and spacing of their children; children have the right not to be separated from their parents; and both parents have equal rights and common responsibilities, irrespective of their marital status, for the upbringing and development of children. The rights to family reunification, foster placement and adoption are particularly important.

The right to privacy entails the protection of family life against arbitrary or unlawful interference, above all by State authorities. One form of interference in family life is the mandatory separation of children from their parents on grounds of gross disregard of parental duties and the placement of the children under the guardianship of the State. Having heard a number of cases, the European Court of Human Rights developed certain minimum guarantees for the parents and children concerned, such as participation in the respective administrative proceedings, judicial review and regular contact between parents and children during the time of their placement in foster homes in order to allow family reunification. In the same vein, following divorce, the general presumption in most jurisdictions is that both spouses should retain the right of access to their children.

10.6 Protection of the home

The protection of the home is another important aspect of privacy, since the home conveys a feeling of familiarity, shelter and security, and therefore symbolizes a place of refuge from public life where one can best shape one's life according to one's own wishes without fear of disturbance. In practice, "home" does not apply only to actual dwellings, but also to various houses or apartments, regardless of legal title (ownership, rental, occupancy and even illegal use) or nature of use (as main domicile, weekend house or even business premises). Every invasion of that sphere – described under the term "home" – that occurs without the consent of the individuals concerned represents interference.

The classic form of interference is a police search for locating and arresting someone or finding evidence to be used in criminal proceedings. However, it is not the only type of interference. The violent destruction of homes by security forces, forced evictions, the use of hidden television cameras or listening devices, electronic surveillance practices or forms of environmental pollution (such as noise or noxious fumes) may constitute interference with the right to protection of the home. Such interference is permissible only if it complies with domestic law and is not arbitrary, i.e. if it occurs for a specific purpose and in accordance with the principle of proportionality. Police searches, seizure and surveillance are usually permissible only on the basis of a written warrant issued by a court, and must not be misused or create disturbance beyond the pursuit of a specific purpose, such as securing evidence.

In its decision in the case of *Francesco Madafferi v. Australia* (communication No. 1011/2001) the Human Rights Committee held that "In the present case, the Committee considers that a decision by the State Party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State Party is to be considered 'interference' with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case."

10.7 Protection of private correspondence

Although the term "correspondence" was initially applied to written letters, it now covers all forms of communication at a distance: by telephone, electronic mail or other mechanical or electronic means. Protection of correspondence means respect for the secrecy of such communication. Any withholding, censorship, inspection, interception or publication of private correspondence constitutes interference.

The most common forms of such interference are surveillance measures secretly taken by State agencies (opening letters, monitoring telephone conversations and intercepting emails, etc.) for the purpose of administering justice, preventing crime (e.g. through censorship of detainees' correspondence) or combating terrorism. As is the case for house searches, interference with correspondence must comply with domestic and international law (i.e. as a general rule, it requires a court order) and with the principles of proportionality and necessity.

10.8 The right to privacy and the fight against terrorism

The right to privacy has been particularly affected by laws enacted in recent years in a number of countries to broaden the powers of police and security services to combat crime, including terrorism. However, even these legal frameworks have been undermined by transnational networks of intelligence agencies coordinating surveillance practices to outflank the protections provided by domestic legal regimes. In addition to the extension of traditional police functions such as search, seizure and targeted surveillance (often without prior authorization by a court), human rights concerns have arisen particularly in relation to the mass screening, scanning, processing, combining, matching, storing and monitoring of private data. Methods such as the automatic taking of fingerprints and blood and DNA samples from target groups, which may be selected through profiling, and minimal levels of transparency also raise concerns.

In this area (as in connection with other human rights, such as the rights to personal liberty and fair trial), members of parliament bear a key responsibility: they must ensure that any extension of police and intelligence powers, if necessary at all, takes place:

- transparently and democratically;
- with due respect for international human rights norms and standards;

without undermining the values of a free and democratic society: individual liberty, privacy and the rule of law. Stakeholders including NHRIs have a critical role in ensuring sufficient independent oversight of the police and intelligence services, particularly in the context of mass surveillance and the implementation by these bodies of related laws, policies and measures.

10.9 Discussion questions on the right to privacy and respect for private life

- Does a law, practice or set of circumstances ensure the right to privacy?
- Does it set out the lawful interferences with the right to privacy?
- If not, where are these interferences set out?
- Are these limits legitimate and proportional?
- What sort of review is available to ensure the legitimacy and proportionality of these interferences in principle?
- What avenues are available to challenge the application in practice of these limits?
- Does a law, practice or set of circumstances ensure the respect for private life?
- Does it set out the limits to the respect for private life?
- If not, where are these limits set out?
- Are these limits legitimate and proportionate?
- What sort of review is available to ensure the legitimacy and proportionality of these limits in principle?
- What avenues are available to challenge the application in practice of these limits?

10.10 Further reading

- UN Special Rapporteur on the right to privacy reports OHCHR | Special Rapporteur on the right to privacy
- OHCHR and privacy in the digital age OHCHR | OHCHR and privacy in the digital age
- M.T.D. Cebreros, OHCHR, Rights to privacy and statistical information under international human rights law Diapositive 1 (unece.org)

11. Freedom of movement

11.1 Freedom of movement in international and regional law and the Gambian Constitution

Article 13 of UDHR “1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country.”

Article 12 of ICCPR “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.”

Article 13 of ICCPR “An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

Article 12 of the African Charter

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

Constitution of the Republic of the Gambia, 1997

Article 25 Freedom of movement

“(2) Every person lawfully within The Gambia shall have right to move freely throughout The Gambia, to choose his or her own place of residence within The Gambia, and to leave The Gambia.

(3) Every citizen of The Gambia shall have the right to return to The Gambia.”

International regional and national standards protect the right of every person residing lawfully in a country to move freely and to choose a place of residence anywhere within the territory of that country. This right should be protected from both public and private interference.

11.2 Freedom of movement of non-nationals within a State

Given that the right of freedom of movement applies to persons, who are lawfully in the territory of a State, governments may impose restrictions on the entry of non-nationals. Whether a non-national is “lawfully” in the territory of a State should be determined according to domestic law, which may specify entry restrictions, if they meet the State’s international obligations.

Non-nationals who enter a country illegally but whose status is subsequently regularized must be considered to be in the territory lawfully. If a person is lawfully in a country, any restriction imposed on that person or any treatment of that person other than the treatment reserved to nationals must be justified under Article 12 (3) of the ICCPR.

An example of restrictions imposed on a non-national is provided in the case of *Celepli v. Sweden* before the Human Rights Committee (1994). Mr Celepli, a Turkish citizen of Kurdish origin living in Sweden, was ordered to leave the country on grounds of suspected involvement in terrorist activities. That order was not enforced, as the Swedish authorities believed Mr Celepli was at risk of persecution in Turkey; he was allowed to stay on if he resided in a particular municipality and reported regularly to the police. The Human Rights Committee found that these restrictions on freedom of movement did not violate Article 12 (3) of the ICCPR.

11.3 Freedom to leave a country

Article 12 (2) of the ICCPR stipulates that all persons (citizens and non-nationals, and even persons residing in a country illegally) are free to leave the territory of a State. This right applies to short and long visits abroad and to (permanent or semi-permanent) emigration. Enjoyment of this right should not depend on the purpose or duration of travel abroad. This right imposes obligations on both the State of residence and the State of nationality. For instance, the State of nationality must issue travel documents or passports to all citizens both within and outside the national territory. If a State refuses to issue a passport or requires its citizens to obtain exit visas in order to leave, there is interference in their right to freedom of movement, which is difficult to justify.

Moreover, in its general comment No. 27 (1999) on freedom of movement, the Human Rights Committee stated the following: “In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of Article 12.

11. 4 Barriers to freedom of movement

The Human Rights Committee notes in paragraph 17 of its general comment No. 27 (1999) that the right to freedom of movement is often subjected to the barriers listed below, which make travelling within or between countries difficult or impossible. Relevant stakeholders may wish to oppose such measures.

11.4.1 Movement within the country

- Obligation to obtain a permit for internal travel
- Obligation to apply for permission to change residence
- Obligation to seek approval by the local authorities of the place of destination
- Administrative delays in processing written applications

11.4.2 Movement to another country

- Lack of access to the authorities or to information regarding requirements
- Requirement to apply for special forms in order to obtain the actual application forms for the issuance of a passport
- Requirement to produce statements of support by employers or relatives
- Requirement to submit an exact description of the travel route
- High fees for the issuance of a passport
- Unreasonable delays in the issuance of travel documents
- Restrictions on family members travelling together
- Requirement to make a repatriation deposit or have a return ticket
- Requirement to produce an invitation from the State of destination
- Harassment of applicants

11.5 Limitations

Freedom of movement must not be restricted, except where such restrictions are provided for by law and where they are necessary on grounds of national security, public order, public health or morals or the rights and freedoms of others (Article 12 (3) of ICCPR). According to the Human Rights Committee, in paragraph 16 of its general comment No. 27 (1999),

these requirements would not be met, for instance, “if an individual were prevented from leaving a country merely on the grounds that he or she is the holder of ‘State secrets’, or if an individual were prevented from travelling internally without a specific permit”. On the other hand, restrictions on access to military zones on national security grounds or limitations on the freedom to settle in areas inhabited by indigenous or minority communities may, according to the Committee, constitute permissible restrictions.

11.6 Enacting limitations and overseeing their implementation

Drawing up legislation in adopting laws that provide for restrictions under Article 12 (3) of the ICCPR, relevant stakeholder should ensure that the legislature is guided by the principle that the restrictions must not defeat the purpose of the right. Laws must stipulate precise criteria for the restrictions – which should be implemented objectively – and respect the principle of proportionality; the restrictions should be appropriate, the least intrusive possible, and proportionate to the interest to be protected.

11.7 Implementation

If a State decides to impose restrictions, they should be specified in a law. Restrictions not provided for by law and not in conformity with Article 12 (3) of the ICCPR violate freedom of movement. Furthermore, the restrictions must be consistent with other rights provided for under the ICCPR and with the principles of equality and non-discrimination. The right to enter one’s own country Article 12 (4) of the ICCPR implies that one has the right to remain in one’s own country and to return to it after having left. The right may also entitle a person to enter a country for the first time (if he or she is a national of that country but was born abroad). The right to return is particularly important for refugees seeking voluntary repatriation. The wording “one’s own country” refers primarily to citizens of that country. In exceptional cases, persons who have resided for a very long period in a country as non-nationals or who were born there as second-generation immigrants may consider their country of residence as their “own” country.

11.8 Discussions questions on freedom of movement

- Does a law, practice or set of circumstances ensure freedom of movement?
- Does it set out the lawful interferences with freedom of movement?
- If not, where are these interferences set out?

- Are these limits legitimate and proportional?
- What sort of review is available to ensure the legitimacy and proportionality of these interferences in principle?
- What avenues are available to challenge the application in practice of these limits?
- Does a law, practice or set of circumstances ensure the respect for freedom of movement?
- Does it set out the limits to the respect for freedom of movement?
- If not, where are these limits set out?
- Are these limits legitimate and proportionate?
- What sort of review is available to ensure the legitimacy and proportionality of these limits in principle?
- What avenues are available to challenge the application in practice of these limits?

11.9 Further reading

- AU Protocol on free movement of persons in Africa 36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf (au.int)
- OHCHR Freedom of movement

OHCHR | Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 13

Claiming human rights, Freedom of movement Freedom of movement - Definition (claiminghumanrights.org)

12. Freedom of thought, conscience and religion

12.1 Freedom of thought, conscience and religion in international and regional standards and the Gambian Constitution

Article 18 of UDHR “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Article 18 of ICCPR “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Article 8 of the African Charter

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

1997 Constitution of The Gambia

Article 25: Freedom of Thought, Conscience and Religion

- (1) Every person shall have the right to-
- (b) freedom of thought, conscience and belief, which shall include academic freedom;
- (c) freedom to practise any religion and to manifest such practice;

The right to freedom of thought, conscience and religion may not be subject to derogation, even during a state of emergency. What is known as the *forum internum*, i.e. the right to form one’s own thoughts, opinions, conscience, convictions and beliefs, is an absolute right protected against any form of state interference, such as indoctrination or “brainwashing”. However, the public manifestation of religion or belief may be restricted on legitimate grounds.

The terms “religion” and “belief” should be interpreted broadly, to include traditional as well as non-traditional beliefs and religions. The freedom to have or to adopt a religion or belief includes the freedom to choose another belief or religion, which may entail replacing a previously held religion or belief with another, to adopt atheist views, or to retain one’s religion or belief.

12.2 Prohibition of coercion

Under no circumstances may a person be coerced by the use or threat of physical force or penal sanctions to adopt, adhere to or recant a specific religion or belief. The prohibition also applies to policies or measures that have the same effect. As the Human Rights Committee states in General Comment No. 22 (1993), paragraph 5, policies or practices such as “those restricting access to education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant, are similarly inconsistent with Article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.”

12.3 Manifesting a religion or belief

In paragraph 4 of General Comment No. 22 (1993), the Human Rights Committee states “The freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private”. The Committee goes on to emphasize that the concept of “manifestation” of religion or belief is very broad. It encompasses:

- worship: performing ritual and ceremonial acts, building places of worship, using ritual formulae and objects, displaying symbols, and observing holidays and days of rest;
- observance: performing ceremonial acts, applying dietary regulations, wearing distinctive clothing or headgear, and using a specific language;
- practice and teaching: choosing religious leaders, priests and teachers, setting up seminaries or religious schools, and producing or distributing religious texts or publications. Since the manifestation of one’s religion or belief is necessarily active, it may affect the enjoyment of some rights by other persons, and in extreme cases even endanger public safety, order and health. Under Article 18 (3) of the ICCPR, therefore, it can be subject to specific limitations.

12.4 Limitations on the manifestation of one’s religion or belief

Limitations on the freedom to manifest one’s religion or beliefs are subject to strictly specified conditions, and are allowed only if they are:

- prescribed by law;
- necessary for protecting public safety, order, health or morals or the fundamental rights and freedoms of others. One example of permissible grounds for a limitation of the freedom to manifest one's religion or belief is when such manifestations amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

12.4.1 The ban on overt religious symbols in French schools

Controversy over a French law enacted in 2004 shows how sensitive the issue of placing limits on manifestations of religion or belief can be. A bill was passed by an overwhelming majority of members of parliament banning overt religious symbols from French State schools. The law has been widely seen as targeting the Islamic headscarf, although the ban also includes Jewish skullcaps and large Christian crosses. While the French Parliament and Government justified the law by invoking the principle of secularity (strict separation of State and religion) and the need to protect Muslim girls against gender-specific discrimination, many human rights groups have argued that the ban violates the right to freedom of religion or belief and that it constitutes coercion, expressly forbidden under Article 18 (2) of the ICCPR.¹²³

12.5 Religious and moral education

Article 18 (4) of the ICCPR requires States to respect the freedom of parents and legal guardians to bring up their children in accordance with their own religious and moral convictions. Compulsory religious or moral education in public schools is not incompatible with the above provision, if religion is taught in an objective and pluralistic manner. This could be for instance, a part of a course on the general history of religion and ethics. If one religion is taught in a public school, provisions should be made for non-discriminatory exemptions or alternatives, accommodating the wishes of all parents or legal guardians.

12.6 Discussion questions on freedom of thought, conscience and religion

- Does domestic law ensure the absolute right to hold opinions without interference?

¹²³See France's headscarf war: 'It's an attack on freedom' | France | The Guardian

- Does domestic law protect the right to freedom of religion?
- Does this include protection for the freedom to manifest that religion?
- If there are any exceptions or restrictions to the protection of this right, are they strictly for the purpose of protecting the rights and freedoms of others, protecting public safety, public order, public health or public morals?
- Are there adequate safeguards in place to protect any exceptions from being misused?
- Has legislation been enacted to prohibit the manifestation of religion or belief becoming propaganda for war or advocacy of national, racial or religious hatred, which constitutes incitement to discrimination, hostility or violence?
- What enforcement mechanism is set out by that legislation?
- Does domestic law recognise that a balance must be drawn between respect of freedom of thought, conscience and religion and the rights of others?
- OHCHR, Annual reports of the Special Rapporteur on the freedom of religion or belief OHCHR | Special Rapporteur on freedom of religion or belief
- OHCHR, The Beirut Declaration and its 18 commitments on faith for rights, Faith4Rights.pdf (ohchr.org)

13. Freedom of opinion and expression

13.1 Freedom of opinion in international and regional standards and the Gambian Constitution

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

Article 19 of ICCPR “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.”

Article 9 of the African Charter

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

Article 25 of the Constitution of the Republic of the Gambia

25(1) Everyone shall have the right to-

- (a) freedom of speech and expression, which shall assembly, include freedom of the press and other media;*

Two main elements can be distinguished in the above provisions:

- freedom of opinion;
- freedom of expression.

13.2 Freedom of opinion

The right to hold opinions is by nature passive and forms an absolute freedom: the ICCPR allows for no exceptions to or restrictions on its enjoyment. The right to express opinions, on the other hand, is not absolute. As we shall see, freedom of expression can and even must be restricted under some circumstances.

13.3 Freedom of expression

Freedom of expression, along with freedom of assembly and association, is a cornerstone of democratic society. Democracy cannot be realised without a free flow of ideas and information, and the possibility for people to gather, voice and discuss ideas, criticise and make demands, defend their interests and rights and set up organisations for those purposes, such as trade unions and political parties. The United Nations Special Rapporteur on freedom of expression has described that right as “an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the International Bill of Human Rights, and that respect for this right reflects a country’s standards of fair play, justice and integrity.”¹²⁴

All international and regional human rights monitoring bodies have underlined the paramount importance of freedom of expression for democracy.

¹²⁴UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (E/CN.4/2002/75), January 2002.

The Human Rights Committee in general comment No. 34 (2011) stated that the rights to freedom of opinion and expression “constitute the foundation stone for every free and democratic society”. The Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in 2000. The African Commission on Human and Peoples’ Rights adopted a Declaration of Principles on Freedom of Expression in Africa in 2002. The Parliamentary Assembly of the Council of Europe has adopted a number of instruments related to various aspects of the right to freedom of expression, including Recommendation 1506 (2001), on Freedom of Expression and Information in the media in Europe, and Resolution 1510 (2006), on Freedom of Expression and respect for religious beliefs.

Freedom of expression comprises not only the right of individuals to express their own thoughts, but also the right to seek, receive and impart information and ideas of all kinds. It therefore has an individual and a group dimension: it is a right that belongs to individuals, and implies the collective right to receive information and to have access to the thoughts expressed by others.

13.3.1 Freedom of expression: a broad right

The Human Rights Committee found in the case of *Vitaliy Symonik v. Belarus* (communication No. 1952 (2010)) that preventing an author from distributing political leaflets, confiscating the leaflets, arresting him, charging him with an administrative offence and subsequently sentencing him to a fine, unjustifiably restricted his right to freedom of expression as guaranteed in Article 19 of the Covenant.

In *A.W.P. v. Denmark* (communication No. 1879 (2009)), the complainant alleged that “by not fulfilling its positive obligation to take effective action against the reported incidents of hate speech against Muslims in Denmark, the State Party has violated the author’s rights”. The Human Rights Committee found the complaint inadmissible, as the author had failed to demonstrate that he was a direct ‘victim’ of discriminatory speech within the meaning of the ICCPR.

In the case of *Irina Fedotova v. Russian Federation* (communication No. 1932 (2010)), the applicant was convicted of an administrative offence and fined 1,500 Roubles for displaying two posters stating “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school. In its decision, the Human Rights Committee found that the applicant’s conviction under the Ryazan Law on Administrative Offences, which prohibits “public actions aimed at propaganda of homosexuality among minors”, violated her right to freedom of expression, read in conjunction with her right to freedom from discrimination, under the ICCPR.

13.4 Freedom to impart information and ideas

This aspect of the freedom of expression is of particular importance to parliamentarians, because it entails the freedom to express oneself politically. In the case of *Kivenmaa v. Finland* (1994) concerning a demonstration to denounce the human rights record of a foreign head of State who was on an official visit to Finland. The Human Rights Committee found that “the right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by Article 19 of the Covenant”. As the Human Rights Committee notes in its general comment No. 34 (2011), the scope of freedom of expression “embraces even expression that may be regarded as deeply offensive”. However, such expression may be subjected to the restrictions contained in Article 19 (3) and Article 20 of the ICCPR.

13.5 Freedom to seek and receive information

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject to clearly defined rules established by law.¹²⁵

The right to seek and receive information is “an essential element of the right to freedom of expression”. As well as being a standalone right, the right to information is also “one of the rights upon which free and democratic societies depend”, as access to information may act as an important “enabler” for the exercise of a range of other human rights (UN Special Rapporteur on the Right to Freedom of Opinion and Expression, A/68/362, paragraphs 18 and 19).

Article 19 of the ICCPR encompasses “a right of access to information held by public bodies”. This requires States to “proactively put in the public domain governmental information of public interest ... [and] ... make every effort to ensure easy, prompt, effective and practical access to such information” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 19). To this end, States must put in place systems to ensure that requests for information are dealt with in a timely fashion under clear rules that are compatible with human rights law, and that fees for information requests “do not constitute an unreasonable impediment” to access. In addition, appeals processes should be made available so that people can challenge refusals to supply requested information (UN Human Rights Committee, general comment No. 34 (2011), paragraph 19).

¹²⁵Article IV, Declaration of Principles on Freedom of Expression in Africa.

The Human Rights Committee has stressed that elements of the right to access information are included within many of the articles of the ICCPR. For example, Article 2 entails an obligation for States to ensure that individuals are provided with information about their Covenant rights. Article 27 provides that “decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken through information-sharing and consultation with affected communities” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 18). Without the freedom to seek and receive information held by public bodies, it would not be possible for the media, members of parliament or individuals to expose corruption, mismanagement or inefficiency. They would not be in a position to ensure transparent and accountable government; or access information affecting their individual rights (UN Special Rapporteur on the Right to Freedom of Opinion and Expression, A/68/362, paragraph 19).

13.6 Access to information concerning human rights violations

Article 19 of the ICCPR requires States Parties to put in the public domain government information of public interest, inter alia by enacting freedom of information legislation and other measures (Human Rights Committee, general comment No. 34 (2011), paragraph 19). The UN Special Rapporteur on Freedom of Opinion and Expression has emphasized that (a) the right to access information and the right to know the truth are “closely interrelated”; and (b) States are under an obligation to produce information concerning alleged human rights violations so that victims can hold the relevant authorities accountable and public debate can take place on the circumstances surrounding the violations (A/68/362, para 24).

Access to information about human rights violations is still beset, however, by many obstacles. The Inter-American Court of Human Rights has held that State authorities cannot resort to such mechanisms as officially declaring such information secret or confidential or invoking public interest or national security to deny information required for judicial or administrative investigations or proceedings in such cases.¹²⁶

In this context, the UN Special Rapporteur on Freedom of Opinion and Expression has also emphasized the importance of the Global Principles on National Security and the Right to Information (the Tshwane Principles). Section A of Principle 10 provides that “Information regarding violations of human rights or humanitarian law is subject to a high presumption of disclosure,

¹²⁶Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, Series C, No. 101, paragraph 180; and *Tiu Tojín v. Guatemala*, Judgment of 26 November 2008, Series C, No. 190, paragraph 77.

and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy” (A/68/362, paragraph 66 (b)).

13.7 Media freedom

A crucial aspect of freedom of expression is freedom of the press and other media, including online information sources, as well as the right of individuals to access media output. The Human Rights Committee stated in its general comment No. 34 (2011) that the free communication of information and ideas between citizens, candidates and elected representatives – crucial for democratic functioning – necessitates a free, diverse and independent media. In paragraph 15 of the general comment, the Committee emphasizes the role of new mobile and internet-based communication technologies and urges States to “take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”

13.8 Restrictions

Article 19 (3) of the ICCPR underscores that the exercise of the right to freedom of expression carries with it special duties and responsibilities. Restrictions are permitted in two areas: (a) respect for the rights or reputations of others; and (b) the protection of national security, public order (ordre public) or public health or morals. Restrictions imposed by a State Party on the exercise of freedom of expression must not, however, put the right itself in jeopardy. Any restriction on the right to freedom of expression must meet the following strict tests of justification:

- The restriction must be provided by law (legislation enacted by parliament, common law articulated by the courts or professional rules). The restriction must be precise and meet the criteria of legal certainty and predictability: it must be accessible to the individual concerned and its consequences for him or her must be foreseeable. Laws that are too vague or allow for excessive discretion in their application fail to protect individuals against arbitrary interference and do not constitute adequate safeguards against abuse.
- The restriction must be necessary for the legitimate purpose of: – respecting the rights or reputations of others; or protecting national security, public order, public health or morals. The latter criterion can be met only if the restriction addresses a specific, well-defined social need and is proportionate to the legitimate aim pursued, so that the harm to freedom of expression does not outweigh the benefits.

13.9 Safeguarding freedom of the media

Various stakeholders including National Human Rights Institutions may take a number of steps to contribute to ensuring free, diverse and independent media, including the following measures:

- advising the State or undertaking advocacy in relation to the revision of media and defamation laws and amending them, if necessary, to bring them into conformity with Article 19 of the ICCPR, in particular, by abolishing any laws that provide for the punishment of journalists and other commentators with imprisonment, except in cases involving racist or discriminatory comments or calls to violence, and ensuring that any fines for offences such as libel, defamation and insults are not out of proportion with the harm suffered by the victims;
- reviewing counter-terrorism legislation to ensure that it is compatible with Article 19 (3) of the ICCPR and does not lead to unnecessary or disproportionate interference in media activities;
- encouraging plurality and independence of all forms of media;
- ensuring that broadcasters are protected against political and commercial influence, including through the appointment of an independent governing board and respect for editorial independence;
- ensuring that an independent broadcasting licensing authority is set up and providing for a system of licensing that is not unduly restrictive or onerous;
- establishing clear and transparent criteria for payment and withdrawal of government subsidies to the media, in order to avoid the use of subsidies for stifling criticism of the authorities;
- avoiding excessive concentration of media control; and implementing measures ensuring impartial allocation of resources and equitable access to the media; and adopting antitrust legislation regarding the media;
- promoting universal access to the Internet.

13.10 Restriction on the ground of respect for the rights and reputation of others

The notion of the “rights” of “others” (as individuals and as members of particular communities) refers to all of the human rights recognized in the ICCPR as well as in other international human rights instruments. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under Article 25 of the Covenant by ensuring that voters are not subjected to forms of expression that constitute coercion or intimidation. These restrictions should not, however, be used to stifle political debate (UN Human Rights Committee, general comment No. 34 (2011), paragraph 28).

The Human Rights Committee has emphasized in its jurisprudence that there is a presumption that public debate concerning public figures and political institutions should not be restricted: “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 38). For this reason, the Committee has expressed concern at the existence and application of laws criminalizing criticism of government officials and institutions.

Any restrictions on freedom of speech justified on the grounds of protecting the rights or reputations of others must be both necessary and proportionate. For example, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict the freedom of expression (*Human Rights Committee, Ballantyne, Davidson & McIntyre v. Canada, communication No. 359/385/89*). On the other hand, the Committee has considered that a State Party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the rights and freedom of children of that faith in a school district (*Human Rights Committee, Ross v. Canada, communication No. 736/97*).

13.11 Restriction on grounds of national security and public order

In its general comment No. 34 (2011), the Human Rights Committee notes that States will be in violation of their obligations under Article 19 (3) if they do not ensure that treason or sedition laws are narrowly applied. In paragraph 30 of the general comment, the Committee states

“It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.” In its decision in the case of *Sohn v. Republic of Korea* (communication No. 578 (1992)), the Human Rights Committee held that national security did not provide legitimate grounds for restricting the applicant’s right to issue a statement supporting labour rights and calling for a national strike.

13.12 Restriction on grounds of public morals or health

The Human Rights Committee observed in general comment No. 22 (1993) that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

13.12.1 Mandatory limitations on freedom of expression

Article 20 of the ICCPR provides that States must adopt legal prohibitions on both “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The Human Rights Committee has explained, however, in its general comment No. 34 (2011), that any restrictions on freedom of expression based on legislation adopted under Article 20 must also meet the necessity and proportionality requirements contained in Article 19 165 (3) of the ICCPR. It notes in paragraph 48 of the comment that “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant.” Legislation favouring or penalizing particular religions or belief systems, or measures preventing or punishing criticism of religious leaders or doctrine, would therefore not be permitted under the ICCPR. The Human Rights Committee has encouraged governments to take legal measures to restrict the publication or dissemination of obscene and pornographic material portraying women and girls as objects of violence or degrading or inhuman treatment (general comment No. 28 (2000)).

13.12.2 “Memory laws” and freedom of expression

In general, comment No. 34 (2011), the Human Rights Committee states “Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States Parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.”

The Committee refers in its comment to its decision in the case of *Faurisson v. France* (Communication No. 550 (93)), concerning an author’s conviction under the Gayssot Act. The Gayssot Act made it an offence to contest the existence of crimes against humanity, as defined in the London Charter (1945) establishing the Nuremburg Tribunal. A majority of the Committee found that the restriction on Mr. Faurisson’s speech was justified because his words constituted an incitement to anti-Semitism and the measures imposed were necessary to protect the rights of others. Several members of the Committee, however, expressed concern at the non-specific nature of the Gayssot Act. They argued that it could be used in other situations to unjustifiably limit speech in connection with bona fide historic research and that such far-reaching restrictions on free speech are not allowed under the ICCPR.

13.13 Discussion questions in relation to the protection of freedom of expression

- Does domestic law, practice and policy protect the right to freedom of expression?
- Does domestic law, practice and policy protect the freedom to share ideas of all kinds with others, through any form of communication or media?
- If there are any exceptions or restrictions to the protection of this right, are they strictly for the purpose of protecting the rights and freedoms of others, protecting public safety, public order, public health or public morals?
- Are there adequate safeguards in place to protect any exceptions from being misused?

13.14 Further reading

- Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019
- Guidelines on Access to Information and Elections in Africa 2017
- Model Law on Access to Information for Africa 2013

14. Freedom of peaceful assembly and association

14.1 Freedom of peaceful assembly and association in international and regional standards and the Gambian Constitution

Article 20 of UDHR “1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association.”

Article 21 of ICCPR “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law 166 and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

Article 22 (1) and (2) of ICCPR “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

Article 10 of the African Charter

- 1. “Every individual shall have the right to free association provided that he abides by the law.*
- 2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.”*

Article 11 of the African Charter

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

Article 25 (1) (d)-(e) of the Constitution of the Republic of the Gambia

“Everyone shall have the right to freedom to assemble and demonstrate peaceably and without arms. Everyone shall have the freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions.”

Freedom of peaceful assembly and of association are, together with freedom of expression, key rights in a democratic society, since they enable the people to participate in the democratic process.

14.2 Freedom of assembly

14.2.1 Scope of freedom of assembly

Protecting freedom of assembly means guaranteeing the right to hold meetings to publicly discuss or disseminate information or ideas – but only if they are “peaceful”, a term that must be interpreted broadly. For instance, States Parties must prevent a peaceful assembly from leading to a riot as a result of provocation or the use of force by security forces or private parties, such as counter-demonstrators or agents provocateurs.

States are under an obligation to take positive measures to guarantee this right and protect it against interference by State agencies and private parties alike. To that end, authorities must take measures to ensure the smooth functioning of gatherings and demonstrations. Accordingly, they should be informed of the location and time of a planned assembly with sufficient advance notice, and should be granted access to it.

14.2.2 Limitations to freedom of assembly

The right to assemble peacefully is subject to restrictions, which must be:

- in conformity with the law: interference with freedom of assembly can be undertaken independently by administrative authorities, particularly the police, on the basis of a general statutory authorization;
- necessary in a democratic society: they must be proportional and compatible with the basic democratic values of pluralism, tolerance, broad-mindedness and popular sovereignty;

- aimed at a legitimate purpose, such as national security, public safety, public order, public health and morals and the rights and freedoms of others (for instance, an assembly may be broken up if it constitutes a specific threat to persons or passers-by).

14.3 Freedom of association

14.3.1 Scope of freedom association

Protecting freedom of association means guaranteeing the right of anyone to found an association with like-minded persons; or to join an existing association. Thus, a strict one-party system that precludes the formation and activities of other political parties violates freedom of association. The formation of and membership in an association must be voluntary; nobody may be forced – directly or indirectly – by the State or by private parties to join a political party, a religious society, a commercial undertaking or a sports club. States are under an obligation to provide the legal framework for setting up associations and to protect this right against interference by private parties. Freedom of association includes the right to form and join trade unions to protect one's interests. Trade union rights are laid down more specifically in Article 8 of ICESCR.

14.3. 2 Limitations to freedom of association

Freedom of association is subject to the same restrictions as freedom of assembly: any limitations must be provided for by law, must be necessary in a democratic society, and must serve one of the purposes justifying interference, namely protection of national security, public safety, public order, public health or morals and the interests and freedoms of others. Associations that advocate national, racial or religious hatred should be banned in the interest of others, pursuant to Article 20 (2) of ICCPR, which prohibits any advocacy of national, racial or religious hatred.

14. 4 Discussion questions on freedom of association and freedom of assembly

- Does domestic law, practice and policy protect the right to freedom of association?
- Does domestic law, practice and policy protect the right to form and join trade unions?

- If there are any exceptions or restrictions to the protection of this right, are they strictly for the purposes of protecting the rights and freedoms of others, public safety, public order, public health or public morals?
- Are there adequate safeguards in place to protect any exceptions from being misused?
- Does it ensure that no one may be compelled to join an association?
- Does domestic law, practice and policy protect the right to freedom of assembly?
- If there are any exceptions or restrictions to the protection of this right, are they strictly for the purposes of protecting the rights and freedoms of others, public safety, public order, public health or public morals?
- Are there adequate safeguards in place to protect any exceptions from being misused?

14.5 Further reading

- African Commission, Guidelines on Freedom of Association and Assembly in Africa African Commission on Human and Peoples' Rights Legal instruments (achpr.org)
- OHCHR, UN Special Rapporteurs on Freedom of Assembly and Association OHCHR | Freedoms of peaceful assembly and of association

15. The right to participate in public affairs

15.1 The right to participate in public affairs in international, regional standards and the Gambian Constitution

Article 21 of UDHR "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country.

3. *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*"

Article 25 of ICCPR "Every citizen shall have the right and the opportunity: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country."

Article 13 of the African Charter

1. *"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*
2. *Every citizen shall have the right of equal access to the public service of the country.*
3. *Every individual shall have the right of access to public property and services in strict equality of all persons before the law."*
- 4.

Article 26 of the Constitution of the Republic of the Gambia

"Every citizen of The Gambia of full age and capacity shall have the right, without unreasonable restrictions- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and stand for elections at genuine periodic elections for public office, which election shall be by universal and equal suffrage and be held by secret ballot; (c) to have access, on general terms of equality, to public service in The Gambia."

The right to take part in government is a cornerstone of modern democracy and therefore crucial for parliament. The correct implementation of this right has direct implications for the democratic nature of parliament, and ultimately for the legitimacy of the government and its policies. The right has three components:

- the general right to public participation;
- the right to vote and be elected;
- equal access to public service.

15.2 The general right to public participation

The right to public participation consists of (a) indirect participation in public affairs through elected representatives, and (b) direct participation in public affairs.

15.2.1 Indirect participation

It is mainly through elections and the constitution of representative bodies – national parliaments in particular – that the people participate in the conduct of public affairs, express their will and hold the government to account. The Human Rights Committee has stated that the powers of representative bodies should be legally enforceable and should not be restricted to advisory functions, and that representatives should exercise only the powers given to them in accordance with constitutional provisions (general comment No. 25 (1996)). For parliaments truly to reflect the will of the people, elections must be genuine, free and fair and held at short intervals. The United Nations – as part of its electoral assistance and electoral observation activities – has also established clear criteria for what should be common elements of electoral laws and procedures.

For elections to be free and fair, they must take place in an atmosphere free from intimidation and respectful of human rights – particularly the rights to free expression, assembly and association – with independent judicial procedures and protections against discrimination. The right to vote should be established by law based on non-discrimination and equal access of all persons to the election process. Although participation in elections may be limited to the citizens of a State, no restriction on unreasonable grounds, such as physical disability, illiteracy, educational background, party membership or property requirements, is permitted.

15.2.2 Direct participation

Direct participation means that not only elected representatives, but citizens too, are able to participate directly in public affairs, either through public debate and dialogue with elected representatives, referendums and popular initiatives, or through self-organization, guaranteed under the freedoms of expression, assembly and association.

In the case of *Marshall v. Canada* (1991), however, the Human Rights Committee recognised a broad margin of discretion of States with regard to granting direct rights of political participation:

“It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups. Although prior consultations, such as public hearings or consultations with the most interested groups, may often be envisaged by law or have evolved as public policy in the conduct of public affairs, Article 25 (a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25 (a).”

15.3 The right to vote and be elected

The right to vote and be elected is crucial for democracy and respect for the rule of law. Its proper implementation and realization has a direct impact on the way voters perceive their elected representatives, on the legitimacy of the legislation, that parliament enacts and on the decisions it takes. It is related to the essence of parliament and the idea of popular rule through representatives. Any breach of this right has direct consequences for parliament’s legitimacy, and even – in the most serious cases – for law and order and stability in a country. Elections must be organized so that the will of the people is freely and effectively expressed and the electorate is offered an actual choice. It is also essential to ensure non-discriminatory access of candidates and competing political parties to the media.

15.3.1 The right to vote

Persons entitled to vote should be able to register. Any manipulation of registration and voting, such as intimidation or coercion, should be prohibited by law. Elections should be based on the principle of “one person, one vote”. The drawing of electoral boundaries and the methods of vote allocation should not distort the distribution of voters or discriminate against any social groups. Positive measures should be taken to remove obstacles to participation, such as illiteracy, language barriers (information should be made available in local languages), poverty, non-accessibility for persons with disabilities and obstacles to freedom of movement.

Citizens should be protected from coercion or from attempts to compel them to reveal their voting intentions or preferences, and the principle of the secret ballot must be upheld.

15.3.2 The right to be elected

The right to stand for election may be subject to restrictions, such as those based on minimum age or citizenship, but these must be justifiable and reasonable. Physical disability, illiteracy, educational background, party membership or property requirements should never apply as restrictive conditions. Furthermore, conditions relating to nomination dates, fees or deposits should be reasonable and non-discriminatory (Human Rights Committee, general comment No. 25 (1996), paragraph 16).

15.3.3 Voting procedures

Free, fair and periodic elections should be guaranteed by national law. Voters should be free to support or oppose the government and form opinions independently. Elections must be held by secret ballot, ensuring that the will of the electors is expressed freely. One such crucial measure is the establishment of an independent authority to supervise the electoral process. It is important to ensure the security of ballot boxes during voting. After the voting, ballots should be counted in the presence of (international) observers, candidates or their agents.

15.4 Women's rights in public and political life¹²⁸

Although women's right to vote has been secured in nearly every country of the world, in practice the right to vote can sometimes be meaningless when other conditions make it virtually impossible or very difficult for both men and women to vote. Conditions such as the absence of free and fair elections, violations of freedom of expression, or lack of security, which tends to affect women disproportionately hinder women's participation in public and political life.

Other obstacles, such as stereotyping and traditional perceptions of men's and women's roles in society, as well as lack of access to relevant information and resources, also inhibit women's ability or willingness to vote. In addition to discriminatory attitudes and practices, the traditional working patterns of many political parties and governments continue to impede women's participation in public life. Women may be discouraged from seeking political office in particular because of their double burden of work and the high cost of seeking and holding public office. Across the globe women remain underrepresented at all levels of government.

¹²⁸ "Women's rights in public and political life", in Women's Rights are Human Rights, New York and Geneva, OHCHR, United Nations, 2014. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>

The CEDAW-Committee's general recommendation No. 25 (2004) promotes temporary special measures to achieve substantive gender equality, which is required by the Convention. Since the Beijing World Conference, States have increasingly adopted quotas to boost women's participation, counter discrimination and accelerate the slow pace at which the number of women in politics is rising. The most common are political party quotas, legislative quotas and reserved seats. However, if adopted in isolation, these measures are usually not enough to ensure equality. Quotas for women need to be coupled with other measures to create an enabling environment for women to participate. Particularly, the positive impact of increasing women's representation in public and political life will not be felt if the women who gain access are not also empowered to participate in the discussions and exercise influence in decision-making.

15.5 Equal access to public service

As regards public service positions, the basic principle of equality must govern the criteria and processes for appointment, promotion, suspension and dismissal, which should be objective and reasonable. In their oversight functions, parliamentarians should pay particular attention to conditions for access, existing restrictions, the processes for appointment, promotion, suspension and dismissal or removal from office, and the judicial or other review mechanisms available with regard to these processes.

15.6 Information and media

It is essential that citizens, candidates and elected representatives are able freely to discuss and communicate information and ideas on political affairs, hold peaceful demonstrations and meetings, publish political material and campaign for election. An independent press, free media expressing a variety of political views – key elements of such an environment – and respect for freedom of association, ensuring the possibility to form and join political parties, are crucial for a well-functioning democracy.

15.6 Discussion questions on the right to participate in public affairs

- Does domestic law, practice and policy protect the right to participate in public affairs?
- Does domestic law, practice and policy protect the right to form and join political parties?

- If there are any exceptions or restrictions to the protection of this right, are they strictly for the purposes of protecting the rights and freedoms of others, public safety, public order, public health or public morals?
- Are there adequate safeguards in place to protect any exceptions from being misused?
- Do individuals from marginalised groups take part in public affairs?
- What steps should the State take to ensure their full and effective participation in public life?

15.7 Further reading

- OHCHR, Guidelines on the right to participate in political affairs
OHCHR | Guidelines on the effective implementation of the right to participate in public affairs
- Factors that impede equal political participation and steps to overcome those challenges, OHCHR, A/HRC/27/29 Factors that impede equal political participation and steps to overcome those challenges : (un.org)

PART 5: ECONOMIC, SOCIAL AND CULTURAL RIGHTS

16. Economic, social and cultural rights

16.1 Introduction

Economic, social and cultural rights are human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water and sanitation, health care and education. Economic, social and cultural rights have become well defined in national, regional and global legal systems. Accepting economic, social and cultural rights as human rights legally obliges States to ensure that everyone can enjoy these rights, and to provide remedies when violations occur. Recognising economic, social and cultural rights, in line with the crosscutting principle of non-discrimination, means giving priority, in policies, legislation and resource allocation, to the needs of the most marginalized groups in society.¹²⁹ Economic, social and cultural rights apply to people throughout the world, but violations of these rights tend to occur most systematically and pervasively in settings where poverty is widespread.

16.2 The principle of progressive realisation

The principle of progressive realisation applies to positive state obligations to fulfil and to protect human rights, in particular economic, social and cultural rights. The human right to health, for example, does not guarantee the right of everyone to be healthy. However, it does oblige States, in accordance with their respective economic capabilities, social and cultural traditions as well as international minimum standards, to establish and maintain a public health system that can in principle guarantee access to certain basic health services for all. Progressive realization means that States should establish targets and benchmarks in order to progressively reduce the infant mortality rate, increase the number of doctors per 1000 inhabitants, raise the percentage of the population that has been vaccinated against certain infectious and epidemic diseases, or improve basic health facilities.

The health standard in poor countries may be lower than in rich countries without any violation of a State's obligations to fulfil the right to health.

¹²⁹See Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, New York and Geneva, OHCHR, United Nations, 2008. Available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

The total absence of positive measures to improve the public health system, retrogressive measures or the deliberate exclusion of certain groups (such as women and religious or ethnic minorities) from access to health services can, however, amount to a violation of the right to health.

16.3 Remedies for violations of economic, social and cultural rights

The provisions for the right to a remedy referred to in Chapter 2.9 refer primarily to civil and political rights, whereas most treaties relating to economic, social and cultural rights – such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter – contain no similar provisions. Despite this, violations of economic, social and cultural rights are increasingly adjudicated before domestic and regional courts, as well as United Nations treaty bodies. Indeed, arguments that economic, social and cultural rights are too vague to be adjudicated, or involve policy decisions better left to political authorities than to the courts, are not convincing. All human rights that entail a positive obligation to fulfil necessarily require policy decisions by State officials. For example, the capacity of a justice system to fulfil the right to a fair trial within a reasonable time depends on policy decisions, including the allocation of necessary resources.

In the same way that violations of civil and political rights can be adjudicated by courts, so too can violations of many economic, social and cultural rights. For example, courts can decide whether States have fulfilled their positive obligations to ensure access to essential primary medical care in accordance with the core content of the right to the enjoyment of the highest attainable standard of physical and mental health. Courts can also adjudicate whether States have complied with their duties to respect economic, social and cultural rights and other immediate duties arising, including the prohibition of discrimination in guaranteeing the rights enshrined in the ICESCR.

At a domestic level, economic, social and cultural rights are not always entrenched in national constitutions or laws. However, as demonstrated by the South African and Indian constitutional courts in particular, national courts are increasingly adjudicating the rights to health, education, water and adequate housing. At the regional, all three human rights mechanisms – the African Court, the African Commission and the Committee of Experts on the Right of the Child – all have the mandate to consider petitions on economic, social and cultural rights. At the sub-regional level, the ECOWAS Court can rule on economic, social and cultural rights matters.

At the international level, complaints can now be submitted to the Committee on Economic, Social and Cultural Rights (CESCR-Committee), following the entry into force in May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The Committee is a quasi-judicial body whose views, while not legally binding, carry important interpretive weight. They help to clarify the scope of State obligations in specific cases and the types of remedies that need to be adopted to bring redress to victims. A number of other international human rights treaties also include provisions on economic, social and cultural rights. The respective treaty bodies for the Convention on the Rights of the Child (CRC), CEDAW, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) and the Convention on the Rights of Persons with Disabilities (CRPD), are competent to consider individual complaints regarding economic, social and cultural rights as defined under these treaties (for details see Chapter 5).

In the same vein, as some economic, social and cultural rights and civil and political rights are interdependent, aspects of economic, social and cultural rights can also be considered under the complaints mechanisms provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR). For example, denial of food or health care to persons deprived of liberty can amount to torture or inhumane and degrading treatment. Forced evictions can also affect the right to private and family life, or violate due process of law.

Although challenges remain in ensuring the right to an effective remedy for economic, social and cultural rights, recent trends such as the entry into force of the OP-ICESCR indicate progress in reversing the outdated assumption that economic, social and cultural rights are not justiciable.

16.4 Globalization, development and economic, social and cultural rights

Rapid globalization is affecting the enjoyment of all human rights. At the World Summit for Social Development, held in Copenhagen in 1995, it was underscored that while the enhanced mobility and communications, increased trade and capital flows and technological advances generated by globalization had opened new opportunities for sustained economic growth and development worldwide, and for creative sharing of experiences, ideals, values and aspirations,

globalization had also been “accompanied by intensified poverty, unemployment and social disintegration”.¹³⁰

In many countries, deregulation, trade liberalisation, privatisation and similar trends have led to a diminished role for the State and a transfer of traditional governmental functions to non-State actors. This has negatively affected the enjoyment of the rights to education, health care, housing, water, sanitation and social security, as well as labour rights – especially in the case of vulnerable groups. The following chapters, which set out international standards in the area of economic, social and cultural rights, show a significant and widening gap between State obligations and the capacity or willingness of States to fulfil them. The UN Human Rights Council expressed concern at how the world food crisis (A/HRC/S-7/2) and the economic and financial crisis (A/HRC/2-10/1) have affected human rights. The Council clarified that such crises relieve neither States nor the international community of their obligations to realize the effective enjoyment of human rights.

16.6 Business and human rights

“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹³¹

“It has long been recognized that business can have a profound impact on human rights. This impact can be positive, for example by delivering innovation and services that can improve living standards for people across the globe. It can also be negative, for example where business activities destroy people’s livelihoods, exploit workers or displace communities. Companies can also be complicit in human rights abuses committed by others, including States – for example, if they collude with security forces in violently suppressing protests or provide information on their customers to States that then use it to track down and punish dissidents.

However, international human rights treaties generally do not impose direct legal obligations on private actors, such as companies. Instead, States are responsible for enacting and enforcing national legislation that can have the effect of requiring companies to respect human rights – such as laws mandating a minimum working age ... [t]he [UN] Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect and Remedy’ Framework are a set of 31 principles directed at States and companies that clarify their duties and responsibilities to protect and respect human rights in the context of business activities.

¹³⁰World Summit for Social Development, Copenhagen Declaration (2005), paragraph 14

¹³¹Guiding Principles on Business and Human Rights, OHCHR, 2011.

According to the framework: [a]ll States have a duty to protect everyone within their jurisdiction from human rights abuses committed by companies; [c]ompanies have a responsibility to respect human rights – i.e. avoid infringing on the rights of others wherever they operate and whatever their size or industry, and address any impact that does occur. This responsibility exists independently of whether States fulfil their obligations; and, [w]hen abuses occur, victims must have access to effective remedy, through judicial and non-judicial grievance mechanisms.”

16.4 Human rights, international trade and investment

The global trade and investment regime has a profound impact on human rights, given that the promotion of economic growth in itself may not lead to inclusive, sustainable or equitable development outcomes. General Assembly Resolution 67/171 affirms human rights as a guiding consideration for multilateral trade negotiations. The resolution calls for mainstreaming of the right to development and strengthening of the global partnership for development within international trade institutions. Trade and investment regimes also overlap and interface with regimes for intellectual property, transfer of technology, climate change and energy, and any evaluation must address how the convergence, divergence and intersection of these regimes impact on the realization of human rights. In a human rights-based approach to trade and investment, consideration is given to how States’ obligations under trade/investment law/agreements might impact on their ability to fulfil their human rights obligations; what measures States and other actors should be taking to ensure positive and avoid negative impacts; and what action is required to mitigate any negative impacts that do occur.

16.5 Poverty as a human rights violation

Poverty is an urgent human rights concern. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. Not only is extreme poverty characterised by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality.¹³³ In light of considerations cited above, poverty eradication has emerged in recent decades as an overarching objective of human development. Poverty represents the denial not only of a person’s economic, social and cultural rights, but also of his or her civil and political rights.¹³⁴

¹³³Final draft of the Guiding Principles on Extreme Poverty and Human Rights, submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, A/HRC/21/39, paragraph 3.

¹³⁴The report “Making the Law Work for Everyone”, published in 2008 by the UN Commission on Legal Empowerment of the Poor, concluded that around four billion people, the majority of the world’s population, are excluded from the rule of law. As affirmed in the report, they are “not protected adequately by law and by open and functioning institutions and, for a range of reasons, are unable to use the law effectively to improve their livelihoods”.

According to UNICEF, today 200 million children's lives are at risk because they are malnourished.¹³⁵ These facts are not new, and yet the gap between rich and poor is widening, making the failure to address poverty effectively in the face of rapid globalization increasingly indefensible. In that context, in September 2000, the United Nations General Assembly adopted the Millennium Development Goals (MDGs), including the goal to halve the number of people living in extreme poverty by 2015. The ambitious targets to be achieved by the same year included universal primary education; reduction of under-five child mortality by two thirds, and maternal mortality by three quarters; and a halving of the proportion of people who suffer from hunger and lack access to safe drinking water.

The MDGs served as a proxy for certain economic and social rights but ignored other important human rights linkages. By contrast, an ambitious new global development framework, the 2030 Agenda for Sustainable Development, now strongly reflects human rights principles and standards. The 2030 Agenda was adopted in September 2015 by 170 world leaders gathered at the UN Sustainable Development Summit in New York. It covers a broad set of 17 Sustainable Development Goals (SDGs), and 167 targets and will serve as the overall framework to guide global and national development action for the next 15 years. The SDGs are the result of the most consultative and inclusive process in the history of the United Nations. Grounded in international human rights law, the agenda offers critical opportunities to further advance the realization of human rights for all people everywhere, without discrimination.

16.5.1 Discussion questions on poverty

- Is there a national policy aimed at improving living conditions?
- How is this policy enforced?
- How does the obligation to improve living conditions affect domestic social policy?
- How can key stakeholders ensure that this obligation is taken into account in forming national social policy?
- Is there a national policy designed to ensure people are free from hunger?
- Is this policy applied in a non-discriminatory way?
- Does this policy prioritise disadvantaged groups and vulnerable people?
- Is the right to food taken into account in drafting other measures such as for land use and management, environmental protection measures or trade policy?
- Is the right to food taken into account in setting any national minimum wage?
- Is provision made for vulnerable individuals living in poverty to access adequate clothing to meet their needs?

¹³⁶UNICEF, Nutrition and life saving food, Nutrition and life-saving food - Unicef UK

16.6 Sustainable Development Goals

The 2030 Agenda for Sustainable Development explicitly references human rights throughout its text, and the 17 Sustainable Development Goals (SDGs) and the related 169 targets directly or indirectly reflect human rights standards. The SDGs are designed to “leave no one behind”, and the Agenda integrates crosscutting human rights principles such as participation, accountability and non-discrimination. In other words, the 2030 Agenda and human rights are inevitably tied together. Given their unique mandate and role, National Human Rights Institutions (NHRIs) can play a key role in the implementation and follow-up of the Agenda, and are at the core of the SDG ‘web of accountability’.¹³⁶

In 2019, GANHRI and the Danish Institute for Human Rights published a study ‘NHRI - Accelerators, Guarantors and Indicators of Sustainable Development’. In 2017, GANHRI has undertaken a study on how NHRIs support the implementation of the SDGs. The findings reaffirm the key role of NHRIs about sustainable development, and contribute to the sharing of experiences, good practices and knowledge management with and among NHRIs, civil society, governments and other stakeholders. Both documents are available to download here.¹³⁷

In response to a request made by the UN Committee on Economic, Social and Cultural Rights in July 2001, Ms. Mary Robinson, the former United Nations High Commissioner for Human Rights, with the assistance of three experts, developed Draft Principles and Guidelines: A Human Rights Approach to Poverty Reduction. The final version of this document was published by Ms. Robinson’s successor, Ms. Louise Arbour, in 2006 (HR/PUB/06/12, 2006). Furthermore, pursuing a specific mandate of the Human Rights Council, the former Special Rapporteur on Extreme Poverty and Human Rights, Ms. Magdalena Sepúlveda, elaborated a set of Guiding Principles on extreme poverty and human rights, which was adopted by the Human Rights Council in 2012 (HRC Resolution 21/11). The UN General Assembly took note, with appreciation of the adoption of the Guiding Principles, considering them “a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate” (A/RES/67/164, paragraph 17).

In defining poverty, these documents adopt the widely accepted view, first advocated by Amartya Sen, that a poor person is an individual deprived of basic capabilities, such as the capability to be free from hunger, live in good health and be literate.

¹³⁶GANHRI, NHRIs and Sustainable Development Goals, Sustainable Development Goals (ohchr.org)

¹³⁷Both documents can be downloaded on the GANHRI webpage titled NHRIs and the Sustainable Development Goals Sustainable Development Goals (ohchr.org)

Examples of human rights with constitutive relevance to poverty are the rights to food, housing, health and education. Many other related rights also have an impact on poverty reduction. For example, the enjoyment of the right to work is conducive to the enjoyment of such other human rights as the rights to food, health and housing. Civil and political rights, including the rights to personal security and equal access to justice, as well as political rights and freedoms, are also of direct relevance to the fight against poverty.

16.7 Human rights and the 2030 Development Agenda

The OHCHR and Centre for Economic and Social Rights publication, *Who Will be Accountable? Human Rights and the Post-2015 Development Agenda* (2013), argues that tailoring post-2015 development goals and targets to the national and sub-national levels should involve the following steps:

- Align national and sub-national goals and targets with the human rights treaty standards applicable to the country concerned.
- Set national and sub-national goals, targets, indicators and benchmarks, and monitor progress, through participatory processes.
- Integrate the principles of non-discrimination and equality, ensuring that the most disadvantaged communities and regions are prioritised.
- Address major bottlenecks and constraints where rights are not being realized, select interventions that multiply positive outcomes and create an enabling environment for human rights fulfilment.
- Look for synergies and gaps in the overall framework of goals, and ensure that it reflects an adequate balance of human rights and sustainable development concerns.
- Define a period and level of ambition consistent with an objective assessment of the “maximum resources” available to the country.
- Set targets and indicators for fiscal and policy efforts, as well as outcomes.
- Use a range of indicators and all available information (subjective as well as objective; qualitative as well as quantitative), across the full range of human rights (civil, cultural, economic, political and social), to help monitor progress.

16.8 International financial institutions and the fight against poverty

Since 1996, the international financial institutions have recognized the importance of poverty reduction for human development. In their Comprehensive Development Programme, the World Bank Group and the International Monetary Fund (IMF), also known as the Bretton Woods Institutions, make poverty reduction a basis for debt relief and development cooperation strategies. Highly indebted and other poor countries are encouraged to develop, in a participatory process; poverty reduction strategy papers (PRSPs) specifying poverty reduction and eradication targets and benchmarks in various areas, such as food production, health, education, labour, justice, good governance and democratization.¹³⁸ Still, many, including the United Nations Special Rapporteurs, for insisting on macroeconomic discipline and effectively negating the claims of local ownership and participation, have criticized such programmes.

Evaluations of the use of PRSPs by the United Nations Population Fund (UNFPA) led the UN to make explicit reference to human rights in the guidance issued to UN field presences regarding their engagement in PRSPs.¹³⁹ The general United Nations policy of human rights integration has led to a human rights approach to poverty reduction strategies in the activities of the United Nations Development Programme (UNDP), the Bretton Woods Institutions and other multilateral and bilateral donor agencies.

The next chapters largely based on the general comments of the Committee on Economic, Social and Cultural Rights and the work of the UN Special Procedures – focus on a selection of the economic, social and cultural rights guaranteed under the international human rights law.

17. The right to development

17.1 Regional standards on the right to development

Article 22 of the African Charter

1. *“All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”*

¹³⁸IMF Factsheet on Poverty Reduction Strategy Papers, 2014, www.imf.org/external/np/exr/facts/prsp.htm.

¹³⁹See for example United Nations Development Group, Guidance for UN country team engagement in PRSPs, adopted on 30 August 2004.

2. *States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”*

The Right to Development (RTD) is a relatively new addition to the international human rights framework. It was first proclaimed by the Organisation of African Unity (OAU) and included in 1981 in the African Charter on Human and Peoples' Rights. In 1986, the UN Declaration on the Right to Development (DRTD) was adopted.

17.2 What is the right to development?

According to Article 1 of the 1986 Declaration on the Right to Development it is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

The starting point for understanding the right to development, as so defined in the Declaration and affirmed in subsequent United Nations resolutions and other related instruments, is that it is a human right on a par with all other human rights. It is neither an all-encompassing “super right” nor a highly restricted “mini right”; it is on an equal footing with all other human rights: universal, inalienable, interrelated, interdependent and indivisible.

Secondly, the right to development is both an individual and a collective right. It belongs to all individuals and all peoples. As a human right, the right to development is universal; it applies to all people, in all countries, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Like other human rights, the right to development contains specific entitlements, including the right “to participate in, contribute to, and enjoy economic, social, cultural and political development”. The Declaration sets out the elements of this right and the means for realizing it. The key principles include the following:

- A people-centred development: the Declaration identifies “the human person” as the central subject, participant and beneficiary of development (Article 2).

- A human rights-based approach: the Declaration requires that development be carried out in a manner “in which all human rights and fundamental freedoms can be fully realized” (Article 1).
- Participation: the Declaration insists on the “active, free and meaningful participation” of individuals and populations in development (Article 2).
- Equity: the Declaration highlights the importance of the “fair distribution of the benefits” of development (Article 2).
- Non-discrimination: the Declaration allows no “distinction as to race, sex, language or religion” (Article 6).
- Self-determination: the Declaration requires the full realisation of the right of peoples to self-determination, including full sovereignty over their natural wealth and resources (Article 1). Stakeholders, including NHRIs, can contribute to the formulation of policies that are in line with the right to development and that incorporate its principles and elements.

17.3 The right to development in the context of the 2030 Agenda, the Sustainable Development Goals and related processes

The right to development will continue to inform the 2030 Agenda, the Sustainable Development Goals and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development. Importantly, there are explicit references to the right to development in both the 2030 Agenda (paragraph 35) and the Addis Ababa Action Agenda, in which States commit to respecting all human rights, including the right to development” (paragraph 1). In order to realize the vision of the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda for a world in which the benefits of development are shared by all, States will need to ensure that right-to-development principles guide the implementation of their commitments.

The preamble to the 2030 Agenda describes it as “a plan of action for people, planet and prosperity” in which “all countries and all stakeholders, acting in collaborative partnership, ... are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet” while leaving no one behind.

The key principles contained in the Declaration on the Right to Development, including participation, non-discrimination, self-determination, individual and collective responsibility, international cooperation and equity, are reaffirmed throughout the 2030 Agenda. The Sustainable Development Goals set out in the Agenda outline development objectives that are rooted in human rights commitments, including the right to development. The SDGs, by taking a rights-based approach and calling for equitable development, improve upon the Millennium Development Goals and present new opportunities for development that benefits everyone.

In order to help realize the SDGs, the 2030 Agenda directly integrates the Addis Ababa Action Agenda and its commitment to respect all human rights, including the right to development. The Addis Ababa Action Agenda:

- (a) calls for increased accountability for development financing commitments (paragraph 58), including accountability for businesses (paragraphs 35 and 37);
- (b) renews pledges to provide a social protection floor for everyone (paragraph 12);
- (c) establishes a new technology facilitation mechanism (paragraph 123); and
- (d) includes for the first time a follow-up and review mechanism for development financing (paragraphs 130–134).

The implementation of the Addis Ababa Action Agenda requires an international system of financing for development that is just, equitable, cooperative, transparent and accountable; that integrates human rights commitments; and that places the human person at the centre of development. In this regard, measures to ensure the participation and empowerment of marginalized and excluded groups will be critical. This applies to the planned reviews of financing for development commitments and the 2030 Agenda for Sustainable Development.

17.4 The right to development: a landmark decision of the African Commission on Human and Peoples' Rights

In its 2010 decision in the case Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, the African Commission found that the Kenyan Government had violated the rights of the country's indigenous Endorois community by evicting them from their lands to make way for a wildlife reserve. The decision constitutes a major legal precedent, recognising indigenous people's rights over traditionally owned land and their right to development. In the 1970s, the Kenyan Government evicted hundreds of Endorois families from their land around Lake Bogoria to create a game reserve for tourism. The displaced Endorois communities did not receive compensation and benefits promised to them and their access to the land was restricted at the discretion of the Game Reserve Authority. This prevented the community from practicing its pastoral way of life, using ceremonial and religious sites and accessing traditional medicines.

The Commission found that the Kenyan Government had violated the Endorois rights to religious practice, property, culture, the free disposition of natural resources and development. The Commission stated that the restrictions on access to land, the lack of consultation with the community and its inadequate involvement in the process of developing the region as a game reserve had violated the community's right to development under the African Charter on Human and Peoples' Rights. The Commission added that "the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds ... that the Endorois community has suffered a violation of Article 22 of the Charter (guaranteeing the right to development)." ¹⁴⁰

17.5 Discussion questions on the right to development

- The right to development is a special right, in the sense that it is a composite of all, or at least the basic rights. What rights make up the right to development?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What is the core content of the right to development?
- What are the states' obligations to fulfil this right?
- Is there a policy and legal framework on the right to development?
- What steps has the State taken to fulfil this right?

¹⁴⁰Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003.

17.6 Further reading

- The Gambia National Development Plan
The Gambia National Development Plan – The Gambia’s National Development Plan (ndp.gm)
- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples’ Rights, 4 February 2010, available at: <https://www.refworld.org/cases,ACHPR,4b8275a12.html>
- Frequently asked questions on the right to development, OHCHR 1529371_E_FACT SHEET_37.pdf (ohchr.org)
- African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights, achpr_instr_guide_draft_esc_rights_eng.pdf

18. The right to social security

18.1 International law on the right to social security

Article 22 of UDHR “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 25 of UDHR “1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

Article 9 of ICESCR “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

18.2 What is a social security system?

Ideally, a social security system should aim to provide comprehensive coverage against all situations that may threaten a person's ability to earn an income and maintain an adequate standard of living. Social security areas are summed up in the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102). They are:

- medical care;
- sickness benefits;
- unemployment benefits;
- old-age benefits;
- employment injury benefits;
- family and maternity benefits;
- invalidity benefits;
- survivors' benefits.

The Committee on Economic, Social and Cultural Rights has provided guidance about the content of the right to social security in its general comment No. 19 (E/C.12/GC/19), and the UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) also expand on the human rights framework applicable to social security. In a social security system, a distinction is drawn between social insurance programmes – which provide for benefits tied to the interruption of employment earnings – and social assistance programmes – which provide for benefits that supplement insufficient incomes of members of vulnerable groups. Both types of programme are intended to guarantee the material conditions required for an adequate standard of living and to offer protection from the effects of poverty and material insecurity. The ILO and other UN agencies recommend that States adopt national social protection floors, guaranteeing basic income security to children, older persons and persons of working age who are unable to earn sufficient income (in particular in cases of sickness, unemployment, maternity and disability) and universal access to essential health care health benefits.¹⁴¹

As regards low-income countries, the following observations on social security are in order:

- Few countries have set up comprehensive social security schemes providing universal coverage.
- Social security schemes tend to target specific groups (such as children or pregnant women).

¹⁴¹See ILO Recommendation 202 concerning National Floors of Social Protection, adopted on 14 June 2012.

- Social security schemes are often emergency relief programmes providing support in the event of calamities. Obstacles frequently encountered in low-income countries in trying to establish a social security system include lack of resources, administrative incapacity, debt and the structural adjustment policies imposed by international financial institutions.

18.3 Key factors to be considered in relation to the right to social security

In their efforts to ensure the implementation and full enjoyment of the right to social security, States and particularly parliaments should take the following steps:

- Adopt a national plan of action – including goals, measurable progress indicators and clear time frames – establishing appropriate mechanisms to monitor advancement in realizing the right.
- Establish social security systems by law in a transparent, sustainable and inclusive manner.
- Expand nationally funded comprehensive social security systems that encompass social insurance and social assistance, in line with the ILO's recommendations on a social protection floor.
- Allocate the resources necessary to progressively ensure universal access to social security for all and the enjoyment of at least the minimum essential levels of economic, social and cultural rights. While all persons should be progressively covered by social security systems, priority should be accorded to the most disadvantaged and marginalized groups.
- Ensure non-discrimination and equality in access to social security by equalizing the compulsory retirement age for both men and women, ensuring that women receive the equal benefit of public and private pension schemes and guaranteeing maternity leave for women, paternity leave for men and parental leave for both men and women.
- Take specific measures to ensure that persons living in poverty, in particular women and persons working in the informal economy, have access to social security benefits, including social pensions, sufficient to ensure an adequate standard of living and access to health care for them and their families.

- Make administrative and judicial appeals procedures available to allow potential beneficiaries to seek redress.
- Devise and implement measures to avoid corruption and fraud with regard to social security benefits.

18.4 Discussion questions on social security

- What is the core content of the right to social security?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What are the State's obligations to fulfil this right?
- Does the Gambia have a policy and legal framework on the right to social security?
- What steps has the State taken to fulfil this right?

18.5 Further reading

- Social protection in the Gambia Social protection | UNICEF Gambia
- OHCHR and the right to social security OHCHR | OHCHR and the right to social security

19. The right to work and rights at work

19.1 The right to work and rights at work in international and regional standards

Article 23 (1) of UDHR "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

Article 6 of ICESCR "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic,

social and cultural development and full and 188 productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

Article 7 of ICESCR “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”

Article 17 of the African Charter

“Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

19.2 The right to work

The right to work primarily protects individuals against exclusion from the economy, and also the unemployed against social isolation. Free choice of work and the prohibition of forced labour are provided for in Article 6 (1) of the ICESCR. According to the UN Committee on Economic, Social and Cultural Rights, in its general comment No. 18 (2005), “The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/ her development and recognition within the community.”

19.2.1 Elements of legislation and policies pertaining to the right to work

When legislation is being drafted on the right to work and its implementation through national employment policies, particular attention should be paid to prohibiting discrimination with regard to access to work.

Legislation should also aim to facilitate the entry of specific groups – such as the elderly, young people and persons with disabilities, and particularly women among those groups – into labour markets. Women experience systemic barriers in almost every aspect of work, ranging from whether they have paid work at all, to the type of work they obtain or are excluded from, the availability of support such as childcare, the level of their pay, their working conditions. Other barriers include access to higher-paying occupations, the insecurity of their jobs, the absence of pension entitlements or benefits, and the lack of time, resources or information necessary to enforce their rights. Measures should also be taken by States to reduce the number of workers in the informal economy and to extend the protection provided by labour legislation to all areas of the economy, including the domestic and agricultural sectors.

The main goal of employment policies should be the attainment of full employment as quickly as possible, in accordance with a nation's resources. Over and above social benefits, those policies should address the concerns of the long-term unemployed and low-income earners through the development of public work programmes. The State should ensure that generally accessible and free or reasonably priced technical and vocational guidance and training programmes are established and that free employment services for all workers are put in place.

19.3 Rights at work

Article 7 of the ICESCR guarantees the right of every person to just and favourable conditions of work. These conditions include:

- remuneration that provides all workers, as a minimum, with: – fair wages and equal payment for work of equal value, without any discrimination (particularly against women); – a decent living for the workers and their families;
- safe and healthy working conditions;
- equal opportunities for promotion on the basis of seniority and competence;
- reasonable working hours, rest, leisure, periodic paid holidays and remunerated public holidays.

Therefore, in line with the recommendations made by the UN Committee on Economic, Social and Cultural Rights in general comment No. 18 (2005), and by the UN Special Rapporteur on Human Rights and Extreme Poverty, parliamentarians should ensure that the following key elements are stipulated in legislation and implemented through relevant strategies, policies and programmes:

- Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to guarantee enjoyment of the right to decent working conditions:
- Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living.
- Extend legal standards regarding just and favourable conditions of work to the informal economy, and collect disaggregated data assessing the dimensions of informal work.
- Take positive measures to ensure the elimination of all forms of forced and bonded labour and harmful and hazardous forms of child labour, in addition to measures that ensure the social and economic reintegration of those affected and avoid reoccurrence:
- Ensure that caregivers are adequately protected and supported by social programmes and services, including access to affordable childcare.
- Put in place specific measures to expand opportunities for employment in the formal labour market, including through vocational guidance and training and skills development.
- Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to unemployment, including women, migrants and persons with disabilities, and tailored to their needs.
- Respect, promote and realize freedom of association so that all workers are effectively represented in social and political dialogue about labour reforms.

19.4 Discussion questions on the right to work and rights and work

- Has legislation been enacted providing for access to the labour marketing general?
- What barriers exist to accessing the labour market?
- What policies are in place at national and regional levels aimed at decreasing barriers to entry to the labour market?

- What facilities exist for the disseminating of information on the labour market and access to it?
- What facilities and policies exist to ensure the access to labour market of disadvantaged groups?
- Are employers encouraged or helped to employ individuals from disadvantaged groups?
- Are there remedies in domestic law for individuals who have had their access to the labour market denied or limited in some capacity?
- Is the right to work taken into account in general social policy?
- Do national policies recognise the link between the right to education and the right to work?
- Do parliamentarians have an input into labour market policies?
- What provision does domestic law, policy and practice make for:
 - A minimum wage;
 - Equality in employment;
 - Health and safety at work; and
 - The rights of trades unions and their members?

19.5 Further reading

• OHCHR Report on Youth and the right to work
OHCHR | Report on youth and the right to work

• The right to work and worker's rights The Right to Work and Workers' Rights | ESCR-Net (escr-net.org)

• ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up The text of the Declaration and its follow-up (DECLARATION) (ilo.org)

20. The right to an adequate standard of living

20.1 The right to an adequate standard of living under international standards

Article 25 of UDHR “1. Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

Article 11 of ICESCR “1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.” Article 12 of ICESCR “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

Article 25 of the UDHR guarantees a social right that – in a way – is an umbrella entitlement: the right to an adequate standard of living. In addition to the right to social security dealt with above, this right also comprises the following rights:

- the right to adequate food;
- the right to adequate clothing;
- the right to housing;
- the right to health. Article 11 of the ICESCR covers the core of the right to an adequate standard of living (food, clothing and housing) and recognizes the right to continuous improvement of living conditions. States Parties to the Covenant commit themselves to “take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent”. Under Article 11 of the ICESCR, the Committee on Economic, Social and Cultural Rights has also derived the rights to water and sanitation.

21. The right to food

Although the international community has often reaffirmed the importance of respecting fully the right to adequate food, there are still considerable gaps in this area between international law standards and the situation that currently prevails in many parts of the world.

Similar to the right to housing, the right to food is not provided for in the African Charter. However, in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, the Commission has interpreted Articles 4 (right to life), 16 (right to health) and 22 (the right of all peoples to economic, social and cultural development) as encompassing the right to food.¹⁴²

According to statistics from the UN Food and Agriculture Organization (FAO) about 805 million people were chronically undernourished during the period 2012–14 among whom an estimated 60 per cent were women or girls, down more than 100 million from the previous decade, and 209 million lower than in 1990–92. The FAO report notes, however, that “Despite overall progress, marked differences across regions persist.

¹⁴²*Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria* para 64-66, achpr30_155_96_eng.pdf

Sub-Saharan Africa has the highest prevalence of undernourishment, with only modest progress in recent years. Around one in four people in the region remains undernourished. Asia, the most populous region in the world, still has the highest number of undernourished.”¹⁴³

The UN Committee on Economic, Social and Cultural Rights has observed that “malnutrition and undernutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries”.

UN human rights mechanisms have noted that food insecurity and related violations of the right to adequate food are caused by high domestic food prices, lower incomes and increasing unemployment. Food insecurity is exacerbated by the sale of land to other States or transnational corporations and the increasing use of agricultural land to grow crops for export and bioethanol production. The Human Rights Council held special sessions on the food crisis (A/HRC/S-7/2) and the global economic crisis (A/ HRC/S-10/2) addressing their impact on the enjoyment of human rights.

21.1 How can the right to food be realised?

According to Jean Ziegler, former United Nations Special Rapporteur on the right to food, hunger and malnutrition are by no means dictated by fate or a curse of nature; they are man made.¹⁴⁴

The right to adequate food is inseparable from the inherent dignity of the person and indispensable to the enjoyment of other human rights. The right to food is realized when every woman, man and child, alone or in community with others, has physical and economic access at all times to adequate food or to means for its procurement. It does not mean that a government must hand out free food, but it entails a government’s obligation to respect, to protect and to fulfil, including, under certain circumstances, to provide for that right.

The right to adequate food is inseparable from the inherent dignity of the person and indispensable to the enjoyment of other human rights. The right to food is realized when every woman, man and child, alone or in community with others, has physical and economic access at all times to adequate food or to means for its procurement.

¹⁴³FAO, IFAD and WFP. The State of Food Insecurity in the World 2014. Strengthening the enabling environment for food security and nutrition. Rome, FAO, 2014.

¹⁴⁴Report on the right to food (E/CN.4/2001/53), 2001, paragraph 6.

It does not mean that a government must hand out free food, but it entails a government's obligation to respect, to protect and to fulfil, including, under certain circumstances, to provide for that right.

21.2 A framework law on food

While under the ICESCR States have an obligation to ensure the exercise of the right to food and must legislate to that effect, hungry citizens may seek redress only if the Covenant can be directly invoked before the national courts – which is rarely the case – or has been incorporated into the national laws.

Therefore, the Committee on Economic, Social and Cultural Rights, which monitors implementation of the Covenant, has emphasized the obligations of States Parties to pass laws protecting the right to food, and has recommended in particular that States consider the adoption of a framework law ensuring, inter alia, that redress is provided for violations of the right to food.

The Committee on Economic, Social and Cultural Rights' general comment No. 12 (1999) states: "The framework law should include provisions on its purpose; the targets or goals to be achieved and the time frame to be set for the achievement of those targets; the means by which the purpose could be achieved, described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations."

21.3 Specific examples of measures that States should take in respect of the right to food

A framework law should be adopted as a key instrument for drawing up and implementing national strategies on food and food security for all. The Committee on Economic, Social and Cultural Rights, as well as the UN Special Rapporteur on the Right to Food and the UN FAO, have all developed legislative and policy recommendations in relation to the right to food.¹⁰ In reviewing the constitution and national laws, and in aligning them with international human rights law on the right to food, particular attention should be paid to the need to prevent discrimination in relation to access to food or to related resources.

The following measures are called for:

- Guaranteeing access to food, both economically and physically, to the members of all groups, including the poor and segments of society that are vulnerable or suffer from discrimination.
- No acts should disrupt access to adequate food (for instance, evicting people from their land arbitrarily, introducing toxic substances into the food chain knowingly, or, in situations of armed conflict, destroying productive resources and blocking the provision of relief food supplies to the civilian population).
- Measures should be adopted to prevent enterprises or individuals from impairing people's access to adequate food. The obligation to protect entails enactment of consumer protection laws and action if, for instance, a company pollutes water supplies or if monopolies distort food markets or the seed supply.
- Guaranteeing that all persons, and particularly women, have full and equal access to economic resources, including the right to inherit and own land and other property and access to credit, natural resources and appropriate technology. According to the FAO, while women make up 80 per cent of the world's agricultural labour force, they own less than 1 per cent of the land and account for less than 1 per cent of the credit offered to farmers globally.

To guarantee and strengthen people's access to and use of resources and means of livelihood, measures should be taken to ensure that:

- people have adequate wages or access to land, respectively, to buy or produce food;
- vulnerable groups are identified and policies are implemented to provide them with access to adequate food by enhancing their ability to feed themselves (for example, through improved employment prospects, an agrarian reform programme for landless groups or the provision of free milk in schools to improve child nutrition).
- Measures should be taken to respect and protect self-employment and remunerated work that ensures decent living conditions for workers and their families, and to prevent denial of access to jobs on the basis of gender, race or other discriminatory criteria, since such discrimination would affect the ability of workers to feed themselves.

- Maintaining land registries. The government should devise adequate farmer-support programmes with particular emphasis on those most in need, for example by securing indigenous peoples' rights to their ancestral lands, empowering women and supporting small scale producers and peasants in remote locations (such as mountains or deserts). Food should be provided whenever individuals or groups are unable to feed themselves for reasons beyond their control, including natural or other disasters (forms of support might include direct food distributions, cash transfers or food-for-work programmes).

21.4 Must action be taken immediately?

Like other economic, social and cultural rights, the obligation of States to fulfil and protect the right to adequate food is subject to progressive realization, which means that States are not required to achieve its full realization immediately, but must take measures to achieve it progressively by maximum use of available resources. However, the following obligations are not subject to progressive realization, and States have a duty to take immediate action in respect of them:

- refraining from any discrimination in relation to access to food and to means and entitlements for its procurement;
- providing basic minimum subsistence (thereby ensuring freedom from hunger);
- avoiding retrogressive measures.

21.5 Discussion questions on the right to food

- What is the core content of the right to food?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What are the States' obligations to fulfil this right?
- Does the Gambia have a policy and legal framework on the right to food?
- What steps have the State taken to fulfil this right?
- What are the key challenges hindering the enjoyment of the right to food in the Gambia?

21.6 Further reading

- OHCHR and the right to food OHCHR | OHCHR and the right to food
- Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria achpr30_155_96_eng.pdf

•African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, achpr_instr_guide_draft_esc_rights_eng.pdf

22. The right to housing

The right to adequate housing should not be understood narrowly – as the right to have a roof over one's head – but as the right to live somewhere in security, peace and dignity. Homelessness is the extreme form of denial of the right to housing and is constitutive of poverty. However, the precarious situation of millions living in slums and remote rural areas, who face problems of overcrowding, lack of sewage treatment, pollution, seasonal exposure to the worst conditions and lack of access to drinking water and other infrastructure, also constitutes a serious denial of the right to adequate housing. SDG 11 urges states to make cities and human settlements inclusive, safe, resilient and sustainable.

22.1 Example of national jurisprudence on the right to adequate housing

Kenyan High Court ordering remedy for evicted persons

In a judgment of November 2011, the Kenyan High Court ruled upon a petition of more than 1000 individuals (Constitutional Petition No. 2 of 2011 (Garissa)) who had been violently removed from their homes, which were then demolished by officials of the provincial administration and Garissa Municipal Council. In its ruling, the High Court recognised the interdependence of civil, political and economic and social rights. It stressed that under the new Constitution, ratified international treaties were part of Kenyan law and therefore based its decision on the ICCPR and the ICESCR. The Court concluded that the State had violated the rights to adequate housing, to water and sanitation, and to physical and mental health. Other violations were the rights to education, to information, to fair administrative decisions and to freedom from hunger, as well as the right of the elderly to pursue personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care. The Court issued a permanent injunction compelling the State to return petitioners to their land and to reconstruct their homes and/or provide alternative housing and other facilities, including schools, and it awarded each of the petitioners KSh 200,000 (approx. US\$ 2,000) in damages. The ruling has been hailed as establishing an important normative precedent and breaking new ground by ordering the reconstruction of demolished homes and awarding punitive damages.¹⁴⁵

¹⁴⁵<http://www.escr-net.org/node/364786>

22.2 The right to housing: realization of its core elements

The Committee on Economic, Social and Cultural Rights' general comment No. 4 (1991) on the right to adequate housing and general comment No. 7 (1997) on forced evictions define the right to housing as comprising a number of specific freedoms and entitlements. It includes legal security of tenure, availability of infrastructure, affordability, accessibility, location, cultural adequacy, habitability and protection against forced evictions. The core elements of the right to housing are also described in reports by the Special Rapporteur on Adequate Housing and by the United Nations Human Settlements Programme (UN-Habitat).¹⁴⁶

- Legal security of tenure: all persons should possess a degree of security of tenure guaranteeing legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure on households that have none. Such steps should be taken in consultation with the affected persons and groups. Women are disproportionately affected by forced evictions, protection against which is a key element of security of tenure and the right to adequate housing.
- Availability of services, materials and infrastructure: all beneficiaries of the right to adequate housing should have sustainable access to natural and common resources: clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.
- Affordable housing: personal or household costs associated with housing should be such that they do not compromise or threaten the satisfaction of other basic needs. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. Plans of action must be drawn up, including public expenditure programmes for low-income housing and housing subsidies, giving priority to the most vulnerable groups, such as persons with disabilities, the elderly, minorities, indigenous peoples, refugees and internally displaced persons, and particularly women among those groups. In societies where the main housing construction materials are natural, steps should be taken by the authorities to ensure the availability of such materials.

¹⁴⁶See The Right to Adequate Housing, Fact Sheet No. 21 Rev. 1, New York and Geneva, OHCHR, United Nations and UN-Habitat, 2014. Available at http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

- Habitable housing: to be adequate, housing must provide the occupants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of the occupants must be guaranteed.
- Accessible housing: to be adequate, housing must be accessible to those entitled to it. Disadvantaged groups must be provided with full and sustainable access to adequate housing resources. Accordingly, such groups as the elderly, children, persons with disabilities the terminally ill, HIV-positive individuals, persons with persistent medical problems, mentally ill persons, victims of natural disasters, and people living in disaster-prone areas should enjoy priority in respect of housing. Housing laws and policy should take into account the special housing needs of these and other vulnerable groups.
- Fitting location: to be adequate, housing must be located to allow access to employment, health-care services, schools, childcare centres and other social facilities; it should not be built on polluted sites or in immediate proximity to pollution sources that would infringe on the occupants' right to health.
- Culturally adequate housing: housing construction, the building materials used and the underlying policies must preserve cultural identity and diversity. The cultural dimensions of housing should not be sacrificed to facilitate housing development or modernization projects.

The list of these extensive rights highlights some of the complexities associated with the right to adequate housing, and reveals the many areas that a State must consider in fulfilling its legal obligation to satisfy the housing needs of the population. Any persons, families, households, groups or communities living in conditions below the level of these entitlements may reasonably claim that they do not enjoy the right to adequate housing as enshrined in international human rights law.

Furthermore, it is necessary to:

ensure that this right is protected from:

- arbitrary demolitions;
- forced or arbitrary evictions;
- ethnic and religious segregation and displacement;
- discrimination;
- harassment and similar interferences;

- take positive measures to reduce the number of homeless people and to provide them with adequate living space, protected from harsh weather and health hazards;
- set up judicial, quasi-judicial, administrative or political enforcement mechanisms capable of providing redress to victims of any alleged infringement of the right to adequate housing.

22.3 Constitutional Court of South Africa in the case *The Government of the Republic of South Africa and others v. Grootboom and others* (2000)

Ms. Grootboom and others, evicted from private property and living on the edge of a sports field in appalling conditions, launched a legal action for immediate relief when winter rains made their temporary shelter unsustainable. The Court determined that, although comprehensive housing legislation and policy were in place, aimed at the progressive realization of the right to adequate housing, they failed to take into account the situation of people in desperate need. The Court applied a test of reasonableness to the housing policy and found it wanting: a reasonable part of the national housing budget was not devoted to people in desperate need. While the Court found that the State had no obligation to provide housing immediately upon demand, it did hold that the State must provide relief for those in desperate need. Additionally, the Court held that the obligation to progressively provide housing included the immediate obligation to draft and adopt a plan of action to devote reasonable resources towards the implementation of that plan.

22.4 Discussion questions on the right to housing

- What is the core content of the right to housing?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What are the State's obligations to fulfil this right?
- Does the Gambia have a policy and legal framework on the right to housing?
- What steps have the State taken to fulfil this right?
- What are the key challenges hindering the enjoyment of the right to housing in the Gambia?

22.5 Further reading

•OHCHR The right to housing toolkit OHCHR | The Right to Adequate Housing Toolkit

•African Commission, Resolution on the right to housing 231 Resolution on the right to adequate housing and protection from forced evictions - ACHPR/Res.231(LII)2012 African Commission on Human and Peoples' Rights Sessions (achpr.org)

•African Commission, SERAC & Anor v Nigeria achpr30_155_96_eng.pdf

•African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, achpr_instr_guide_draft_esc_rights_eng.pdf

23. The right to health

23.1 The right to health in international and regional standards

Article 25 (1) UDHR

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Article 16 of the African Charter

1. *"Every individual shall have the right to enjoy the best attainable state of physical and mental health."*
2. *State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*

Article 12 of the ICESCR further elaborates upon the right to the highest attainable standard of physical and mental health and outlines relevant State obligations.

In its general comment No. 14 (2000) on the right to health, the UN Committee on Economic, Social and Cultural Rights stated “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment”. The right to health, therefore, includes both access to health care and State obligations to guarantee the underlying determinants of health. Article 12 of the International Covenant on Economic, Social and Cultural Rights requires States Parties to adopt measures in at least four separate areas:

- maternal, child and reproductive health;
- healthy workplaces and natural environments;
- prevention, treatment and control of diseases, including access to essential medicines and basic medical services;
- access for all to medical service and medical attention in the event of sickness.

23.2 Health and poverty

Health and poverty Calling attention to a “vicious circle of poverty”, in which “persons experiencing ill health are more likely to become poor, while persons living in poverty are more vulnerable to accidents, diseases and disability”, the UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39, paragraph 82) call upon States to:

- take multidimensional measures to tackle the relationship between ill health and poverty, recognizing the many and varied determinants of health and the agency and autonomy of persons living in poverty;
- enhance the accessibility and quality of preventive and curative health care for persons living in poverty, including sexual and reproductive health care and mental health care;
- ensure that persons living in poverty have access to safe and affordable medicines and that inability to pay does not prevent access to essential health care and medicine;
- establish health-care facilities within the safe physical reach of communities living in poverty, including in rural areas and slums, and ensure that such facilities have all resources necessary for their proper functioning;

- take special measures to target the main health conditions affecting persons living in poverty, including neglected diseases. This should include free immunization, educational programmes and training for health practitioners to identify and treat such illnesses;
- implement specific and well-resourced policies to tackle gender-based violence, including accessible preventive and treatment services that protect the dignity and privacy of persons living in poverty;
- provide tailor-made services for groups whose access to health services may raise particular challenges, such as language, geographical barriers, cultural barriers, age, discrimination or existing health status. Women living in poverty should have access to high-quality sexual and reproductive health services and information.

Various measures can be taken to ensure that the right to health is implemented; a number of these are outlined in the UN Committee on Economic, Social and Cultural Rights' general comment No. 14 (2000) and in documents by the UN Special Rapporteur on the Right to Health, the OHCHR and the World Health Organization.¹⁴⁷

By bringing their own functions and powers to bear, various stakeholders including National Human Rights Institutions can play a decisive role in that process. Generally speaking, enjoyment of the right to health requires State action to improve the underlying determinants of health and ensure primary health care for all, without discrimination. The existence of a national public health strategy and plan of action to make health facilities, services and goods, including essential medicines, available, accessible, acceptable and of good quality; and the establishment of national health indicators, benchmarks and monitoring mechanisms. Health insurance mechanisms and educational programmes on health problems and prevention are also necessary. Stakeholders should ensure that there is sufficient funding for such efforts and for health-related research and development.

23.3 Groups in need of special attention

Health issues specific to particular groups, such as persons with disabilities, the poor, children and people living with HIV/AIDS – and particularly women among those groups – require special attention. Targeted policies, developed with the participation of the groups concerned and sufficient health budgets geared to the needs of these groups, are necessary.

¹⁴⁷See, for example, The Right to Health, Fact Sheet No. 31, New York and Geneva, OHCHR, United Nations and WHO, 2008. Available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

Regarding people living in poverty, key health issues include the enhancement of access to health services, the introduction of appropriate immunization programmes and the implementation of basic environmental measures (especially waste disposal). Members of parliament can be highly instrumental in drafting relevant laws, ensuring their implementation and raising public awareness of the situation of the poor.

Women's access to health care, including maternal, sexual, and reproductive health services and information, requires special attention and resources.

Laws ensuring the provision to all children of necessary medical assistance and health care should be enacted and implemented. It is essential to launch programmes designed to reduce infant and child mortality and to conduct information programmes on children's health and nutrition, the advantages of breastfeeding, the importance of hygiene and environmental sanitation, and accident prevention.

Persons with disabilities should have equal access to health-care services, including those required because of their disabilities. They should benefit from rehabilitation services and programmes, particularly in the areas of health, employment, education and social services. Programmes should also be developed to respond to the needs of persons affected by chronic diseases, such as HIV/AIDS, malaria and tuberculosis. Specific legislative provisions should be enacted to ensure that persons access education, housing, employment or political education without discrimination based on their health condition.

23.3.1 Free AIDS treatment

In April 2004, the Constitutional Tribunal of Peru ruled upon the petition (amparo action) of a person living with HIV requesting full medical care. The petitioner affirmed lacking enough financial resources to face the high cost of the treatment. The Tribunal held that economic and social rights were not simply programmatic rights, but required implementation of their core content as this was not only necessary for the enjoyment of political and civil rights, but was also a requirement of solidarity and respect for human dignity. Stressing that the ultimate aim of the Peruvian Constitution was to defend the dignity of the human person, the Court stated that the right to life and to health were inextricably linked.

It held that the constitutional norm stipulating that constitutional norms requiring new and high expenses were to be implemented progressively did not mean inaction and did not relieve the State of its duty to provide for timetables and concrete action to implement State policies.

Referring in this context to the Constitutional Development Plan concerning, inter alia, the fight against HIV/ AIDS and the subsequent law No. 28243, providing free medical treatment of vulnerable persons living in extreme poverty, the Court ordered the State to provide free medical treatment to the petitioner.¹⁴⁸

23.3.2 Women's sexual and reproductive health rights

Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination. The Committee on Economic, Social and Cultural Rights has clearly held that States have obligations to respect, protect and fulfil rights related to women's sexual and reproductive health, which rights imply that women are entitled to sexual and reproductive health care services, goods and facilities that are

- (a) available in adequate numbers;
- (b) accessible physically and economically;
- (c) accessible without discrimination; and
- (d) of good quality (see general comment No. 22 (2016)). Human rights law further obliges States, inter alia, to provide comprehensive sexual and reproductive health services; remove barriers to accessing these services, including criminal laws; address the underlying and social determinants of health, including discrimination against women in terms of access to health services; and ensure women have access to evidence-based information in order to make informed choices about their health and their lives.¹⁴⁹

Despite these obligations, violations of women's sexual and reproductive health rights are frequent and take many forms. For instance, unacceptable numbers of women and girls are still dying or suffering grievous harm in pregnancy and childbirth, despite agreement within the medical community that such deaths and injuries are almost entirely preventable. The crisis of maternal mortality and morbidity is directly linked to a web of human rights denials, including failures within the health system as well as wider discrimination against women. Women's rights are also violated when they are denied access to health services that only women require, such as abortion or emergency contraception.

¹⁴⁸<http://www.eschr-net.org/docs/i/405156>.

¹⁴⁹<http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>

Laws and practices that subject women's access to health services to third party authorization and the performance of procedures related to women's reproductive and sexual health without the woman's consent, including forced sterilization, forced virginity examinations and forced abortion, are also denials of human rights. Women's sexual and reproductive health rights are also at risk when they are subjected to female genital mutilation and early marriage.

Violations of women's sexual and reproductive health rights are often deeply engrained in societal values pertaining to women's sexuality. Patriarchal concepts of women's roles within the family mean that women are often valued based on their ability to reproduce. Early marriage and pregnancy, or repeated pregnancies spaced too closely together, often as the result of efforts to produce male offspring because of the preference for sons, has a devastating impact on women's health with sometimes fatal consequences. Women are also often blamed for infertility and subjected to ostracism and various human rights violations as a result.

23.4 Discussion questions on the right to health

- Has legislation been enacted with respect to access to healthcare in general?
- Do domestic law, policies and practice secure access to primary healthcare for all without discrimination?
- Is there a national public health strategy and a plan of action for implementing that strategy?
- What practical barriers exist to limit access to healthcare?
- Does the government monitor the health of the people, including their ability to access healthcare?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to effectively protect the health of particularly vulnerable groups, including (i) women's access to maternal health services and family planning; (ii) children's health services; (iii) disabled people; and (iv) people living with HIV/AIDs?
- Do parliamentarians have an active input into health policy?
- When did parliamentarians last debate the right to health?

- Who controls the budget for health policies and programmes?
- Are adequate funds available for health policies and programmes, including programmes targeting education and preventative healthcare?
- Are there remedies in domestic law for individuals who have had their access to healthcare denied or limited in some capacity?

23.5 Further reading

- OHCHR, Toolkit on the right to health OHCHR | Toolkit on the Right to health
- OHCHR& WHO, Fact sheet on the right to health Factsheet31.pdf (ohchr.org)
- African Commission, General Comment No.1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. [Article 14 (1) (d) and (e), the Maputo Protocol lays down women's right to self-protection and to be protected from HIV infection, as well as their right to be informed of their HIV status and the HIV status of their partners in accordance with international standards and practices in force.]
- General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. [Under Article 14 (2) (c) of the Maputo Protocol, States Parties are called upon to take all appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus".]
- African Commission, Purohit & anor v The Gambia, Purohit and Anor v Gambia (Communication No. 241/2001) [2003] ACHPR 49; (29 May 2003) | African Legal Information Institute (africanlil.org)
- African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, achpr_instr_guide_draft_esc_rights_eng.pdf

24. The rights to water and sanitation

24.1 The right to water and sanitation under international and regional standards

While water has not been explicitly recognized as a self-standing human right in international treaties, international human rights law entails specific obligations related to access to safe drinking water. These obligations require States to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses, defined as water for drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene. These obligations also require States to progressively ensure access to adequate sanitation, as a fundamental element for human dignity and privacy, but also to protect the quality of drinking-water supplies and resources.¹⁵⁰

In addition to the rights to food, housing and clothing (provided for explicitly under Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR), the right to an adequate standard of living may comprise other underlying determinants of these rights. The right to water is also referred to in Article 14 (2) of CEDAW and Article 24 (2) of CRC.

In July 2010, through Resolution 64/292¹⁵¹, the United Nations General Assembly explicitly recognised the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.

In November 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment 15 on the right to water. Article I.1 states that “The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights”. Comment No. 15 also defined the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses.

In July 2020, the African Commission adopted the Guidelines on the Right to Water in Africa.¹⁵²

¹⁵⁰OHCHR, The right to water, Fact sheet 35, p. 3.

¹⁵¹<https://undocs.org/Home/Mobile?FinalSymbol=E%2FA%2FRES%2F64%2F292&Language=E&DeviceType=Tablet>

¹⁵²Guidelines on the right to water in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)

These Guidelines inform the development of a comprehensive state-integrated strategy to address all water-related rights, which are by nature interconnected and interdependent. Thus the realisation of the right to sanitation and the right to a safe environment is a necessary precondition to ensure the realisation of the right to water. Access to safe drinking water and water for cleansing and hand washing are essential to realise the right to health. Water for menstrual hygiene management is a necessary precondition for the right to education of women and girls. The right to food complements the right to water by providing water for farming, fishing and livestock husbandry, and securing other water-related livelihoods.¹⁵³

24. 2 What is the right to water?

The right to water entitles all human beings to sufficient, safe, physically accessible and affordable water for personal and domestic uses. It is essential for the realization of many other rights, such as the right to life, health and food. Although what constitutes water adequacy varies depending on conditions, the following factors apply in all circumstances:

- **Availability:** a regular water supply must be available to every person in a quantity sufficient for personal and domestic uses. These uses ordinarily include drinking, personal hygiene, food preparation, sanitation, washing clothes and household cleanliness. The volume of water available for each person should meet the periodically revised WHO Guidelines for Drinking-water Quality. Some individuals and groups may need additional water because of particular health, climatic and work conditions.

- **Quality:** the water available for personal and domestic use must be safe, i.e. free from micro-organisms, chemical substances and radiation detrimental to health. Its colour, odour and taste should be appropriate for personal and domestic uses.

- **Accessibility:** water and water facilities and services must be accessible to all persons living in the territory of a State, without discrimination. Accessibility has four overlapping dimensions:

- **Physical access:** for all population groups, water and adequate water facilities and services must physically be within safe reach. Enough, safe and acceptable water must be accessible in every household, educational institution, health-care establishment and workplace, or in their immediate vicinity.

¹⁵³African Commission, Preface, Guidelines on the right to water in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)

The quality of all water facilities and services must be sufficiently good and culturally appropriate, and must meet gender, life-cycle and privacy requirements. The physical security of persons accessing water facilities and services must be guaranteed.

– **Economic access:** water and water facilities and services must be affordable for all. The direct and indirect costs and charges associated with securing water must be reasonable and not compromise or threaten the enjoyment of other rights guaranteed under the ICESCR.

– **Non-discriminatory access:** by law and in practice, water and water facilities and services must be accessible to all, including the most vulnerable or marginalized population groups, without discrimination on any grounds; States should take steps to ensure that women are not excluded from decision making processes concerning water resources and entitlements, and that the disproportionate burden on women to collect water is alleviated.

– **Information access:** accessibility includes the right to seek, receive and impart information concerning water issues.

24.3 Poverty and the rights to water and sanitation

The UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) observe in paragraph 77 that “Unsafe water and lack of access to sanitation are a primary cause of diarrhoeal diseases linked to high levels of child and infant mortality among families living in poverty and restrict the enjoyment of many other rights, including those to health, education, work and privacy, thereby seriously undermining the possibilities of escaping poverty.

Persons living in poverty often inhabit areas in which access to water and/or sanitation is restricted owing to cost, lack of infrastructure, denial of services to persons without secure tenure, poor resource management, contamination or climate change. Lack of access to water and sanitation particularly affects women and girls living in poverty.” Paragraph 78 provides that “States should:

- (b) Ensure that persons living in poverty have access to at least the minimum essential amount of water that is sufficient and safe for personal and domestic uses (including drinking, personal sanitation, laundry, food preparation and personal and household hygiene) and sanitation that is gender-sensitive, safe, physically accessible and affordable;

- (c) In the context of informal settlements, lift legal barriers related to land tenure to allow inhabitants to obtain a formal and official connection to water and sanitation services. No household should be denied the rights to water and sanitation on the grounds of its housing or land status;
- (d) Ensure access to water and sanitation for homeless persons, and refrain from criminalizing sanitation activities, including washing, urinating and defecating in public places, where there are no adequate sanitation services available;
- (e) Implement measures to ensure that persons living in poverty are not charged higher rates for water services owing to consumption levels;
- (f) Organize large-scale public information campaigns on hygiene through channels accessible to persons living in poverty.”

24.4 Types of violations of the right to water

Violations of the obligation to respect the right to water

- arbitrary or unjustified disconnection or exclusion from water services or facilities;
- discriminatory or unaffordable increases in the price of water;
- pollution and diminution of water resources, affecting human health.

Violations of the obligation to protect the right to water

- failure to enact or enforce laws to prevent the contamination and inequitable extraction of water;
- failure to effectively regulate and control private water-service providers;
- failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction.

Violations of the obligation to fulfil the right to water

- failure to adopt or implement a national water policy designed to ensure the right to water for everyone;
- insufficient expenditure or misallocation of public resources, resulting in non-enjoyment of the right to water by individuals or groups, particularly vulnerable or marginalized groups;

- failure to monitor the realization of the right to water at the national level, inter alia by using right-to-water indicators and benchmarks;
- failure to take measures to reduce the inequitable distribution of water facilities and services;
- failure to adopt mechanisms for emergency relief;
- failure to ensure that everyone enjoys the right at a minimum essential level;
- failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

24.5 What activities can contribute to ensuring the enjoyment of the right to water?

First, governments should provide for the availability, adequate quality and accessibility of water, as outlined above. Progressive implementation of all of the measures described above will eventually lead to full realization of the right to water. National Human Rights Institutions and relevant stakeholders can monitor and promote the following specific government measures:

- If necessary, governments should adopt a national water strategy and plan of action to ensure a water supply and management system that provides all inhabitants with a sufficient amount of clean and safe water for their personal and domestic use. The strategy and plan of action should include tools – such as right-to-water indicators and benchmarks – for monitoring progress closely, and should specifically target all disadvantaged or marginalized groups;
- Governments should take effective measures to prevent third parties, including transnational corporations, from obstructing equal access to clean water, polluting water resources and engaging in inequitable water extraction practices;
- Governments should take measures to prevent, treat and control water-related diseases and, in particular, ensure access to adequate sanitation.

24.5.1 Right to water under the African Charter on Human and Peoples' Rights

Case Centre on Housing Rights and Evictions (COHRE) v. Sudan

The case concerns atrocities committed in the Darfur region of Sudan since February 2003. The African Commission's decision looks not only at violations of the right to life and to be free from torture, but examines also violations of economic, social and cultural rights, including the right to water. The ACHPR had already found earlier that failure to provide basic services such as safe drinking water and electricity constituted a violation of the right to health enshrined in Article 16 of the Charter.

The African Commission held that “the destruction of homes, livestock and farms as well as the poisoning of water sources such as wells amounted to a violation of Article 16. It referred in this context to general comment No. 14 by the UN Committee on Economic, Social and Cultural Rights, which sets out that “the right to health extends not only to timely and appropriate health care, but also to the underlying determinants of health such as access to safe and potable water, an adequate supply of safe food, nutrition and housing”. With regard to the State’s obligation to respect, protect and fulfil, the Commission noted that “violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States” and that “States should ... refrain from unlawfully polluting air, water and soil ... during armed conflicts” and “should also ensure that third parties do not limit peoples’ access to health-related ... services” and that “failure to enact or enforce laws to prevent the pollution of water [violated the right to health]”.¹⁵⁴

24.6 Discussion questions on the right to water and sanitation

- What is the core content of the right to water and sanitation?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What are the State’s obligations to fulfil this right?
- Does the Gambia have a policy and legal framework on the right to water and sanitation?
- What steps have the State taken to fulfil this right?
- What are the key challenges hindering the enjoyment of the right to water and sanitation in the Gambia?

24.7 Further reading

- African Commission, Guidelines on the right to water and sanitation in Africa 2020 African Commission on Human and Peoples’ Rights Legal Instruments (achpr.org)
- The right to water and sanitation, Resolution A/RES/64/292. United Nations General Assembly, July 2010 Human right to water and sanitation | International Decade for Action ‘Water for Life’ 2005-2015 (un.org)
- General Comment No. 15. The right to water. UN Committee on Economic, Social and Cultural Rights, November 2002 General comment No. 15: The right to water (refworld.org)

¹⁵⁴Communications 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions/The Sudan. See also Housing and ESC Rights Law Quarterly, Vol. 7, No. 3 September 2010.

25. The right to education

25.1 The right to education under international and regional standards

Article 26 (1) of UDHR “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

Article 13 of ICESCR “1. The States Parties to the present Covenant recognize the right of everyone to education. [...] 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.” Article 14 of ICESCR “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years,

to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 17 of the African Charter: Every individual shall have the right to education.

Article 30 of the Constitution of the Republic of the Gambia

All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right-

- (a) basic education shall be free, compulsory and available to all;*
- (b) secondary education, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;*
- (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education;*
- (d) functional literacy shall be encouraged or intensified as far as possible;*
- (e) the development of a system of schools with adequate facilities at all levels shall be actively pursued.*

In addition to the above-mentioned human rights instruments, the right to education is also referred to in Articles 28 and 29 of the Convention on the Rights of the Child; and Article 11 of the African Charter on the Rights of the Child. From the above international and international standards, the right to education may be broken down into the following two components:

- enhancement of access to education and
- freedom to choose the type and content of education.

25.2 Poverty and education

The UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) observe in paragraph 87 that “Education is a crucial means by which persons can develop their personalities, talents and abilities to their fullest potential, increasing their chances of finding employment, of participating more effectively in society and of escaping poverty.

The economic consequences of not finishing primary or secondary school are thus devastating and perpetuate the cycle of poverty. Girls are more commonly denied their right to education, which in turn restricts their choices and increases female impoverishment.”

Accordingly, the Guiding Principles provide in paragraph 88 that “States should:

- (a) Ensure that all children, including those living in poverty, are able to enjoy their right to free and compulsory primary education through the provision of high-quality education in schools within safe reach and without indirect costs;
- (b) Provide schools in disadvantaged areas with high-quality, trained teachers and adequate infrastructure, including gender-sensitive sanitation facilities, water and electricity;
- (c) Take steps to progressively ensure the availability, accessibility, acceptability, adaptability and quality of education in all forms and at all levels. This includes allocating, as a priority, resources to persons living in poverty to compensate for socioeconomic disadvantages (e.g. proactive measures to combat school dropout rates, grants and school meal provisions);
- (d) Take measures to progressively introduce free education for secondary and higher levels, in particular for girls and groups vulnerable to poverty and marginalization such as children with disabilities, minorities, refugees, children of undocumented migrants, stateless persons, children living in institutions and those living in remote areas and slums;
- (e) Review and reform legislation to ensure consistency between the minimum school leaving age and the minimum age of marriage and employment;
- (f) Provide high-quality early childhood education centres to improve the education and health of children living in poverty;
- (g) Take measures to eradicate illiteracy, including for adults;
- (h) Ensure that persons living in poverty are able to know, seek and receive information about all human rights and fundamental freedoms and have access to human rights education and training.

These two components can be subdivided into four areas of obligation: availability, accessibility, acceptability and adaptability, as stipulated in general comment No. 13 by the Committee on Economic, Social and Cultural Rights (1999). These concepts comprise the following practical measures:

Availability of functioning educational institutions and programmes

- obligatory and free primary education for all (to protect children from child labour);
- teacher training programmes;
- adequate working conditions for teachers, including the right to form unions and bargain collectively.

Accessibility of education to everyone

- economically affordable secondary and higher education;
- non-discriminatory access to education;
- adequate education-grant system for disadvantaged groups;
- adequate funding for education in remote and disadvantaged areas;
- mechanisms for monitoring policies, institutions, programmes, spending patterns and other practices in the education sector.

Acceptability of form and substance

- legislation guaranteeing the quality of curricula and teaching methods;
- minimum educational standards (on admission, curricula, recognition of certificates, etc.) and related monitoring mechanisms;
- guarantee of the right to establish private institutions.

Adaptability of curricula

- curriculum design and education funding in conformity with the pupils' and students' actual needs.

25.2.1 Judicial enforcement of free primary and inclusive education: the example of Colombia

In its decision C-376/10 (19 May 2010), the Colombian Constitutional Court ruled that, under the international human rights instruments ratified by Colombia and thus binding upon the State, providing free education is an unequivocal obligation which must be immediately enforced with respect to primary education. The Court held that charging fees at the primary education level could become a barrier to accessing the education system.

In another decision (T-051/11, 4 February 2011), concerning a hearing-impaired pupil who was prevented from attending school past the first year as the number of pupils required to appoint sign language interpreters had not been reached, the Constitutional Court concluded that his right to education had been violated and ordered his reintegration into school.

The Court found that the Decree, which conditioned the appointment of sign language interpreters on a minimum enrolment of hearing impaired pupils, was unconstitutional and argued that such requirements deepened the marginalization of students with hearing disabilities. It ordered the authorities to make the necessary corrections in the budgets, planning, curricula and organization of its educational institutions to guarantee the right to education to persons with hearing disabilities. Since this decision, Colombia became the 100th State to ratify the CRPD in May 2011.

25.3 Plans of action

State efforts to realize the right to education should be progressive. They should be effective and expeditious to a warranted degree. State obligations are not of equal urgency in all areas (basic, primary, secondary and higher education): governments are expected to give priority to the introduction of compulsory and free primary education while taking steps to realize the right to education at other levels. States that at the time of ratification of the ICESCR had not been able to secure compulsory and free primary education should adopt and implement a national educational plan, as laid down in Article 14 of the Covenant. The plan should be drawn up and adopted within two years for the progressive implementation, within a reasonable number of years to be fixed in that plan, of the principle of compulsory education free of charge for all. The two-year specification does not absolve a State Party from this obligation in case it fails to act within that period.

25.4 Equal enjoyment of the right to education by every girl

Despite the progress made, discrimination against girls persists, including in the form of child marriage, early pregnancy, sexual violence and harassment inside and outside schools. Together with social and cultural stereotypes that enforce obedience and fixed gender constructs, violence against girls and the targeting of schools by extremist movements continue to impair girls' access to education. The right to education is a multiplier right. States have an obligation to translate their international obligations into national policies with an adequate legal framework based on the principle of the best interests of the child.

In the area of education, this obligation includes temporary special measures ensuring gender parity and access to education by marginalized communities, including rural communities. Institutional frameworks need to prioritize education in budgetary allocations, support early childhood education, provide a safe and supportive environment in schools and integrate a gender perspective into education policies. States have to remove structural barriers to education, such as gender bias and stereotypes, from curricula and teaching and learning materials. They need to ensure girls' safety in schools, including through the provision of adequate sanitary facilities and safe drinking water, as well as protection from sexual harassment, abuse and violence in the school environment.¹⁵⁵

25.5 Discussion questions on the right to education

- What is the core content of the right to education?
- Does the State have a fully functioning system of primary education, which is compulsory and free for all?
- If not, does it have an action plan for the introduction of compulsory, free primary education?
- Has legislation been enacted providing for access to education in general?
- What barriers exist to access to education?
- Are there remedies in domestic law for individuals who have had their access to education denied or limited in some capacity?
- Is the right to education taken into account in policies relating to children?
- Do national policies recognise the right to education as linked to the right to work?
- Do relevant stakeholders have an input into national education policy?
- Is adequate funding made available for education, particularly to provide for education for vulnerable and disadvantaged groups and in rural areas?
- What's the state's policy on religious schools?

25.6 Further reading

- OHCHR, OHCHR | Special Rapporteur on the right to education
- UN General Assembly, Thematic study on the right of persons with disabilities to education United Nations (ohchr.org)
- African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, achpr_instr_guide_draft_esc_rights_eng.pdf
- Right to education initiative Right to Education Initiative | (right-to-education.org)

¹⁵⁵Human Rights Council panel discussion on the equal enjoyment of the right to education by every girl, June, 2015 (A/HRC/30/23)

26. Cultural rights

26.1 Cultural rights under international and regional standards

Article 27 of UDHR “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Article 15 ICECSR “1. The State Parties recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The State Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity; 4. The State Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

Article 15 (2) of the African Charter: “Every individual may freely take part in the cultural life of his community.”

Article 29 (7) of the African Charter: “The individual shall also have the duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society.”

Article 17 of the Maputo Protocol: (1) “Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. (2) States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

26.2 Key components of cultural rights

The main components of the cultural rights contained in Article 27 of the UDHR and Article 15 of the ICECSR are:

- the right to take part in cultural life;
- the right to enjoy the benefits of scientific progress and its applications;
- the right to protection of intellectual property;
- the freedom indispensable for scientific research and creative activity. Cultural rights are closely linked to other human rights, such as freedom of expression and information, the right of all peoples to self-determination and the right to an adequate standard of living. Many references to cultural rights can be found in provisions and instruments relating to minorities and indigenous peoples.

Likewise, Articles 43(1g) and 45(1d) of the International Convention on the Protection of the Rights of All Migrant Workers enshrine the right for migrant workers and their families to access and participate in cultural life and to have their cultural identities respected. International organizations engaged in the field of cultural rights include UNESCO, which is concerned with the preservation of the cultural heritage of humanity, and the World Intellectual Property Organization (WIPO), responsible for the protection of moral and material benefits for the authors of scientific and artistic production.

The promotion and protection of cultural rights was strengthened in October 2009 by the appointment of an Independent Expert in that field (subsequently transformed into a Special Rapporteur), with the mandate to identify best practices and obstacles to promote and protect cultural rights. The Special Rapporteur's reports have explored, inter alia, the meaning and scope of cultural rights, access to cultural heritage, the right to benefit from scientific progress and its applications, the right to artistic freedom, the writing and teaching of history and memorialisation processes and the cultural rights of women.¹⁵⁶

Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.¹⁵⁷

¹⁵⁶More information can be found at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>.

¹⁵⁷Committee on Economic, Social and Cultural Rights, general comment No. 21, paragraph 1, November 2009.

26.3 Cultural rights in the African regional mechanisms

Article 17 of the African Charter provides that member states also duty bound to “protect and promote cultural and traditional values recognized by the community”. Article 29 (7) the African Charter imposes an obligation on every individual to “preserve and strengthen positive cultural values of Africa.” The word “*positive*” in Article 29 demonstrates the recognition and promotion of African cultural values, which do not violate women’s rights.

This is a very important provision, which while recognising positive cultural values, acknowledges the potential danger of legitimising discriminatory practices through the guise of cultural practices.

This viewpoint is buttressed by Article 17 of the Maputo Protocol, which provides that women shall have the right to live in a positive cultural context and participate at all levels in the determination of cultural policies. It also encourages States Parties to take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

26.4 Discussion questions on cultural rights

- How do we understand cultural rights in the context of the Gambia?
- What are the State’s obligations to fulfil this right?
- Does the Gambia have a policy and legal framework on cultural rights?
- What steps have the State taken to fulfil this right, while respecting its national, regional and international human rights obligations?
- What steps has the State taken / should the State take to ensure that cultural practices do not violate the rights of marginalised groups?

26.5 Further reading

• UN Committee on Economic Social and Cultural Rights, General comment No. 21 Right of everyone to take part in cultural life E/C.12/GC/21 - E - E/C.12/GC/21 -Desktop (undocs.org)

• Special Rapporteur in the field of cultural rights, Report on the universality of human rights, cultural diversity and cultural rights (2018) A/73/227 - E - A/73/227 -Desktop (undocs.org)

• Toyin Falola, Human Rights and Cultural Limitations, Premium Times, 13 December 2020 Human Rights and Cultural Limitations, By Toyin Falola - Premium Times Opinion (premiumtimesng.com)

•African Commission, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, achpr_instr_guide_draft_esc_rights_eng.pdf

27. Right to enjoyment of a safe, clean, healthy and sustainable environment

27.1 Introduction to the right to enjoyment of a safe, clean, healthy and sustainable environment

All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations. We may not have access to even the minimum standards of human dignity.¹⁵⁸

In 2012, the UN created the human rights and the environment mandate, which was extended in 2018. The mandate examines states' human rights obligations as they relate to a safe, clean, healthy and sustainable environment. It also promotes best practices relating to the use of human rights in environmental policymaking.

¹⁵⁹

An unusual aspect of the development of human rights norms relating to the environment is that they have not relied primarily on the explicit recognition of a human right to a safe, clean, healthy and sustainable environment—or, more simply, a human right to a healthy environment. Although this right has been recognised, in various forms, in regional agreements and in most national constitutions, it has not been adopted in a human rights agreement of global application, and only one regional agreement, the African Charter on Human and Peoples' Rights, provides for its interpretation in decisions by a review body.¹⁶⁰

Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have instead applied human rights law to environmental issues by “greening” existing human rights, including the rights to life and health.¹⁶¹

¹⁵⁸OHCHR, About human rights and the environment, OHCHR | About Human Rights and Environment

¹⁵⁹Ibid.

¹⁶⁰UNGA, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, p4, paras 11-12, A/HRC/37/59 - E - A/HRC/37/59 -Desktop (undocs.org)

¹⁶¹Ibid.

27.2 The right to enjoyment of a safe, clean, healthy and sustainable environment under the African Charter on Human and Peoples' Rights

Article 24 of the African Charter

"All peoples shall have the right to a general satisfactory environment favourable to their development."

The African Commission interprets the provision on the right to a satisfactory environment in *SERAC & anor v Nigeria*. In that case, the Commission found that Article 24 imposes clear obligations, which require the State to take reasonable and other measures to prevent pollution and ecological degradation, promote conservation, and secure an ecologically sustainable development and use of natural resources. The Commission also referred to Article 12 of the International Covenant on Economic, Social and Cultural Rights requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene.¹⁶²

The Commission noted that the right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) obligate governments to desist from directly threatening the health and environment of their citizens. It affirmed that the State is under an obligation to respect these rights, which entail largely non-interventionist conduct, requiring the State not to carry out, sponsor or tolerate any practice, policy or legal measures violating the integrity of the individual.¹⁶³

27.3 The content of the right to enjoyment of a safe, clean, healthy and sustainable environment

Human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights. This relationship recognised as the right to a healthy environment is enshrined in over 100 constitutions.¹⁶⁴ There are several established human rights related to the environment, including substantive rights (fundamental rights) and procedural rights (tools used to achieve substantial rights).

¹⁶²African Commission: 155/96 : Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria para 52 achpr30_155_96_eng.pdf

¹⁶³Ibid.

27.3.1 Substantive Rights

Substantive rights are those in which the environment has a direct effect on the existence or the enjoyment of the right itself. Substantive rights comprise *civil and political rights*, such as the rights to life, freedom of association and freedom from discrimination; *economic and social rights* such as rights to health, food and an adequate standard of living; cultural rights such as rights to access religious sites; and *collective rights* affected by environmental degradation, such as the rights of indigenous peoples.

27.3.2 Procedural Rights

Procedural rights prescribe formal steps related to enforcing legal rights. Procedural rights include fundamental access rights: access to information, public participation, and access to justice.

27.4 Climate change and human rights

Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally.”

—**Michelle Bachelet**, United Nations High Commissioner for Human Rights, 9 September 2019, Opening Statement to the 42nd session of the Human Rights Council

Climate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development. States have a human rights obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it, particularly those in vulnerable situations, have access to effective remedies and means of adaptation to enjoy lives of human dignity.¹⁶⁵

¹⁶⁵OHCHR, OHCHR and Climate Change, OHCHR | OHCHR's work on human rights and climate change

27.4.1 The impacts of climate change on the effective enjoyment of human rights

The Intergovernmental Panel on Climate Change (IPCC) has unequivocally confirmed in its reports that climate change is real and that human-made greenhouse gas emissions are its primary cause. The increasing frequency of extreme weather events and natural disasters, rising sea levels, floods, heat waves, droughts, desertification, water shortages, and the spread of tropical and vector-borne diseases have been identified as some of the adverse impacts of climate change. These phenomena directly and indirectly threaten the full and effective enjoyment of a range of human rights by people throughout the world, including the rights to life, safe drinking water and sanitation, food, health, housing, self-determination, culture, work and development – as affirmed by the IPCC and Human Rights Council resolution 41/21.¹⁶⁶

The negative impacts of climate change are disproportionately borne by persons and communities already in disadvantageous situations owing to geography, poverty, gender, age, disability, cultural or ethnic background, among others, that have historically contributed the least to greenhouse gas emissions. In particular, persons, communities and even entire States that occupy and rely upon low-lying coastal lands, tundra and Arctic ice, arid lands, and other delicate ecosystems and at risk territories for their housing and subsistence face the greatest threats from climate change.¹⁶⁷

27.4.2 A human rights-based approach to climate change

The negative impacts caused by climate change are subject to increase exponentially according to the degree of climate change that ultimately takes place. Climate change, therefore, requires a global rights-based response. The Human Rights Council, the human rights mechanisms (the special procedures, the human rights treaty bodies and the Universal Periodic Review), and the Office of the High Commissioner for Human Rights have sought to bring renewed attention to human rights and climate change. This has been done through a series of resolutions, reports, and activities on the subject, and by advocating for a human rights-based approach to climate change.¹⁶⁸

¹⁶⁶OHCHR, The impacts of climate change on the effective enjoyment of human rights OHCHR | The impacts of climate change on the effective enjoyment of human rights.

¹⁶⁷Ibid.

¹⁶⁸Ibid.

The Preamble of the Paris Agreement to the United Nations Framework Convention on Climate Change makes it clear that all States “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.

As the Human Rights Council has stressed, it is critical to apply a human rights-based approach to guide global policies and measures designed to address climate change. The essential attributes of a human rights-based approach are the following:

- As policies and programmes are formulated, the main objective should be to fulfil human rights.
- The rights-holders and their entitlements must be identified as well as the corresponding duty-bearers and their obligations in order to find ways to strengthen the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.
- Principles and standards derived from international human rights law – especially the Universal Declaration of Human Rights and the core universal human rights treaties, should guide all policies and programming in all phases of the process.¹⁶⁹

27.5 Discussion questions on the right to the enjoyment of a safe, clean, healthy and sustainable environment; and climate change

- The right to the enjoyment of a safe, clean, healthy and sustainable environment is a special right, in the sense that it is a composite of all, or at least the basic rights. What rights make up this right?
- Which indicators are the right identified with that can be unequivocally defined, corresponding to the content of the right?
- What is the core content of the right to the enjoyment of a safe, clean, healthy and sustainable environment?
- What are the states’ obligations to fulfil this right?

¹⁶⁹ Ibid.

- Is there a policy and legal framework on the right to the enjoyment of a safe, clean, healthy and sustainable environment?
- What steps has the State taken to fulfil this right?
- What are some of the effects of climate change in the Gambia?
- How has the State responded to the effects of climate change?

27.6 Further reading

- African Commission: 155/96 : Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria para 52 achpr30_155_96_eng.pdf
- UN Environment, Environmental Rule of Law: First Global Report
Environmental Rule of Law: First Global Report | UNEP - UN Environment Programme
- OHCHR, Special Rapporteur on human rights and the environment page OHCHR | Special Rapporteur on human rights and the environment

Part 6: MARGINALISED GROUPS

28.1 Introduction to marginalised groups

Certain groups are disadvantaged because they face discrimination from society and public institutions. Discrimination may occur in public institutions, such as the legal system or the education and health services, as well as in the household and in the community. Those who are discriminated against often end up excluded from society, the economy and political participation. They are more likely to be poor.

The principle of equality is reflected in every international human rights instrument and in most national constitutions. While the right to equal treatment before the law is a freestanding right in itself in most international human rights instruments and domestic constitutions, it is also important in interpreting each of the other substantive rights to remember that they must be enjoyed equally and without unlawful discrimination.

In order to have real effect on the ground, the right to equality imposes both positive and negative obligations on the State.¹⁷⁰ Governments have an obligation to avoid arbitrary discrimination in their laws, policies and practice. However, everyday lives depend on a far broader matrix of private providers and actors. The right to equal treatment before the law is generally interpreted to require States to take action to ensure access to housing, education and other services provided by the private sector without unlawful discrimination.¹⁷¹ In light of this, equality and anti-discrimination guarantees are often implemented in statutory protection in order to promote legal certainty and to give individuals access to more defined routes of redress for discrimination.

28.1 Equality and non-discrimination in national and international law

Articles 1-2, UDHR

'All human beings are born free and equal in dignity and rights' 'Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.'

¹⁷⁰(26 May 2004) [CCPR/C/21/Rev.1/Add 13 para 8] General Comments (ccprcentre.org), OHCHR | c) General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)

¹⁷¹Article 9 ICCPR General Comment No 18 'Non-discrimination' (10 November 1989), General comment No. 4: Article 3 (Equal right of men and women (refworld.org)).

Article 2, ICCPR

'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 2 African Charter

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

Article 3 (1) of the African Charter: Every individual shall be equal before the law.

Article 33 of the Gambian Constitution: Protection from discrimination

- (1) All persons shall be equal before the law.*
- (2) Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect.*
- (3) Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.*
- (4) In this section, the expression "discrimination" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privilege or advantages which are not accorded to persons of another such description.*
- (5) Subsection (2) shall not apply to any law in so far as that law makes provision- (a) with respect to persons who are not citizens of The Gambia or to qualifications for citizenship; (b) with respect to the qualifications prescribed by this Constitution for any office; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter in the case of persons who, under that law, are subject to that law.*

(6) Subsection (3) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (5).

(7) The exercise of any discretion to the relating to the institution, conduct or discontinuance of civic or criminal proceedings in any court that is vested in any person by the Constitution or any other law shall not be enquired into by any court on the grounds that it contravenes the provisions of subsections (3).

28.2 State obligations to respect, protect and fulfil the right to equal treatment

The right to equality

Respect

The State's decision-making processes do not discriminate against individuals or groups.

Protect

The State has adopted equality and non-discrimination legislation to prevent unlawful discrimination by the private sector in employment, housing, education and the provision of services.

Fulfil

- Where social attitudes are promoting discrimination and unequal treatment, the State has introduced positive strategies to promote equality in practice, including through public education programmes.
- Research and monitoring programmes are in place to monitor the impact of equality guarantees in practice.
- Where historical disadvantage is entrenched, the State introduces measures to address that disadvantage in practice.

28.3 Unlawful discrimination: ‘other status’

The listed and prohibited grounds of discrimination listed in the ICCPR and other international and regional human rights instruments are not exhaustive. Equal protection and non-discrimination clauses have been interpreted broadly in order to protect individuals from discrimination based on their personal characteristics without objective and reasonable justifications. Importantly, individuals must be protected from discrimination based on their sexual orientation.¹⁷² Other grounds which have successfully been used as bases for discrimination claims have included homelessness¹⁷³ and HIV status.¹⁷⁴

28.3.1 Justified distinctions

Not all distinctions drawn by the State amount to unlawful discrimination; for example affirmative action initiatives to improve the situation of a marginalised group would not amount to unlawful discrimination. Different treatment may be justified by objective and reasonable criteria based on factual or legal distinctions. However, the burden will always fall on the government to prove that any distinction drawn is reasonable and objectively justifiable in the circumstances. The degree of evidence required to provide an objective justification for discrimination will increase according to the type of distinction drawn and the impact of the discrimination on the individuals affected. Objective and reasonable justification is never set in stone; as societal attitudes change, the reason for a distinction may appear less reasonable and objective, and so, less acceptable.

28.3.2 Action to ensure equality

The right to equal treatment may require States to take positive steps to ensure that individuals can access their rights on an equal basis. So, in order to ensure that persons with disabilities are capable of enjoying their rights, States may have to take positive steps to adjust practices or environments. For example, without adjustments to public transport or school premises, it may be difficult for children with physical disabilities to access mainstream education.

¹⁷²Committee on Economic, Social and Cultural Rights General Comment 20 ‘Non-Discrimination in Economic, Social and Cultural Rights’ (Article 2, paragraph 2) (10 June 2009) [E/C 12/ GC/20]

¹⁷³R (on the application of RJM) (FC) (Appellant) v Secretary of State for Work and Pensions [2008] UKHL 63 www.bailii.org/uk/cases/UKHL/2008/63.html.

¹⁷⁴4 RM v UK (App No 22761/93) UN Commission on Human Rights; and United Nations High Commissioner for Human Rights (UNHCHR) ‘The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)’, Resolution 995/44 (3 March 1995) [E/CN.4/1995/176].

28.4 Discussion questions on equality

- Does the law, policy or practice provide for different rules for different groups or types of people?
- Does the law, policy or practice have a greater impact on certain groups of people?
- If so, has the government provided a reasonable, objective and legitimate reason to justify the distinction?
- Is the distinction justifiable in light of the reason given?
- Has the government provided credible evidence to support their reason for distinction and the weight of their justification?

29. Women

Article 2, CEDAW

'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

- (g) To repeal all national penal provisions which constitute discrimination against women.'

Article 4 CEDAW

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 5, Maputo Protocol

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices.

Article 9 (1) Maputo Protocol

States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures.

It is now recognised that the obligations of States to protect and fulfil human rights clearly encompass the duty to protect women from violations committed by third parties, including in the private sphere, and to take positive steps to fulfil their human rights.

The Convention on the Elimination of All Forms of Discrimination against Women covers both public and private acts. Its article 2 (e) specifically addresses the obligation of States to address discrimination against women perpetrated by any person, organization or enterprise, and its article 2 (f) concerns the modification and abolition not only of discriminatory laws and regulations, but also of customs and practices. Its article 5 (a) requires States "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."¹⁷⁵

¹⁷⁵OHCHR Publication, Women's rights are human rights, p 26 <https://www.ohchr.org/Documents/Publications/HR-PUB-14-2.pdf>

29.1 Non-discrimination and equality between men and women

The Convention articulates the nature and meaning of sex-based discrimination, and lays out State obligations to eliminate discrimination and achieve substantive equality. As with all human rights treaties, only States incur obligations through ratification. However, the Convention articulates State obligations to address not only discriminatory laws, but also practices and customs, and discrimination against women by private actors. With these general principles as an overarching framework, the specific obligations of States to eliminate discrimination against women in political, social, economic and cultural fields are laid out in 16 substantive articles. The Convention covers both civil and political rights (rights to vote, to participate in public life, to acquire, change or retain one's nationality, equality before the law and freedom of movement) and economic, social and cultural rights (rights to education, work, health and financial credit). The Convention also pays specific attention to particular phenomena such as trafficking, to certain groups of women, for instance rural women, and to specific matters where there are special risks to women's full enjoyment of their human rights, for example marriage and the family

Non-discrimination and equality between women and men are central principles of human rights law capture in the ICCPR, ICESCR, the African Charter and the Maputo Protocol. The definition of discrimination in the Convention on the Elimination of All Forms of Discrimination against Women encompasses a variety of possible discriminatory actions (any distinction, exclusion or restriction) having either the express purpose or the actual effect of discriminating against women. The Convention goes further than other human rights treaties in also describing in detail the State obligations and actions to be taken to achieve gender equality in practice. It not only requires equality between women and men, but also prohibits practices that can perpetuate women's inequality.¹⁷⁶

Substantive gender equality and formal gender equality, as well as de facto discrimination and de jure discrimination, are central concepts in the Convention's equality framework. Discrimination and inequality can occur in different ways. Discrimination can occur through de jure or direct discriminatory provisions, such as when a law or policy restricts, prefers or distinguishes between certain groups, for instance, prohibiting women from driving, owning land or inheriting property.

¹⁷⁶ibid.

Ensuring formal equality requires eliminating all instances of de jure discrimination. While much progress has been made to eliminate discriminatory laws, many persist and reforming them should be a matter of the utmost priority for States to comply with their human rights obligations.¹⁷⁷

Laws, policies or programmes can also have detrimental effects on women even though they appear to be gender-neutral. This is known as de facto discrimination. For instance, aid programmes, which distribute benefits to the “head of household”, may not benefit women equally since men are often considered the head of a household. Similarly, given women’s disproportionate representation among those living in poverty, a government-lending scheme to buy land may be inaccessible to women due to its cost—even if the scheme is open to both men and women.¹⁷⁸

29.2 Equality of results and substantive equality

The Committee on the Elimination of Discrimination against Women has explained that, to achieve actual equality, the underlying causes of women’s inequality must be addressed; it is not enough to guarantee identical treatment with men. In the Committee’s view, the Convention requires that women should have an equal start. Secondly, the State should create an enabling environment for the empowerment of women in order to achieve equality of results (also referred to as equality of outcome). Equality of results is the logical consequence of de facto or substantive equality, according to the Committee. Through special measures, historical wrongs and inequalities are corrected by temporarily giving advantages to women, and giving them access to opportunities that traditionally have been out of their reach. Achieving substantive equality requires a change in attitudes, in gender roles and stereotyping; a fundamental societal change, which will lead to a change in women’s lived realities.¹⁷⁹

The Committee on the Elimination of Discrimination against Women’s general recommendation No. 25 (2004) clarifies that the term “special measures” can encompass a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices.

¹⁷⁷Globally, laws that discriminate against women remain a significant problem, and even when there are laws in place that guarantee gender equality they are not yet being put into practice. See United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), *Progress of the World’s Women 2011–2012: In Pursuit of Justice* (2011), and “Report of the Office of the United Nations High Commissioner for Human Rights on good practices in efforts aimed at preventing violence against women” (A/HRC/17/23). See also Working Group on the issue of discrimination against women in law and in practice, available from www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx (accessed 6 November 2013).

¹⁷⁸OHCHR Publication, *Women’s Rights are human rights* p 30.

¹⁷⁹Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) on temporary special measures.

These could include such as outreach or support programmes, allocation and/or reallocation of resources, preferential treatment, targeted recruitment, hiring and promotion, numerical goals connected with periods, and quota systems. They should be adopted with a view to achieving substantive gender equality as required by the Convention.

29.3 Women rights in practice

The right to education is recognized in the International Covenant on Economic, Social and Cultural Rights (art. 13), the Convention on the Rights of the Child (art. 28), the Convention on the Elimination of All Forms of Discrimination against Women (art. 10) and the Convention on the Rights of Persons with Disabilities (art. 24). Besides calling for non-discrimination in the enjoyment of the right to education and free universal primary education, human rights law also requires States to address the particular obstacles that girls and women face in accessing education, such as early marriages, pregnancies, child labour and violence. The needs of girls suffering from multiple forms of discrimination—e.g., with disabilities, from poor or rural areas and belonging to minority communities—should also be considered. Ensuring equality in education requires financial resources as well as continued awareness raising about the importance of girls' education.¹⁸⁰

Historically, women have been excluded from political life and decision-making processes. The Convention on the Elimination of All Forms of Discrimination against Women builds on previous conventions and its article 7 concerns women's access to decision-making in political and public life. Article 7 guarantees the right of women to vote in all elections and public referendums and to be eligible for election to all publicly elected bodies, the right to participate in the formulation of government policy and its implementation, to hold public office. It also warrants their right to perform all public functions at all levels of government, and the right to participate in non-governmental organizations (NGOs) or associations concerned with the public and political life of the country. Article 8 requires States Parties to "take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations."

States have adopted different forms of quota systems. The most common are political party quotas, legislative quotas and reserved seats. Political party quotas are usually voluntary, party-specific and put in place to increase the number of women party candidates or elected representatives, through setting a percentage of women.

¹⁸⁰Supra, OHCHR Publication, Women's Rights are human rights , p41-42

Legislative quotas are binding national policies that are enforced through legislation, requiring all political parties to include a certain number of women in their lists of candidates for elections. Another method is to reserve seats for women in parliament through a national policy, which ensures a certain number of female legislators.¹⁸¹ Since the Beijing World Conference, States have increasingly adopted quotas to boost women's participation, counter discrimination and accelerate the slow pace at which the number of women in politics is rising. These measures are meant to correct some of the obstacles, especially institutional and systemic barriers, which still prevent women's equal access to politics.

Participation in public life is, however, much broader than elections or being elected to public office. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has explained that the Convention's article 7 extends to all areas of public and political life and is thus not limited to those specified in the article itself. According to the Committee, the political and public life of a country is a broad concept, and can refer to the exercise of political power, in particular legislative, judicial, executive and administrative powers, all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels.¹⁸²

However, if adopted in isolation, these measures are usually not enough to ensure equality. Moreover, they require adaptation to the local context. Quotas for women have often been criticized for various reasons, e.g., if the women are chosen by political parties or leaders to serve political interests which may be contrary to ensuring equality or because quotas put too little emphasis on actual merits.¹⁸³ Quotas for women need to be coupled with other measures to create an enabling environment for women to participate. Particularly, the positive impact of increasing women's representation in public and political life will not be felt if the women who gain access are not also empowered to participate in the discussions and exercise influence in decision-making.¹⁸⁴

According to the CEDAW Committee, the political and public life of a country is a broad concept, and can refer to the exercise of political power, in particular legislative, judicial, executive and administrative powers, all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels.

¹⁸¹Homa Hoodfar and Mona Tajali, *Electoral Politics: Making Quotas Work for Women* (London, Women Living under Muslim Laws, 2011), pp. 42–49.

¹⁸²OHCHR Publication, *Women's Rights* p. 47

¹⁸³Hoodfar and Mona Tajali, *Electoral Politics: Making Quotas Work for Women*, pp. 43–45 and 50–57.

¹⁸⁴Farzana Bari, "Women's political participation: issues and challenges", draft, United Nations Division for the Advancement of Women (EGM/WRP-EE/2005/EP.12), 3 November 2005, p. 6.

Women's right to participation also includes participating in civil society, public boards, local councils and the activities of political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life. The Committee's general recommendation No. 23 (1997) on women in political and public life emphasizes States' responsibility to appoint women to senior leadership positions, at all levels (local, national, international) of government, all government bodies, the judiciary, and to encourage political parties to do the same. States should ensure women's access to information and take measures to overcome barriers such as illiteracy, language, poverty and barriers to women's freedom of movement. Women's participation specifically in peace building and peace-making processes is particularly important if post-conflict societies are to be rebuilt based on respect for human rights and democratic values. United Nations Security Council resolution 1325 (2000) and its follow-up resolutions reports on women, peace and security, recognize women's important contribution to peace and call for increased representation of women at all levels of decision-making, in all mechanisms for the prevention, management and resolution of conflicts.¹⁸⁵

Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education and the prohibition of discrimination. The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have both clearly indicated that women's right to health includes their sexual and reproductive health. This means that States have obligations to respect, protect and fulfil rights related to women's sexual and reproductive health. The Special Rapporteur on the right to health maintains that women are entitled to reproductive health-care services, goods and facilities that are: (a) available in adequate numbers; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality.¹⁸⁶

Women in all countries, irrespective of status, class, age, caste or religion, experience violence in virtually all spheres of life, whether in the home, at work, on the street, in government institutions, or in times of conflict or crisis. Violence is also present throughout the lifetime of a woman, affecting girls and older women too. Specific groups of women suffering from various forms of discrimination, such as women with disabilities or migrant women, lesbian, bisexual and transgender women are particularly vulnerable to violence.

¹⁸⁵OHCHR Publication, Women's Rights, p.48

¹⁸⁶OHCHR, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health <https://undocs.org/en/A/61/338>

Understanding that violence against women is a manifestation of historically unequal power relations between men and women, a human rights analysis posits that the specific causes of such violence and the factors that increase the risk of its occurrence are grounded in the broader context of systemic gender-based discrimination against women and other forms of subordination. Vulnerability to violence is understood as a condition created by the absence or denial of rights.¹⁸⁷

Violence against women in the family can take the form of domestic violence or harmful or degrading practices that are violent to and/or subordinate women. Other examples of violence in the family are domestic assault (physical, psychological, emotional, financial or sexual violence), marital rape, femicide or gender-motivated killings (domestic murder, ritual killings or killings of women accused of witchcraft, lynching, as well as gender identity- and sexual orientation-related or ethnic or indigenous identity-related killings), child marriage, female genital mutilation and sex-selective abortion.¹⁸⁸

Violence against women may also be perpetrated or condoned by a state's agents. This type of violence can include gender-based violence during conflict, disappearance or extrajudicial killings, custodial violence, violence against refugees and internally displaced women, or women from indigenous or minority groups (A/66/215). As will be explained below, State responsibility can also be invoked for private acts, i.e., when State officials are not the direct perpetrators of the violence. The Special Rapporteur on violence against women has referred to the due diligence standard in terms of the State's obligation to prevent, prosecute, punish and compensate for acts of violence against women (E/CN.4/2006/61).¹⁸⁹

29.4 Discussion questions on women's rights

- Has legislation been enacted to protect women's rights?
- Do domestic law, policies and practice protect women and girls from discrimination?
- Is there a national women's policy? Is there a plan of action for implementing that policy?
- What practical barriers limit women's rights?

¹⁸⁷"In-depth study on all forms of violence against women" (A/61/122/Add.1), para. 65.

¹⁸⁸Radhika Coomaraswamy and Lisa M. Kois, "Violence against women", in *Women and International Human Rights Law*, vol. 1, pp. 184–186. See also the Special Rapporteur on violence against women's report on gender-related killings of women (A/HRC/20/16), para. 16.

¹⁸⁹In various areas of law, the due diligence standard is used to assess whether a State is meeting its obligations. For human rights law, the standard serves as a tool for rights holders to hold duty bearers accountable by providing an assessment framework for ascertaining what constitutes effective fulfilment of the obligation, and for analysing the actions or omissions of the duty bearer. This is especially important if the potential infringement comes through a duty bearer's failure to act, as it can be difficult for rights holders to assess if an omission constituted a violation of their right without some normative basis for the appraisal.

- Does the government take steps to address the various challenges faced by women?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to protect the health of particularly vulnerable including (i) women's access to maternal health services and family planning; (ii) children's health services; (iii) women with disabilities; and (iv) women living with HIV/AIDs?
- Do relevant stakeholders input into women's policy?
- Who controls the budget for women's policies and programmes?
- Are adequate funds available for implementing women's policies and programmes?
- Are there remedies in domestic law for violations pertaining to discrimination and specific violations faced by women?

29.5 Further reading

- OHCHR page on women's rights and gender equality OHCHR | Women's Human Rights and Gender Equality
- OHCHR Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children FactSheet23en.pdf (ohchr.org)
- African Commission, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)
- African Commission, General Comments No.1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)
- Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the rights and welfare of the Child on ending child marriage
joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf
- African Commission, The Guidelines on Combating Sexual Violence and its Consequences in Africa African Commission on Human and Peoples' Rights Legal Instruments (achpr.org)

30. Persons with disabilities

30.1 Persons with disabilities in international, regional instruments and the Gambian Constitution

Article 1, Convention on the Rights of Persons with Disabilities (CRPD)

'The purpose of UN Convention on the Rights of Persons with Disabilities is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

Article 18(4) African Charter

'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

Persons with disabilities face discrimination and barriers every day that restrict them from participating in society on an equal basis with others. For example, they are commonly denied their rights to be included in school and the workplace, to live independently in the community, to vote, to participate in sport and cultural activities, to enjoy social protection, to access justice, to consent or refuse medical treatment or to enter freely into legal commitments such as opening a bank account, and inheriting or buying property.¹⁹⁰

The protection guaranteed in regional and national human rights treaties should apply to all. Persons with disabilities have, however, remained largely 'invisible', often excluded in the rights debate and denied from enjoying and exercising the full range of human rights. The Convention on the Rights of Persons with Disabilities, which was adopted in 2006 and entered into force in 2008, signaled a 'paradigm shift' from traditional charity-oriented, medical-based approaches to disability to one based on human rights. Of importance in the CPRD is the principle of reasonable accommodation which means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹⁹¹

¹⁹⁰Article 4 CRPD.

¹⁹¹Article 2 CRPD

As regards accessibility to enable persons with disabilities live independently and participate fully in all aspects of life. States are urged to take appropriate measures to ensure to persons with disabilities access on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.¹⁹²

The CRPD calls for the inclusion and participation of persons with disabilities across the human rights, development and humanitarian agendas and highlights the rights and empowerment of women with disabilities and children with disabilities as groups which face multiple and intersecting forms of discrimination. THE CRPD is not only an instrument for persons with disabilities. Its principles and provisions benefit the entirety of the human family because it strengthens our responses against exclusion, and segregation and indeed, like the Sustainable Development Goals, it illustrates that reaching the furthest behind first is the key to leaving no one behind.¹⁹³

30.2 Notable provisions of the CRPD

The Gambia has ratified the United Nations Covenant on the Rights of Persons with Disabilities (UNCRPD) and its Optional Protocol. Some key features of the UNCRPD include:

- ***The social model of disability:*** The UNCRPD is based on the social model of disability, which focuses on social barriers faced by persons with disabilities rather than the medical description, symptoms or conditions experienced by people with disabilities. This approach acknowledges that barriers to equality lie in social attitudes and reactions to disability, which can be addressed in practice
- ***Reasonable adjustments may be necessary to meet rights of individuals in practice.*** In line with the social model of disability, the UNCRPD is based on the presumption that social and physical changes may be necessary to ensure equality for people with disabilities.

¹⁹²Article 2 CRPD

¹⁹³UN High Commissioner for Human Rights, Michelle Bachelet, About the rights of persons with disabilities, <https://www.ohchr.org/EN/Issues/Disability/Pages/AboutHumanRightsDisability.aspx> accessed 6 November 2020.

- ***Involvement and participation of people with disabilities in community and political life, law-making and administrative decision making*** is at the heart of the UNCRPD. This approach is designed to address historical and charitable approaches to disability based on the old fashioned medical model. It echoes the motto of many organisations of and for people with disabilities: ‘nothing about us, without us’.

- ***The right to independent living:*** For the first time in international human rights law, Article 19 of the UNCRPD expressly recognises the fundamental right of persons with disabilities to live independently as part of the community. Independent living does not mean the right to life without support. Following the social model of disability, it recognises that adjustments and support may be necessary in order to facilitate and enable people with disabilities to live independently within the community in so far as possible making decisions about their own life choices and personal, family and community life.

30.3 Monitoring the implementation of the CRPD¹⁹⁴

- › The right to equal recognition before the law requires, inter alia, eliminating disability as a ground for depriving someone of his or her legal capacity—for example, by eliminating the practice of appointing guardians who make decisions on behalf of persons with disabilities and, instead, providing support to persons with disabilities so that they can make their own decisions;
- › The right to liberty and security of the person requires, inter alia, monitoring psychiatric and other institutions to ensure that no one is placed there on the basis of their disability, including mental and intellectual disabilities, unless with their free and informed consent;
- › Freedom from torture requires, inter alia, examining whether institutions resort to practices and treatments such as electroshock therapy and cage beds for persons with disabilities, or impose intrusive or irreversible medical treatments aimed at correcting the disability against a person’s will;

The right to education requires, inter alia, examining whether pupils and students with disabilities are not excluded from the general education system based on their disability.

¹⁹⁴OHCHR, Monitoring the Convention on the Rights of Persons with Disabilities, Professional Training Series No 17, https://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf accessed 9 November 2020.

It also requires that that reasonable accommodation of the pupils' requirements is provided in the general education system; and that effective individualized support measures are provided to maximize academic and social development consistent with the goal of inclusion;

- › The right to health requires, inter alia, not only an examination of whether there is universal access to essential medicines but also whether treatments are provided based on the free and informed consent of the person with a disability;
- › The right to work requires, inter alia, examining whether labour laws prohibit discrimination in the workplace and require employers to take positive steps to ensure physically accessible buildings as well as accessible technology such as computer and Internet technology for those persons with disabilities that may require it;
- › The right to an adequate standard of living requires, inter alia, an examination of social programmes and policy frameworks, poverty reduction strategies, national development plans and projects, such as projects related to the Millennium Development Goals, to ensure that they include the promotion and protection of the right to food, clothing, housing and other rights of persons with disabilities;
- › The right to participate in public and political life requires, inter alia, election monitoring to ensure that election materials are provided in accessible formats (such as written materials in Braille and television advertisements with sign-language interpretation) and that voting booths are accessible, for example, with ramp access.

With regard to economic, social and cultural rights, the Convention on the Rights of Persons with Disabilities reaffirms the obligation of States to implement them, as already recognized in article 2 of the International Covenant on Economic, Social and Cultural Rights and article 4 of the Convention on the Rights of the Child. The recognition that the full realization of economic, social and cultural rights may be constrained by limited resources is balanced by the requirement that measures should be taken to the maximum of a State's available resources and, where needed, within the framework of international cooperation.¹⁹⁵ (Convention on the Rights of Persons with Disabilities, Arts. 4 (2) and 32).

¹⁹⁵Arts. 4 (2) and 32, Convention on the Rights of Persons with Disabilities.

Several aspects of the progressive realization of economic, social and cultural rights are important for monitoring purposes:¹⁹⁶

- › Discrimination on any grounds, including disability, is always forbidden, regardless of the level of realization of economic, social and cultural rights;
- › States have an immediate obligation to ensure a minimum essential level of enjoyment of each economic, social and cultural right;
- › States have an obligation to take steps towards the progressive realization of these rights. A State, for example, can develop a plan of action which should include:
 - (a) a time frame for implementing economic, social and cultural rights;
 - (b) time-bound benchmarks of achievement; and
 - (c) indicators of success.

States are forbidden from taking regressive steps or measures that diminish the enjoyment of economic, social and cultural rights.

30.4 Discussion questions on persons with disabilities

- Has legislation been enacted to protect persons with disabilities?
- Do domestic law, policies and practice protect persons with disabilities from discrimination?
- Is there a plan of action for implementing that policy?
- What practical barriers exist to limit the rights of persons with disabilities?
- Does the government take steps to address the various challenges faced by persons with disabilities?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to protect the health of persons with disabilities?
- Do stakeholders have an active input into policies pertaining to persons with disabilities?
- Who controls the budget for policies and programmes related to persons with disabilities?
- Are adequate funds available for policies and programmes for persons with disabilities?

¹⁹⁶See also Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations.

- Are there remedies in domestic law for violations pertaining to discrimination and specific violations faced persons with disabilities?

30.5 Further reading

- UN Committee on the Rights of Persons with Disabilities OHCHR | Committee on the Rights of Persons with Disabilities
- OHCHR page on the rights of persons with disabilities for reports, publications and resources
OHCHR | Human Rights of persons with disabilities
- Centre for Human Rights, University of Pretoria, African Disability Rights Yearbook Volumes 1 – 5, Publications - Centre for Human Rights (up.ac.za)

31. Children

The two key instruments, which protect children's rights, are the Convention on the Rights of the Child at the international level and the African Charter on the Rights and Welfare of the Child at the regional level.

31.1 Four general principles of the Convention on the Rights of the Child

The Convention on the Rights of the Child has four general principles¹⁹⁷, which are meant to help with the interpretation of the Convention and guide national programmes of implementation.

i. Non-discrimination (art. 2)

States parties must ensure that all children within their Jurisdiction enjoy their rights. No child should suffer discrimination. This applies to every child, "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." The essential message is equality of opportunity. Girls should be given the same opportunities as boys. Refugee children, children of foreign origin, children of indigenous or minority groups should have the same rights as all others. Children with disabilities should be given the same opportunity to enjoy an adequate standard of living.

¹⁹⁷OHCHR, Fact Sheet No.10 (Rev.1), The Rights of the Child <https://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf>

ii. Best interests of the child (art. 3)

When the authorities of a State take decisions, which affect children, the best interests of children must be a primary consideration. This principle relates to decisions by courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions. This is, of course, a fundamental message of the Convention, the implementation of which is a major challenge.

iii. The right to life, survival and development (art. 6)

The right-to-life article includes formulations about the right to survival and to development, which should be ensured “to the maximum extent possible”. The term “development” in this context should be interpreted in a broad sense, adding a qualitative dimension: not only physical health is intended, but also mental, emotional, cognitive, social and cultural development.

iv. The views of the child (art 12)

Children should be free to have opinions in all matters affecting them, and those views should be given due weight” in accordance with the age and maturity of the child”. The underlying idea is that children have the right to be heard and to have their views taken seriously, including in any judicial or administrative proceedings affecting them.

31.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) is an important tool for advancing children’s rights across Africa. While building on the same basic principles as the UN Convention on the Rights of the Child, the AU Children’s Charter highlights issues of special importance in the African context.

The ACRWC is more explicit about certain issues relevant in Africa, which are not in the CRC. For example, In particular, ACRWC challenges child marriage,¹⁹⁸ and affirms the rights of children born out of marriage.¹⁹⁹ It prohibits the use of children as beggars,²⁰⁰ promotes affirmative action for girls’ education and grants girls the right to return to school after pregnancy. In respect of children used as child-soldiers, it goes beyond the 15-year age limit for military recruitment stipulated in the CRC.²⁰³ ACRWC also gives express recognition to the conception that children have responsibilities in the community depending on their evolving capacities.²⁰⁴

¹⁹⁸Article 21(2) ACRWC

¹⁹⁹18 (3) ACRWC

²⁰⁰Article 29 (b) ACRWC

²⁰⁴Article 31 ACRWC

²⁰¹Article 11 (3) (e) ACRWC

²⁰²Article 11 (6) ACRWC

²⁰³22(2) ACRWC

Obligations arising from the ACRWC include:

- Obligation to protect the child from all forms of discrimination (2)
- Obligation to respect the right of the child to have his/her best interests taken as a primary consideration in all actions (3(1))
- Obligation to respect the principle of evolving capacities (5)
- Obligation to ensure maximum survival and development of the child (6)
- Obligation to respect the right to be heard (12)

31.3 Discussion questions on children's rights

- Does current legislation adequately protect children?
- Do domestic law, policies and practice protect children from discrimination?
- Is there a children's policy and a plan of action for implementing that policy?
- What practical barriers limit the rights of children?
- Does the government take steps to address the various challenges faced by children?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to protect the health of children?
- Do stakeholders have an active input into policies pertaining to children?
- Who controls the budget for policies and programmes related to children?
- Are adequate funds available for policies and programmes for children?
- Are there remedies in domestic law for violations pertaining to discrimination and specific violations faced by children?

31.4 Further reading

- OHCHR page on children OHCHR | OHCHR and children
- UN Committee on the Rights of the Child OHCHR | Committee on the Rights of the Child
- OHCHR, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and any other child sexual abuse material OHCHR | Special Rapporteur on the sale of children
- African Committee on the Rights and Welfare of the Child ACERWC - African Committee of Experts on the Rights and Welfare of the Child

- African Committee on the Rights and Welfare of the Child, General Comment on the Situation of Children in Armed Conflict General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf (acerwc.africa)
- African Committee on the Rights and Welfare of the Child, General Comment on Article 30: Children of incarcerated and imprisoned parents and primary caregivers General_Comment_Article_30_ACRWC_English.pdf (acerwc.africa)

32. Older persons

In recent years, there have been significant advocacy efforts calling for enhanced international thinking and action on the human rights of older persons. Various stakeholders have called for more visibility and increased use of international human rights standards to address the dire situation of millions of older women and men around the world.²⁰⁵

Not very long ago, the issue of ageing was considered a matter of importance for only a handful of countries. Nowadays, the number of persons aged sixty and over is increasing at an unprecedented pace, anticipated to rise from its current 740 million to reach 1 billion by the end of the decade. Unfortunately, the increase in numbers has also shed light on the lack of adequate protection mechanisms, and on the existing gaps in policies and programmes to address the situation of older persons. Today, two-thirds of the world's older people live in low-and middle-income countries and this proportion will rise to 80 per cent by 2050.²⁰⁶

32.1 The rights of older persons under international law

None of the foundational human rights instruments, namely the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly prohibit discrimination based on age.

Both the ICCPR and the ICESCR ensure that the rights contained within are applicable to all people “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*”.

²⁰⁵OHCHR, Human rights of older persons, <https://www.ohchr.org/en/issues/olderpersons/pages/olderpersonsindex.aspx>, accessed 12 November 2020

²⁰⁶Ibid.

Within the subsequent nine core international human rights treaties²⁰⁷, only one prohibits discrimination based on age and two mention older people: Articles 1.1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families prohibit discrimination based on age. Article 11.1.e of the Convention on the Elimination of All Forms of Discrimination Against Women provides for the equal right of women to social security including in old age. Article 25.b and 28.2.b of the Convention on the Rights of Persons With Disabilities require States to provide services to prevent and minimise further disabilities among older people, and to ensure older people with disabilities have access to retirement benefits and programmes.

Four other provisions in the CRPD require “age-appropriate” or “age-sensitive” measures for people with disabilities that could be interpreted to include old age, related to access to justice, prevention of abuse, and information on reproductive rights. Obviously, the rights protected in these treaties are contingent on the older person in question being a migrant or part of a migrant’s family, a woman or a person with a disability.

A consequence of excluding age from explicit prohibited grounds for discrimination is that States are not prompted to report on the situation of older people. Where older people’s specific situations are not expressly referenced and their specific rights, needs and challenges are not articulated, older people face rights violations that deprive them of dignity, integrity of person, security of person and even life, without any recourse to justice or redress. States can selectively interpret “other status,” and therefore their obligations, thus creating uncertainty for the protection of older person’s rights.²⁰⁸ Where older people’s specific situations are not expressly referenced and their specific rights, needs and challenges are not articulated, older people face rights violations that deprive them of dignity, integrity of person, security of person and even life, without any recourse to justice or redress.²⁰⁹

In 1995, the Committee on Economic, Social and Cultural Rights (CESCR) devoted its General Comment No. 6 to the economic, social and cultural rights of older people. From that point, the CESCR issued a further nine General Comments making at least passing reference explaining state obligations to ensuring different rights relevant to older people.

²⁰⁷OHCHR, The Core International Human Rights Instruments and their monitoring bodies, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 12 November 2020.

²⁰⁸Secretary General Report, Follow-up to the Second World Assembly on Ageing, (A/64/127), July 2009, paras 19 and 20

²⁰⁹HelpAge International, International human rights law and older people: Gaps, fragments and loopholes p.3, <https://www.helpage.org/silo/files/international-human-rights-law-and-older-people-gaps-fragments-and-loopholes.pdf> accessed 12 November 2020.

General Comment No. 6 was described in the April 2012 report of the High Commissioner for Human Rights to the Economic and Social Council as offering “the most comprehensive guidance on older persons on rights such as the right to health, an adequate standard of living including food and housing, to work and to social security”.²¹⁰

In addition, in 2007, its General Comment No. 19 addressed social security in old age. Within a list of places where people live under custody or control, the Committee against Torture noted in its General Comment No. 2 (2008) that institutions that care for older people fall within the definition of places of detention in which State parties have obligations to prohibit and redress torture and other cruel, inhuman and degrading treatment and punishment. In 2010, the Committee on the Elimination of Discrimination against Women drafted General Recommendation No. 27 on the gendered nature of ageing and disproportionate impact of discrimination against older women. Three other CEDAW Committee General Recommendations include paragraphs on particular needs and vulnerabilities of older women. These provide valuable insight into the CEDAW Committee’s interpretation of the Convention. The 1991 UN Principles for Older Persons²¹¹ address the dignity, self-fulfilment, participation, independence and care of older people and encourage governments to include them in national programmes.

On 26 September 2019, the Human Rights Council extended the mandate of the mandate of the Independent Expert on the enjoyment of all human rights by older persons.²¹² The mandate will among other things,

- Continue to assess the implementation of national, regional and international standards relevant to the rights of older persons and to identify, exchange and promote best practices relating to the promotion and protection of these rights;
- Report on developments, challenges and protection gaps in the realization of the rights of older persons, including as input to the work of the Open-ended Working Group on Ageing, and to make recommendations to the Human Rights Council in this regard;
- Engage in dialogue and to consult with States and other relevant stakeholders, including United Nations agencies, funds and programmes, regional human rights mechanisms, national human rights institutions, older persons, civil society organizations and academic institutions.²¹³

²¹⁰Report of the United Nations High Commissioner for Human Rights (E/2012/51), April 2012, p6.

²¹¹Adopted by General Assembly resolution 46/91 of 16 December 1991 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx> accessed 11 November 2020

²¹²Human Rights Council Resolution 42/12.

²¹³For further details of the mandate see OHCHR, Mandate of the Independent Expert on the enjoyment of all human rights by older persons <https://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Mandate.aspx> accessed 11 November 2020.

32.2 The rights of older persons in Africa

At the regional level, in 2016 the African Union adopted the Protocol to the African Charter on Human and Peoples' on the Rights of Older Persons in Africa. The Protocol prohibits all forms of discrimination against older persons, urges states to take corrective measures where discrimination and stigmatisations against older persons persist, and calls on states to enforce initiatives aimed at eradicating discrimination against older persons.²¹⁴

In addition to international law, African governments have agreed to the 1991 UN Principles for Older Persons, which address the dignity, self-fulfilment, participation, independence and care of older people and encourage governments to include them in national programmes. The first recommendation of the African Union's 2002 Policy Framework and Plan of Action on Ageing is that member states recognise and ensure the protection of older people's rights. This policy framework supported the development of the 2002 Madrid International Plan of Action on Ageing, which is a global agreement that promotes the full realisation of all human rights and fundamental freedoms of all older people in all countries. National plans of action on ageing in a number of African countries provide frameworks for developing equitable policies and practices that will protect and fulfil older people's rights.²¹⁵

32.3 Protection of older persons under national law

Human rights become more meaningful when they are enshrined in domestic legislation and translated into policies, with resources allocated to the delivery of services associated with them. Countries that have ratified international human rights treaties are obliged to ensure their national legislation is compatible with provisions in that treaty. However, some countries have legislation that continues to discriminate against older people, or allows customary law to prevail even if this discriminates against older women in terms of inheritance or property rights.²¹⁶

Cases of rights violations against older people rarely go to court, either because law enforcement agencies are unwilling to prosecute, due to negative attitudes to older people, or because older people are afraid to press charges. Older people may not be aware of their rights, or may not know how to claim them.

²¹⁴African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons https://au.int/sites/default/files/treaties/36438-treaty-0051_-_protocol_on_the_rights_of_older_persons_e.pdf accessed 11 November 2020.

²¹⁵HelpAge International, Protecting the rights of older people in Africa, p2 <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> accessed 12 November 2020.

²¹⁶HelpAge International, Protecting the rights of older people in Africa, p3 <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> accessed 12 November 2020

African governments should ensure that legislation is revised to protect, rather than discriminate against, older people and that judicial systems enforce and realise their rights.²¹⁷

32.4 Challenges faced by older persons in Africa

Identity and access to entitlements

A major barrier for older people in realising their rights is their lack of identity documentation. Older people are often eligible for a range of entitlements, including free health care, old age or vulnerability allowances and support with education-related costs for those in their care. However, without proof of age and identity they are unable to prove their eligibility, and are therefore denied access to them. Women are particularly affected.²¹⁸

i. The right to health

For many older people in Africa, physical health is the single most important asset, as it enables them to work. Despite this, accessing health care is often a struggle for older people, for reasons including the concentration of hospitals or clinics in urban areas, far from where most older people live the cost of transport, inability to afford fees for services or drugs, lack of information about services and entitlements. Other challenges include shortage of supplies, poor management of health services, lack of medical personnel trained in older people's health care and negative attitudes of medical staff.²¹⁹

ii. The right to social security

Income security is one of the major concerns of older people. Older women, in particular, play a major role in caring for young children whose parents have been affected by HIV and AIDS, and have little income or assets to support them. Nevertheless, most Africans are still denied their right to social security and security in old age. The majority of poor older people – especially women – have worked all their lives in the informal sector, with no access to contributory pensions or other forms of formal social security.²²⁰

Too few African countries have any form of non-contributory or 'social' pension, despite the fact that evidence from those that do – such as South Africa, Lesotho and Botswana – shows that this is a practical and affordable way of tackling poverty, as well as of reducing the devastating impact of HIV and AIDS.

²¹⁷HelpAge International, Protecting the rights of older people in Africa, p3 <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> accessed 12 November 2020

²¹⁸Ibid.

²¹⁹Ibid.

²²⁰Ibid. p5.

This is particularly important in countries such as South Africa, Botswana and Tanzania, where between 50 and 60 per cent of children orphaned by the epidemic live with their grandparents, who face additional financial costs due to their role as carers. Income from social pensions also helps older people and their families to realise their other rights, such as health and education.²²¹

iii. Property and inheritance rights

Women in Africa – especially older women – are marginalised because of their lack of knowledge about widows' inheritance rights. Being unable to own property also weakens women's economic base. Without a sound economic base, widows face perpetual poverty and dependence on relatives. Widowhood profoundly changes the status of women across Africa and undermines their security. Customary laws exist that deny widows the right to inherit common assets (for example, a house or land), and in some communities widows can be inherited by their deceased husband's brother, and must abide by these laws or risk being ostracised and left without income and assets at a time of trauma and bereavement. For older widows, discrimination compounds the effects of a lifetime of poverty and gender discrimination. This can result in extreme impoverishment and isolation, both for the widows themselves and for any dependants they care for. Their situation is worsened by a lack of knowledge of their legal rights, of how to access appropriate information and of where to seek impartial advice and guidance.²²²

32.5 Help Age Africa recommendations to governments²²³

1. Make identity documentation free of charge to all older people and hold registration and awareness-raising events to ensure they are aware of their entitlements.
2. Provide accessible and affordable health care for older people, including training health personnel in older people's health and older carers' needs in HIV and AIDS responses.
3. Guarantee adequate social protection and income in old age, through providing non-contributory (social) pensions for all older people.

²²¹R Monasch and J T Boerma, 'Orphanhood and childcare patterns in sub-Saharan Africa: an analysis of national surveys from 0 countries', AIDS 18 (suppl. 2), 2004, pp s55 –s65

²²²HelpAge Africa Report, p.6 <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> accessed 12 November 2020.

²²³Ibid, p.8 <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> accessed 12 November 2020.

4. Revise any legislation that discriminates against older people, including inheritance and property laws, to ensure that they comply with the protection of older people's rights under international law.
5. Introduce concrete measures that challenge and address any intimidation, isolation, abuse and violence against older people. This may include training law enforcement agencies and the judiciary, providing services to support abused older people, including violence against older people in domestic violence legislation, and creating a culture that will not tolerate abuse of older people.
6. Include and consult older people in emergency aid and rehabilitation planning following disasters and humanitarian crises.

32.6 Discussion questions on older persons

- Has legislation been enacted to protect older persons' rights?
- Does domestic law, policies and practice protect older persons from discrimination?
- Is there a national older persons' policy and a plan of action for implementing that policy?
- What practical barriers limit older person's rights?
- Does the government take steps to address the various challenges faced by older persons?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to protect the health of older persons?
- Do stakeholders have an active input into older persons' policy?
- Who controls the budget for older persons' policies and programmes?
- Are adequate funds available for older persons' policies and programmes?
- Are there remedies in domestic law for violations pertaining to discrimination and specific violations faced by older persons'?

32.7 Further reading

- OHCHR Reports on the Rights of Older Persons OHCHR | Reports
- The Independent Expert on the enjoyment of all human rights by older persons OHCHR | Independent Expert on the enjoyment of all human rights by older persons

33. Migrants

An estimated 258 million people, approximately 3 per cent of the world's population, currently live outside their country of origin, many of whose migration is characterised by varying degrees of compulsion. Notwithstanding that many migrants choose to leave their countries of origin each year, an increasing number of migrants are forced to leave their homes for a complex combination of reasons. They leave due to poverty, lack of access to healthcare, education, water, food, housing, and the consequences of environmental degradation and climate change, as well as the more 'traditional' drivers of forced displacement such as persecution and conflict.²²⁴

While migration is a positive and empowering experience for many, it is increasingly clear that a lack of human rights-based migration governance at the global, regional and national levels is leading to the routine violation of migrants' rights in transit, at international borders, and in the countries, they migrate to. While migrants are not inherently vulnerable, they can be vulnerable to human rights violations. Migrants in an irregular situation tend to be disproportionately vulnerable to discrimination, exploitation and marginalization, often living and working in the shadows, afraid to complain, and denied their human rights and fundamental freedoms.²²⁵

Human rights violations against migrants can include a denial of civil and political rights such as arbitrary detention, torture, or a lack of due process, as well as economic, social and cultural rights such as the rights to health, housing or education. The denial of migrants' rights is often closely linked to discriminatory laws and to deep-seated attitudes of prejudice or xenophobia.²²⁶

33.1 The protection of migrants under international law

Migrants are protected under by treaties which make up the international Bill of Rights Universal Declaration of Human Rights (UDHR) which, together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Other international human rights instruments, adopted since 1945, provide additional specific legal protections applying equally to migrants. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, whose implementation is overseen by the Committee on Migrant Workers is particularly relevant.

²²⁴OHCHR, Migration and Human Rights, <https://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx> accessed 12 Nov 2020.

²²⁵Ibid.

²²⁶Ibid.

33.2 Monitoring and enforcement

Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families gives the Committee on Migrant Workers (CMW) competence to receive and consider individual communications alleging violations of the Convention by States parties who made the necessary declaration under article 77. This individual complaint mechanism will become operative when 10 states parties have made the necessary declaration under article 77.²²⁷

33.3 The Global Compact on Migration

The Global Compact is the first inter-governmentally negotiated agreement, prepared under the auspices of the United Nations, covering all dimensions of international migration in a holistic and comprehensive manner. It is a non-binding document, which respects states' sovereign right to determine who enters and stays in their territory and demonstrates commitment to international cooperation on migration. It presents a significant opportunity to improve the governance of migration, to address the challenges associated with today's migration, and to strengthen the contribution of migrants and migration to sustainable development. The Global Compact is framed in a way consistent with target 10.7 of the 2030 Agenda for Sustainable Development in which Member States committed to cooperate internationally to facilitate safe, orderly and regular migration.²²⁸

The Global Compact is designed to:

- support international cooperation on the governance of international migration;
- provide a comprehensive menu of options for States from which they can select policy options to address some of the most pressing issues around international migration; and
- give states the space and flexibility to pursue implementation based on their own migration realities and capacities.²²⁹

²²⁷OHCHR, Human Rights Bodies - Complaints Procedures <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> accessed 12 November 2020.

²²⁸International Organisation of Migration, Global Compact for Migration, Global Compact for Migration <https://www.iom.int/global-compact-migration> accessed 12 November 2020.

²²⁹Ibid.

33.4 State obligations to protect migrants

While human rights are inalienable and should not be granted on the basis of citizenship, as part of the notion of state sovereignty, states possess extensive authority to protect their borders and determine their own laws. For example, states have the power to determine the admission of non-nationals into their country, detention of migrants and removal or expulsion of non-nationals.²³⁰

However, although states have the power to manage migration flows into, through and from their territory, they are obligated by international law to do so in such a way that upholds the rights of individuals within their territory and under their jurisdiction.

By developing laws and practices that protect the human rights of irregular migrants, such as victims of trafficking and smuggling, states can better address issues of corruption²³¹ and transnational organized crime²³², which are often associated with trafficking or smuggling in persons. These laws promote the protection of national security and public order. Furthermore, instituting anti-human trafficking legislation that requires states to protect victims of trafficking from exploitation and assist victims to rehabilitate by providing them with appropriate housing, counselling and medical, psychological and material assistance, does not challenge state sovereignty, and does not infringe upon the right of the state to protect its borders and those within them.²³³

Migrant workers offer another example of how upholding the rights and freedoms of both documented and undocumented migrant workers does not undermine state sovereignty but strengthens states. The Core Human Rights Conventions—including the Convention for the Protection of the Rights of all Migrant Workers and Members of their Families—recognises that all migrant workers are entitled to legal protection within the international human rights regime. The Convention accords both documented and undocumented migrants with civil, social and labour rights. Regarding irregular migrants, the Convention recognizes that workers who are non-documented or in an irregular situation frequently are employed under less favourable working conditions than other workers are.

²³⁰International Covenant on Civil and Political Rights; Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live; International Convention for Migrant Workers and Their Families, Article 16.

²³¹United Nations Office on Drugs and Crime, *The Role of Corruption in Trafficking in Persons*, Issue Paper (2011).

²³²United Nations Office on Drugs and Crime, *Organized Crime involvement in trafficking in persons and smuggling of migrants*, Issue Paper (2010).

²³³Article 7, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

Managing the migration of workers is fundamental to ensure stability and development of the state, especially in a globalized world where labour mobility, or the movement of people across state borders for employment, is a key feature. This is because migrant workers contribute to the economic and human development of the countries in which they work and where they fill gaps in the labour market and provide essential skills.

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In the case of migrant care and domestic workers—where women are heavily present—their often invisible and silent work effectively contributes to containing the ‘care crisis’ faced by many developed countries. In addition, migrant workers contribute to their home countries through remittances, which contribute to development and poverty reduction.²³⁷ However, the ability of migrant workers to be economically productive and contribute to the development of both their countries of origin and residence is conditioned by the extent of their integration, as well as by the living and working conditions in the country of settlement.²²⁸ By upholding the rights of migrant workers, states can manage migration in such a way that fosters a stable environment for migrants to live and work so that migration becomes advantage for the development of the state.

²³⁴Ibid.

²³⁵Convention for the Protection of the Rights of all Migrant Workers and Members of Their Families (Preamble).

²³⁶L. Thompson, ‘Protection of Migrants’ Rights and State Sovereignty’ <https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty> accessed 13 November 2020.

²³⁷Office of the United Nations High Commissioner for Human Rights, ‘Migration and Development: A Human Rights Approach’, pp. 8-9.

²³⁸Ibid.

By effectively protecting migrants (regardless of status), and enabling them to earn decent pay and enjoy decent working conditions, their productivity will contribute to the host country's economy and to that of the country of origin where a considerable portion of the earnings are likely to be sent.²³⁹

33.5 Discussion questions on migrants

- Has legislation been enacted to protect migrants' rights?
- Do domestic law, policies and practice protect migrants from discrimination?
- Is there a national migrants' policy and a plan of action for implementing that policy?
- What practical barriers limit migrants' rights?
- Does the government take steps to address the various challenges faced by migrants?
- Do effective national health indicators, benchmarks and monitoring mechanisms exist?
- Do specific policies and programmes exist to protect the health of migrants?
- Do stakeholders have opportunities to influence migrants' policy?
- Who controls the budget for migrants' policies and programmes?
- Are adequate funds available for migrants' policies and programmes?
- Are there remedies in domestic law for violations pertaining to discrimination and specific violations faced by migrants?

33.6 Further reading

- OHCHR page on migration and human rights [OHCHR | Migration and Human Rights](#)
- AU IOM Africa Migration Report, Challenging the narrative [africa-migration-report.pdf \(iom.int\)](#)

²³⁹L. Thompson, Supra.

34. Sexual minorities

34.1 Introduction Sexual orientation and gender identity

The term “sexual minority” includes a variety of gender and sexual identities and expressions that differ from cultural norms. LGBTQIA+ refers to- lesbian, gay, bisexual, transgender, intersex, queer and other non-binary identities.

Deeply-embedded homophobic and transphobic attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many lesbian, gay, bisexual and transgender (LGBTQIA) people of all ages and in all regions of the world to egregious violations of their human rights. They are discriminated against in the labour market, in schools and in hospitals, mistreated and disowned by their own families. They are singled out for physical attack – beaten, sexually assaulted, tortured and killed. In several countries, laws against cross-dressing are used to punish transgender people on the basis of their gender identity and expression. Moreover, in some 77 countries, discriminatory laws criminalize private, consensual same-sex relationships – exposing individuals to the risk of arrest, prosecution, imprisonment — even, in at least five countries, the death penalty.²⁴⁰

Protecting LGBTIA+ people from violence and discrimination does not require the creation of a new set of LGBTIA+-specific rights, nor does it require the establishment of new international human rights standards. The legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law based on the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law. These include the right to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.²⁴¹

The core legal obligations of States with respect to protecting the human rights of LGBT people include obligations to:

- Protect individuals from homophobic and transphobic violence.

²⁴⁰OHCHR, *Combating discrimination based on sexual orientation and gender identity* OHCHR | Combating discrimination based on sexual orientation and gender identity

²⁴¹Ibid.

- Protect individuals from homophobic and transphobic violence.
- Prevent torture and cruel, inhuman and degrading treatment.
- Repeal laws criminalizing homosexuality and transgender people.
- Prohibit discrimination based on sexual orientation and gender identity.
- Safeguard freedom of expression, association and peaceful assembly for all LGBT people.²⁴²

34.3 The protection of sexual minorities under international and regional standards

Article 2 of the UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 2(1) of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 2(2) of the ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

34.3.1 The Yogyakarta Principles

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birth-right.²⁴³

²⁴²Ibid.

²⁴³The Yogyakarta principles YogyakartaPrinciples.org – The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

34.3.2 Protection from discrimination on the grounds of Sexual orientation

Discrimination on the grounds of sexual orientation is prohibited in international human rights law.²⁴⁴ The earliest human rights instruments were drafted over half a century ago, when homosexuality was criminalised in most countries. Over the course of this time, international law has recognised that sexuality is a protected status and a personal characteristic of individual identity, which should not provide a basis for unlawful and arbitrary discrimination. In 1994, the Human Rights Committee in *Toonen v Australia* recognised that the right to equal treatment in the ICCPR provides protection against discrimination on the basis of sexual orientation.²⁴⁵

Sexual orientation is included, together with gender and race, in a core of personal characteristics where the prohibition on discrimination is considered particularly important to protect the full development of the person. Discrimination can be 'direct' or 'indirect'. States directly discriminate by treating one type of person less favourably than another in the same circumstances, based on their personal characteristics. Indirect discrimination takes place where a State applies a set of criteria indiscriminately which makes it more difficult for some people to meet because of their personal characteristics. In some contexts, these distinctions may be unhelpful and unfamiliar. It may be more helpful to focus on justified distinctions and unjustified discrimination.

34.4 Sexual Orientation and Gender Identity under the African human rights system

In 2014, the African Commission on Human and Peoples' Rights passed Resolution 275 on Protection against Violence and other Human Rights Violations against Persons based on their real or imputed Sexual Orientation or Gender Identity.²⁴⁶ The resolution contains a number of recommendations for joint action to give effect to this Resolution.

Resolution 275 utilises Articles 2, 3, 4 and 5 of the African Charter on the rights to freedom from discrimination, equality, life, and dignity respectively.

²⁴⁴Article 13 CESCR General Comment 15 'The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' 29th Session 11-29 November 2002 (20 January 2003) [E/C 12/2002/11] and Article 32 CESCR General Comment No 20 'Non-Discrimination in Economic, Social and Cultural Rights (Article 2, paragraph 2)' 42nd Session 4-22 May 2009 (10 June 2009) [E/C 12/GC/20]

²⁴⁵*Toonen v Australia* (Communication No 488/1992) (4 April 1994) CCPR [CCPR/C/50/D/488/1992] www.worldlii.org/int/cases/UNHRC/1994/15.html.

²⁴⁶African Commission on Human and Peoples' Rights Sessions (achpr.org)

The protection of LGBTIQ+ persons is also inherent in the African Commission's approach to the interpretation of human dignity, which expects that States will not interfere in the private lives of citizens.²⁴⁷

34.5 Protection by National Human Rights Institutions

NHRIs in some countries have also taken steps to protect the rights of LGBTIQ+ persons in their jurisdictions. For example, the NHRIs of Kenya, Uganda, Malawi, South Africa and Ghana have taken various steps by employing judicial and non-judicial measures to expand the protection space for LGBTIQ+ persons.²⁴⁸

34.6 Discussion question on sexual minorities

- Which constitutional, domestic law, policies and practice protect sexual minorities from discrimination?
- What practical barriers limit sexual minorities' rights?
- Does the government take steps to address the various challenges faced by sexual minorities?

34.5 Further reading

- NANHRI, Report on the Sexual Orientation, Gender Identity & Human Rights Kenya Incountry Report.pdf (ohchr.org)
- Ending Violence and other human rights violations based on sexual orientation and gender identity A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations Ending_violence_and_other_human_rights_violations_based_on_sexual_orientation_and_gender_identity.pdf (up.ac.za)
- NANHRI, A Guide for African National Human Rights Institutions for Implementing Resolution 275 in Africa By the Network of African National Human Rights Institutions.
NANHRI Guide for African NHRIs on Implementing Resolution 275 of the African Commission | NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS
- NANHRI SOGIE Complaints Handling, Investigations and Documentation Report
General Reports | NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS (nanhri.org)

²⁴⁷NANHRI, A Guide for African National Human Rights Institutions for Implementing Resolution 275, p15.

²⁴⁸Ibid. p18.

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