



Strasbourg, 28 June 2013

CDDH(2013)R78 Addendum I

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)**

**Draft toolkit to inform public officials about the State's obligations under
the Convention**

PURPOSE

1. This toolkit aims to provide officials of the States party to the European Convention on Human Rights (“The Convention”) with information and practical guidance to equip them to respect the Convention rights of the people they deal with, fulfil the State’s Convention obligations and so, as far as possible, avoid breaches of the Convention.

WHO THIS TOOLKIT IS FOR

2. The toolkit is primarily for officials working in the justice system and for those responsible for law enforcement or for the deprivation of a person’s liberty. Specifically, that will include (but not be limited to) **police, prison officers, immigration officers and workers in secure psychiatric institutions or other institutions providing care to vulnerable persons.**

3. More widely it is also for any official who interacts with the public in ways which raise potential issues of Convention rights, for instance **social workers, registrars and licensing authority officials.**

4. It is not designed for judges, lawyers or senior civil servants, but for those “at the sharp end”. It assumes no prior legal knowledge.

THE CONVENTION AND HOW IT WORKS

5. The **Convention on Human Rights and Fundamental Freedoms** (to give the Convention its official title) is an international **treaty** between the states (currently 47) members of the **Council of Europe** (not to be confused with the European Union). The Council of Europe was set up after the Second World War as an international organisation for the promotion of democracy, human rights and the rule of law. The Convention was adopted in 1950.

6. States become bound to abide by the obligations of the Convention when they become **party** to it by **ratification**. All the member states have ratified the Convention.

7. There are a number of **optional protocols** to the Convention, which supplement its provisions by adding to the substantive rights given. States may choose whether to accept the optional protocols by ratifying them, and not all states have accepted all the optional protocols. You should check which of the optional protocols have been ratified by your state on the Council of Europe [Treaty Office website](#).

8. States have the right to derogate from, that is contract out of, certain Convention obligations. This decision is taken at the governmental level; unless your authorities inform you that a derogation is in force, you should assume that the Convention and relevant optional protocols apply in full.

9. The primary responsibility to ensure the convention is implemented at national level rests on the States party to it (see paragraph 14 below). Their laws and policies should be framed, and all public officials should carry out their duties, in a way that gives full effect to the Convention. States also have to provide a system of remedies for breaches of the Convention. Only when national remedies for an alleged breach have been tried and found absent or inadequate can a victim resort to the **European Court of Human Rights (“the Court”)**.

10. The Court's function is to ensure observance by the States party of the obligations they have undertaken under the Convention and its protocols. The Court has one judge from each member state and sits in Strasbourg. It has jurisdiction to hear and decide applications from any person claiming to be a victim of a breach of their Convention rights by one or more of the States party to the Convention (and to hear inter-state cases, though these are rare and not relevant to this toolkit). The states **undertake to abide by the final judgment of the Court in any case to which they are parties**, which usually entails paying any damages awarded by the Court, reinstating as far as possible the victim to the position before the breach and often making changes to national law and practice in order to prevent future similar breaches. Thus, any breach of the Convention by an agent of a state may have very serious consequences for that state, as well, of course, as for the victim.

11. Each case is decided on its individual facts, but in the process the Court often has to interpret the meaning of the Convention more generally, and lay down principles for its application. The meaning of the Convention is not set in stone: it evolves in accordance with the changing European consensus in matters of law and policy, with changing social attitudes and above all through the interpretations of the Court. It is the Convention **as interpreted by the Court** that is binding on states party and enforced in national law by national courts. Hence the toolkit will often refer to specific decided cases, which illustrate how the Convention provisions have been applied, and serve as a guide to how officials should act to respect them.

USING THE TOOLKIT

12. The toolkit is in three main parts:

Part I A guide to the rights conferred by the Convention and its Protocols and to the corresponding obligations of the State, following the order in which the provisions appear. (NB As pointed out above, not all States are party to all the Protocols; Part III states the position, correct at time of going to press, on whom is bound by what.) Those provisions which most often arise in the work of the officials for whom this toolkit has been written are covered in much greater detail than those which rarely arise. The guide does not aim to cover all potential issues, as a legal textbook would; it concentrates selectively on the most significant and frequently encountered ones.

Part II Questions and checklists highlighting points to consider, to help officials decide whether a potential issue under the Convention arises, plus a flow chart.

Part III Text of the right-conferring provisions of the Convention and its Protocols.

PART I THE RIGHTS AND OBLIGATIONS OF THE CONVENTION AND ITS PROTOCOLS

THE CONVENTION

The obligation to respect human rights (Article 1)

13. The States' basic obligation is to "**secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention**", (which includes, for those states party to the various Protocols, the obligation to secure the rights and freedoms defined in those Protocols).

14. "**Everyone**" is very broad:

- non-nationals of the state concerned are covered as well as nationals; the rights are not only for citizens.
- legal persons (e.g. companies, NGOs and incorporated associations) are covered as well as natural ones (e.g. individuals and groups of people).

15. **“Within their jurisdiction”** usually means the same as “within the state’s territory”, but the Court has extended that to cover exceptional cases where a state’s agents (e.g. diplomats or members of the armed forces) present on foreign territory exercise control and authority over others, or where, through military action, a state exercises effective control over an area outside national territory.

SUBSTANTIVE RIGHTS AND FREEDOMS

16. Meaning of some technical terms

The following terms used in this guide have a particular meaning in the context of the Convention:

- **Unqualified rights** are rights which cannot be balanced against the needs of other individuals or against any general public interest. They may be subject to specific exceptions, e.g. the right not to be deprived of liberty, Article 5; or to none at all, when they are called **absolute rights**, e.g. freedom from torture, Article 3.
- **Qualified rights** are rights which may be interfered with in order to protect the rights of another or the wider public interest, e.g. the right to private and family life, Article 8.
- **Negative obligations** place a duty on state authorities to refrain from acting in a way that unjustifiably interferes with Convention rights. Most of the Convention rights are framed in this way.
- **Positive obligations** place a duty on state authorities to take active steps in order to safeguard Convention rights. In most cases these are not stated explicitly in the text but have been implied into it by the Court.

Right to life (Article 2)

17. **Paragraph 1** of Article 2 says **“Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally...”** There follows an exception for the death penalty, which is not relevant in states which are party to Protocol 6 (which abolishes it except, if the state’s law so provides, in time of war) or to Protocol 13 (which abolishes it completely). **Paragraph 2** sets out three limited exceptions to the prohibition of intentional deprivation of life.

18. The Court has found the positive obligation on states and their agents to safeguard life requires **preventive measures** in many situations, for example:

- to **protect someone from violence by others**, but only where the authorities knew or should have known of a real and immediate risk and failed to do all that could reasonably be expected to avoid it. For example, this obligation was breached where a prisoner on remand was killed by his cell-mate, another prisoner with a history of violence and mental illness (Edwards v UK). It can also arise where there is a history of domestic violence.

- **effectively** to protect the life of someone under your control
- **to protect someone from self-harm**, for example where detainees are known to be a suicide risk.
- to **protect people living near dangerous industrial sites**, as where a lethal explosion occurred at a rubbish tip which was known to pose an operational risk (Oneryildiz v Turkey), or to guard against foreseeable natural disasters.

19. So the obligation to protect life does not just mean enacting laws, e.g. criminalising unlawful killing. It extends to protecting witnesses and informants, and to those who run prisons, detention centres, care homes and psychiatric institutions protecting those under their care from lethal harm from others or themselves.

20. **Use of lethal force by agents of the state:** Paragraph 2 sets out the limited situations in which the use of lethal force will not be a breach of the right not to be intentionally deprived of life. They are

- (a) to defend someone from unlawful violence
- (b) to effect a lawful arrest or prevent the escape of someone lawfully detained
- (c) in lawful action to quell a riot or insurrection.

21. **These are exhaustive exceptions, not illustrations.** And the state has to satisfy a very high test before resorting to lethal force: it must be **no more than absolutely necessary** to achieve one or more of the authorised purposes and **strictly proportionate to that purpose**. It is not enough to balance the individual right against the public interest. So for example, firing fifty shots during the storming of a suspected terrorist's house went well beyond a justifiable self-defence for the police officers involved (Gul v Turkey 2000).

22. **Obligation to investigate deaths:** this is a procedural obligation on the state, not stated explicitly in Article 2 but implied into it by the Court. The investigation should be set in motion automatically by the authorities. It must be carried out promptly, effectively and publicly, and independently of the agency which used the lethal force concerned. Investigation is also required when death occurs as a result of the acts of private individuals. Responsibility for such investigation will normally be taken at senior level but officials involved at working level need to prepare for this possibility, e.g. by keeping records of information received indicating a risk to life, or details of the watch kept on suicide risks in detention etc., and they must cooperate fully and honestly with any investigation, which otherwise might fall below the standards the Convention requires.

23. The right to life can also arise in cases of **deportation and extradition** if a person is to be sent to a country where there is a real risk of them being subject to the death penalty. Decisions to deport or extradite are normally taken by courts and ministers, but **immigration officers** and others concerned should be aware of the possibility and take advice before sending a would-be immigrant to another state where they might be at such a risk.

Prohibition of torture and inhuman and degrading treatment (Article 3)

24. **Article 3** simply states that “**No-one shall be subjected to torture or to inhuman and degrading treatment or punishment**”.

25. It is an **absolute** right. Unusually among the Convention provisions, there are **no permitted exceptions** or qualifications, nor have any been implied into it by the Court. That

means neither the public interest nor rights of others nor the actions of the victim, however dangerous or criminal, can justify treatment prohibited by the Article.

26. Article 3 has been invoked in many different situations, but the most common context where it arises is **treatment** of persons deprived of their liberty. As a result **police** and others responsible for detainees (**prison officers, immigration officials and persons working in detention centres and secure psychiatric units**) need to take particular care to avoid breaches of the Article. It is wise to make an early assessment of the risk of ill-treatment, especially for vulnerable categories (suspected paedophiles, minority groups etc.).

27. **“Torture”** has been defined as **“deliberate inhuman treatment causing very serious and cruel suffering”**. The degree of suffering is the main difference between torture and inhuman treatment, but it also has to be deliberate, e.g. to extract information or to intimidate. NB The fact that the information might save innocent lives does not justify torture. Examples of acts found by the Court to amount to torture include **rape, threats of harm to family, being kept blindfolded and mock executions**. The suffering can be mental as well as physical. The threshold for torture is evolving: what was not considered torture thirty years ago may be so now, as standards rise (Selmouni v France, which concerned a suspect subjected to physical blows). The same is true of inhuman treatment.

28. **“Inhuman treatment”** must reach a minimum level of severity, and **“cause either actual bodily harm or intense mental suffering”**. It need not be deliberate nor inflicted for a purpose. In the typical case of injuries in custody, where a person is in good health before arrest or detention and is proved to be injured after it, the burden of proof is on the authorities to show force was not used, or was not excessive, or was justified by the victim’s own conduct. Undue restraint during arrest or of a psychiatric patient can also amount to inhuman treatment.

29. **“Degrading treatment”** involves **humiliation and debasement** as opposed to physical and mental suffering. As with inhuman treatment, it does not have to be deliberate. It is most often the **conditions of detention** that are degrading, e.g. dirty and over-crowded conditions over a prolonged period (Kalashnikov v Russia). The same conditions may also be inhuman if severe enough. **Strip searches**, even where justified for security reasons, can be degrading if conducted without respect to a person’s dignity, e.g. in public or in front of the opposite sex. **Solitary confinement** is not necessarily inhuman or degrading, but can be so particularly if prolonged. Absence or refusal of **medical assistance** can be degrading where it causes anxiety or stress or suffering, especially to mental patients. The opposite situation of **compulsory medical intervention** e.g. force-feeding, while not in principle inhuman or degrading, may become so if not medically necessary or carried out without safeguards or respect. Contrast two cases where medical intervention was taken to recover drugs swallowed by suspected traffickers. In Jalloh v Germany an emetic was forcibly administered in order to obtain evidence, despite violent resistance. The way it was done was degrading and carried health risks. A breach of Article 3 was found. In Bogumil v Portugal surgery to remove a parcel of cocaine from the applicant’s stomach was done under medical advice and supervision to save life rather than to obtain evidence. No breach. **The importance of close coordination between detaining officers and doctors in such situations cannot be overstressed.** Handcuffing is not degrading if reasonably necessary, e.g. to prevent escape or injury to others, but can be if the handcuffed person is undergoing hospital treatment or is paraded in public or at trial.

30. **Discrimination**, e.g. on ethnic grounds, when added to evidence of ill treatment, can make a finding of breach of Article 3 more likely, for example where Roma suspects were

treated in a hostile and degrading way by judicial and executive authorities (Moldovan v Romania No 2).

31. **Deportation and extradition:** deporting or extraditing a person to another country where they face a real risk of treatment contrary to Article 3 can result in a breach by the deporting state. As with Article 2, in most cases the decision to deport etc. will be taken at a high judicial or governmental level. But the conditions of return of a deportee are often the responsibility of police or immigration officers. Humane conditions should always be ensured and a person who is medically unfit to travel should not be forced to do so.

32. **Positive obligations under Article 3:** the obligation to **prevent** treatment contrary to Article 3 is mostly a function of government in making laws and regulations. But it can also arise at working level, e.g. where social workers failed to take reasonable steps to protect children from serious and long-term parental neglect of which they were or should have been aware (Z v UK). Where vulnerable groups like children, persons of unsound mind or detainees are concerned, the state's obligation to prevent ill-treatment is strengthened.

33. **Procedural obligation to investigate:** as with the right to life (Article 2), where there is an arguable breach of Article 3, there is an obligation to carry out an independent, effective and prompt investigation. For example, injuries need to be medically examined as soon as possible to establish how they occurred. Police and other officials need to keep good and accurate records of their actions, and if accused of ill treatment, cooperate fully with any investigation.

Prohibition of slavery, servitude and forced labour (Article 4)

34. “**Slavery**” means “**the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised**”. In a case where a young girl brought in from her native country was required to work long hours without payment for a family and to live in their house with no possibility of changing her circumstances, the Court found that she was not a slave (because the family did not “own” her) but she was in **servitude** (Siliadin v France) because her place of residence and her work were forced on her against her will.

35. “**Forced or compulsory labour**” is where a person is required to work or give service under the threat of a penalty. Paragraph 3 of Article 4 lists three situations which are not to be considered forced or compulsory labour:

- (a) work done by prisoners in lawful detention
- (b) military service (or its recognised equivalent)
- (c) work that is part of normal civic obligations (e.g. jury duty).

36. A **positive obligation to investigate** may also arise here, especially in cases of human trafficking and domestic servitude. The investigation must satisfy the same requirements of openness, effectiveness and independence detailed above on Articles 2 and 3 (see para. 23 above).

Right to liberty and security (Article 5)

37. The right not to be deprived of personal liberty without lawful cause is one of the keystones of the Convention system. So Article 5 strongly asserts a **presumption in favour of liberty** at the outset, both positively and negatively: “Everyone has the right to liberty and

security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law..."

38. **Loss of liberty** has two elements: confinement in a particular place for a not negligible length of time, and lack of consent by the detainee. It does not require being physically locked up. At the same time, some instances of control of large numbers of people for safety reasons do not amount to deprivation of liberty under the Article, for example control of crowds at sporting events or on motorways following an accident. The Court has also found, on the particular facts, that Article 5 did not apply when demonstrators, including some violent elements, were for public safety reasons confined by a police cordon in a narrow city area for some hours (Austin and others v UK).

39. The Court has stressed that **protection from arbitrariness** is at the core of Article 5, which gives a right to security as well as liberty and requires that in all cases procedures prescribed by law be followed. So, where a foreign national wanted for murder in State A could not for legal reasons be extradited there, the police arrested him and forcibly took him by car to the border with State B, from where he could be extradited. The Court found the arrest, which was designed to get round the requirements of the extradition law, was arbitrary and contrary to Article 5 (Bozano v France).

40. In contrast to Article 3, the **right to liberty is not absolute** (see para. 17 above); there are obviously legitimate reasons why society may need to deprive people of their liberty in the general interest, especially where their actions pose a danger to themselves or others. So the right is subject to **six specific exceptions**, set out in paragraph 1 sub-paragraphs a to f, which are **exhaustive**. Officials responsible for law enforcement and especially those with powers of arrest and detention have an especially important role to observe strictly the limits set by sub-paragraphs a-f, and submit their actions and decisions promptly to judicial control.

41. The **six exceptions where deprivation of liberty is permitted** are:

- (a) A person can be detained following conviction by a court with authority to decide the case.
- (b) A person can be detained for non-compliance with the order of a court or to secure the fulfilment of any obligation prescribed by law.
- (c) A person can be arrested and detained in order to bring him or her before a court on reasonable suspicion of having committed a criminal offence, or when reasonably necessary to prevent him committing an offence or fleeing after having done so.
- (d) A minor (i.e. under 18) can be detained to ensure he or she receives education or pending non-criminal court proceedings (e.g. to commit the minor into care; criminal proceedings are covered by sub-paragraph c).
- (e) Persons with infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants may be detained.
- (f) A person may be arrested or detained to prevent unauthorised entry into the country or for the purposes of deportation or extradition.

42. In all six situations there is a specific requirement that the detention be **lawful**. That means not only that it must conform to domestic law and procedure which are both accessible

and foreseeable, but also the application of that law must conform to the Convention, i.e. be for a purpose sanctioned in sub-paragraphs a-f.

43. Detention to **secure the fulfilment of a legal obligation** (sub-paragraph b) covers such things as submitting to a road block, a random breath test or an identity check, and other common exercises of police powers. Any detention must be as a last resort, after the person has been given the opportunity to comply voluntarily. It must also be proportionate, and with the aim of securing compliance, not of punishment.

44. **Arrest and detention on suspicion of committing a crime** (sub-paragraph c) is the most common exceptional situation, and the one where problems most often arise. Arrest must be on **reasonable suspicion** with an intention to bring charges rather than to fish for information, which might lead to charges. But the Court accepts that a period of time for interrogation is permissible, which can be longer in some cases e.g. where terrorism acts are suspected, because of the difficulty of obtaining hard evidence on which to base charges.

45. The Court has not defined **“unsound mind”** (sub-paragraph e), because medical opinion and practice is always evolving. The only safe course for officials, therefore, is only to detain people (and keep them in detention) on authoritative, objective and recent medical advice. The place and conditions in which such persons are held must also be appropriate to their situation. Placing a person of unsound mind in a social care home can also amount to a deprivation of liberty.

46. In dealing with **persons of unsound mind, alcoholics, vagrants and drug addicts** (sub-paragraph e) the Court requires a **proportionate** response to the person’s behaviour. In a case where someone who was intoxicated got into an argument in a post office, the police took him to a sobering-up centre and kept him there for over six hours. There was no evidence that he was a danger to others or himself, nor did he have a history of alcoholism. There were other options open to the police (e.g. taking him home to sober up). The Court said, “detention of an individual is such a serious matter that it is only justified where other, less severe measures have been considered and found insufficient to safeguard the individual or public” (Witold Litwa v Poland)

47. Detention pending **deportation or extradition** (sub-paragraph f) can be in a detention centre specially set up for fast-track processing of such cases, but only for a short period (seven days was ruled acceptable in Saadi v UK). Detention can take place outside any recognised place of custody: a breach was found where asylum seekers were confined for to a transit zone in an airport for twenty days, after which they were deported. In theory they were free to leave but in practice they had nowhere to go and no legal or social assistance. The guarantees of Article 5 had not been applied. (Amuur v France)

48. **Paragraph 2** of Article 5 requires that **a person who is arrested must be informed promptly, in a language he or she understands, of the reasons for his or her arrest and any charge against him or her.** It is an elementary safeguard for a person to be told why he or she has been arrested, in simple and non-technical language, so that he or she can deny the offence or challenge his or her detention, if necessary in court (see Article 5(4) below). The understandable language required may be a foreign language or, for example, sign language if the arrested person is deaf. What satisfies the **“promptly”** requirement can vary according to the circumstances of the case, but the Court has indicated it will expect the information to be given to the detainee “within a few hours of his arrest”. Similarly, the **degree of detail** required can vary: in some cases of suspected terrorism the Court has accepted that the reasons can be brief and less specific than in normal cases, to avoid disclosing too much of

what is known and not known to the authorities. In rare cases the information may be given to the arrested person's representative (e.g. where that person's mental state precludes them understanding).

49. **Paragraph 3** requires that a person arrested on suspicion of committing an offence **be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release pending trial**. This must happen automatically; the detainee does not have to apply for it (unlike paragraph 4, below). The person before whom the detainee is brought can be a judge or magistrate, or another judicial officer provided that person is independent of the authorities and the parties and is impartial. The point is that the person have competence to conduct a review on the merits, ascertain the reasons for arrest and detention are sufficient and order release if they are not. What satisfies "**promptly**" can again vary, but normally it should be the next day. The Court has treated four days as a maximum, although shorter periods may also be contrary to the Convention. The decision on **bail** may be taken then or shortly thereafter. The Court requires that detention pending trial be shown to be necessary (e.g. if there is a serious risk of the detainee absconding), based on proper examination of the circumstances of each individual case in accordance with the general presumption in favour of liberty. Getting the case to trial within a reasonable time will involve prosecutors and the courts as well as the police. All of them have to work together to that end.

50. **Paragraph 4** is the "**habeas corpus**" provision of the Convention, giving a person arrested or detained the right "**to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful**". This right cannot be used to contest imprisonment as part of a criminal sentence (Article 5(1)(a)). The proceedings have to be adversarial and the two sides must have equality of arms, which implies that detained persons and their representatives must have access to the core documents, on which basis detention is requested. "Speedily" implies that there should be no undue delay in bringing proceedings to the court (e.g. delay in translating the documents used in court proceedings). If detention has been ordered by a court, that will usually satisfy this right. The right normally entails a right periodically to initiate a review of the lawfulness of detention.

51. **Paragraph 5** guarantees a **right to compensation for everyone who has been the victim of arrest and detention in contravention of the provisions of Article 5**. Ensuring this right will fall to others than the officials whose job includes powers of arrest and detention, but it is a powerful incentive to those officials to respect the rights given by Article 5. Failure to do so can cost the state a lot of money.

Right to a fair trial (Article 6)

52. The key provision of Article 6, in the first sentence of Paragraph 1, is that "**In the determination of his civil rights and obligations or of any criminal charge against him, anyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law**".

53. Fair trial is a fundamentally important guarantee in any democratic society, so this Article is one of the most important, and most frequently invoked, provisions of the Convention. There are more cases about fair trial than about any other issue. Responsibility to ensure a fair trial falls far more on judges, public prosecutors and lawmakers than on the officials dealing directly with the public for whom this toolkit is designed. But **police** (who can in some systems act as prosecutors) and **prison officers** have responsibilities in criminal

cases and other officials – **court officials, social workers, licensing officials and registrars** - also can have responsibilities in civil cases.

54. Because the Convention has to apply to many states, whose legal systems differ substantially, many of the terms in the Article have been given their own “autonomous” Convention meaning by the Court. This applies, e.g., to “criminal”, “charge” and “civil right”. These terms will not always mean the same as they do in national systems.

Civil proceedings

55. In principle, Article 6 applies broadly to all civil disputes, with some long-standing exceptions. In practice it is simplest to list some of the cases to which the Court has said Article 6 will apply and others to which it will not, but, NB, the lists which follow are not exhaustive and practice is always developing:

Disputes to which Article 6 has been applied:

- property disputes e.g. planning disputes
- licensing decisions e.g. the right to practise a profession or sell alcohol
- family proceedings, e.g. adoption, fostering, cross-border return of children and placing a child in care
- claims for compensation against public authorities including hospitals
- welfare benefit claims so long as there is a right, i.e. the benefit is not purely discretionary
- disciplinary proceedings against judges and employment disputes of public officials

Disputes to which Article 6 has been held not to apply:

- immigration and nationality disputes
- taxation disputes between taxpayer and revenue authorities
- election rights, e.g. the right to stand for elected office.

56. In all civil cases to which it applies, Article 6(1) **expressly** requires:

- a **public hearing**, subject to some exceptions, for example to protect children in family cases
- an **independent and impartial tribunal** i.e. one that is independent of the authorities and parties and is unbiased
- trial **within a reasonable time**
- a **publicly pronounced judgment**, i.e. publicly available, not necessarily pronounced in open court

57. The Court has also **implied into Article 6(1)** the following rights:

- **Access to court** (both physical and procedural)
- **Legal representation** in civil cases (paragraph 3(c) already gives this right in criminal cases, see below)
- **The right to participate effectively** e.g. through adversarial proceedings, with evidence available to one side disclosed to the other, and equality of arms, i.e. a proper opportunity for both sides to present their case

- **The obligation on the court to take both parties' cases fully and equally into account**
- **The right to a reasoned judgment/decision**
- **The obligation on the State to execute a civil judgment in a timely and effective manner**
- **Legal certainty**, including the finality of judicial decisions.

58. The main impact on public officials is to **put those dealing with civil disputes covered by Article 6 on notice that they must ensure the fair trial rights are respected, either at the time of the administrative decision or will be respected later in judicial review**. These include social workers dealing with cases of adoption and placing children in care etc.; planning officers deciding on planning applications; licensing authorities and professional bodies dealing with licences to practise etc.; welfare officials dealing with claimants; and so on.

Criminal proceedings

59. For trials that determine a criminal charge, the procedural safeguards are stricter than for other judicial proceedings. The notion of 'criminal' has a specific meaning under the Convention and may extend to disciplinary, administrative or fiscal proceedings if they may lead to punishment of the person concerned.

60. In addition to the rights given by paragraph (1), people charged with a criminal offence have the following further specific rights, set out in paragraphs (2) and (3) a-f:

- **Presumption of innocence (paragraph 2)** A person is innocent until proven guilty according to law. There is a right to silence and not to incriminate oneself. So public officials may breach this right if they state or imply publicly, e.g. to the media, that a person is responsible for a crime before a court has found him or her so. The provision does not however prevent preliminary tests like blood or urine tests nor orders to produce documents.
- **Prompt and intelligible information of the nature and cause of the accusation against him or her (paragraph 3(a))** This is similar to the right in Article 5(2) (see above) but the purpose is different; in Article 5 it is to enable the person to challenge his or her arrest and detention, in Article 6 to prepare his or her defence. The task will normally fall to the police, court officials or prosecution officials. The person must be able to understand the information, including, if necessary, by being provided with a translation (at state expense, see paragraph 3(e) below). Where the accused has a disability (e.g. blindness, deafness or mental illness) which makes it hard for him or her to understand, other special assistance to him or her may be required).
- **Adequate time and facilities for the preparation of his or her defence (paragraph 3(b))** The time will vary with the complexity of the case, but the facilities will always need to include, for prisoners on remand, visits by their lawyers, who must be able to have confidential discussions, out of earshot of police or prison officers.
- **The right to defend him/ herself in person or through legal assistance of his or her own choice, provided free where the interests of justice so require (paragraph 3(c))** Similar issues of access by lawyers to the accused apply here. The Court has held the legal assistance must be practical and effective including at the pre-trial stage as well as in court. Thus, where a high-profile prisoner was interrogated for nearly seven days without being allowed access to his lawyer, there was a breach, because his defence risked being irretrievably prejudiced. In the same case, because the files were

so big, two one-hour visits a week were not enough to allow the defence to be prepared (Öcalan v Turkey). As before, consultations need to take place out of earshot of officials. As a rule, the assistance of a lawyer needs to be provided as from the first interrogation by the police.

- **The right to examine prosecution witnesses and call witnesses in his or her defence (paragraph 3(d)).** Where a witness's evidence is decisive as to the guilt of the accused, the latter must be given a chance to cross-examine that witness, if necessary with legal assistance.
- **The right to an interpreter, provided free, if he or she cannot understand or use the language used in court (paragraph 3(e)).**

61. As is evident from the above, in criminal cases the role of **police and prison officers in respecting and protecting rights is much greater than in civil ones. In addition to the examples given, the length of time cases take will depend in part on the efficiency of police investigations. The Court includes the investigatory phase when assessing if the time taken is reasonable.**

No punishment without law (Article 7)

62. This provision **forbids retrospective application of the criminal law.** It includes the right not to be tried or punished for an act which was not a criminal offence at the time it was done. **Police need to be careful to ensure that offences and penalties were in force at the time of the acts in respect of which they arrest and charge people.** Again, it should be noted that the notion of 'criminal' has a specific meaning under the Convention and may extend to disciplinary, administrative or fiscal proceedings if they may lead to punishment of the person concerned.

Articles 8-11

63. These four articles, respectively on **respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association** have several **common features**:

- They are all **qualified rights**
- They share a **two-paragraph structure**, in which paragraph 1 states the right and paragraph 2 sets out the circumstances in which interference with it may be justifiable
- The second paragraphs vary in detail but have **three common requirements for an interference with the right to be justified.**

64. **First** the interference must be **in accordance with the law.** "Law" includes primary and secondary legislation, common law and EU law for states which use those systems, and rules of professional bodies, universities etc. The law must be established in the national system. It must also be **accessible**, i.e. publicly available, and **foreseeable**, i.e. sufficiently precise to allow someone to regulate their behaviour to comply with the law. In one of several cases on telephone tapping, the Court found that a law did not contain sufficiently clear and detailed rules especially given the seriousness of the interference and the increasing sophistication of the technology (Kruslin v France).

65. **Second** the interference must **pursue a legitimate aim.** All the second paragraphs set out lists of specific permitted aims, which vary from article to article, such as "prevention of

crime”, “protection of public order, health or morals” or “protection of the rights and freedoms of others”.

66. **Third** the interference must be “**necessary in a democratic society**” to pursue the aim in question. “Necessary” means neither “indispensable” at one extreme nor merely “reasonable” at the other. It means the government has to establish that there was a “**pressing social need**” for the interference and that it was **proportionate to the aim pursued**. Despite the word not appearing in the Convention text, proportionality is at the heart of how the Court has interpreted it. So, even if an action or policy pursues a legitimate aim, it is not permissible if the means used are excessive, arbitrary or unfair. Essentially the Convention requires national authorities to balance the individual’s rights against the public interest; it may also be a matter of striking a balance between competing individual rights. The Court has recognised that it is primarily for national authorities to safeguard human rights and strike the right balance, and that they are in principle better placed than the Court itself to assess the necessity for an interference. Hence it has developed a principle that states enjoy a discretion in this area, which it calls the “**margin of appreciation**”, recognising that, as social and other circumstances differ, so may local solutions. This latitude is, however, limited, and is subject always to the supervision of the Court. It will be stronger if practice across Europe varies widely than if there is a consensus which is out of line with the individual state’s policy or practice. In the nature of things, social attitudes change, and the decisions of the Court evolve along with those attitudes.

Right to respect for private and family life (Article 8)

67. Under **paragraph 1 everyone has the right to respect for his or her private and family life, home and correspondence**. All these terms have been given an expansive interpretation by the Court, going beyond their ordinary meaning under many national systems. Officials need to be aware of this and not assume that the Convention meaning will be the same as what they are used to.

68. “**Private life**” is much wider than privacy (which is mainly about rights to confidentiality and seclusion). It covers, among other things, personal identity; sexual orientation and activity; gender identity; data protection; freedom from noise or toxic emissions; and freedom from harassment.

69. “**Family life**” similarly is a wide concept under the Convention, going well beyond a traditional married couple with children. It covers unmarried couples (provided there is evidence of a settled long-term relationship); same sex couples and transsexuals; near relatives such as grandparents and grandchildren; and siblings. The issue is, does evidence of close personal ties exist? It has often been applied in deportation cases to allow persons with family ties to remain even where they have committed crimes or overstayed their entry permission.

70. “**Home**” requires a victim to show sufficient and continuous links with the place where they live, but it need not be occupied by them at all times; it can be temporary (like a caravan) or business premises, and sometimes occupied illegally or in contravention of a planning decision. The right protects the peaceful enjoyment of living in the home, free from unauthorised entry and also from nuisances like noise and other pollution.

71. “**Correspondence**” covers not only letters (especially from prisoners) but telephone conversations, emails and texts.

72. **“Respect”** involves both **negative and positive obligations**. Negatively, it is an obligation not to interfere with the rights arbitrarily. Positively, it may involve the adoption of measures designed to secure respect for private and family life not only in relations between the state and the individual but also in the sphere of relations between individuals. So, in a series of cases concerning transsexuals, the issue has not been that the states have prevented gender reassignment surgery (in fact they facilitated it), but that thereafter they refused to alter personal documents like birth certificates to reflect the new identity. This was a breach of their positive obligation to respect private life (Goodwin v UK). Cases concerning environmental pollution also concern mostly the positive obligation. Furthermore, in all actions concerning children, the best interests of the child are a primary consideration.

73. **Paragraph 2** follows the pattern explained above, permitting no interference with the right except such as is in accordance with the law and necessary in a democratic society for a legitimate aim. In Article 8 the permitted aims are:

- **In the interests of national security, public safety or the economic well-being of the country**
- **For the prevention of disorder or crime**
- **For the protection of health or morals, or**
- **For the protection of the rights and freedoms of others.**

74. Each time an interference is claimed, there has to be an assessment based on **three questions**:

- **Is it in accordance with the law?**
- **Does it pursue a permitted aim?**
- **Is it necessary in democratic society to fulfil that aim, i.e. not excessive, arbitrary or unfair?**

75. An **example** of how this works: in a case concerning the collection and retention of personal data by the police, the applicants were charged with offences and DNA samples and fingerprints were taken. Later they were either acquitted or the charges were dropped, but the samples were retained. The retention was provided for by law and pursued a permitted aim, the prevention of crime. But the Court found it failed the “necessary in a democratic society” test because it was disproportionate, as a blanket provision, which did not permit exceptions where people were suspected of offences but had subsequently been acquitted (S and Marper v UK).

76. **Officials need to ask themselves the same questions before they interfere with Article 8 rights**, to make sure they do not infringe them without justification. This article is one of those most often breached by action at working level. It is impossible to cover all the many ways it has been applied. The following are **examples** (based on decided cases) of **some of the situations where care by particular groups of officials is most needed (NB these are not exhaustive)**:

Police: searching someone’s home; taking or retaining physical samples or documents.

Security services: tapping a person’s phone; bugging their home or business premises, retaining data.

Prison officers: monitoring or interfering with prisoners' correspondence, especially with lawyers or courts; searches of visitors for drugs etc.; interference with visiting rights; imposing sanctions on serving prisoners.

Registrars: applying restrictions on choices or changes of name; changing civil status documents after gender-reassignment.

Social workers: taking children into care; placing them for fostering or adoption (need to inform and consult with natural parent(s), avoid delays that create irretrievable changes in relationships etc.); facilitating contact of a child with his/her parent who has not been granted custody.

Local government officers: applying planning laws where peoples' homes and family lives are affected; using CCTV footage publicly where a person's identity can be revealed; managing plant which can cause pollution by noise or toxic emissions (e.g. waste treatment works).

Medical practitioners: treatment requiring informed consent.

Immigration officials: dealing with cases of prospective deportees (e.g. illegal over-stayers, convicted criminals at the end of their sentences) who have family ties in the country.

The above are not situations where Article 8 will necessarily impede the action in question, but where care is needed to ensure justification and proportionality. In several cases, officials may need to check that necessary judicial authorisation has been obtained.

Freedom of thought, conscience and religion (Article 9)

77. **Paragraph 1** is in two parts:

- An **unqualified right to freedom of thought, conscience and religion, which includes the freedom to change one's religion or belief.**
- A **qualified right to manifest one's religion or belief**, alone or with others, publicly or in private, in worship, teaching, practice and observance.

Only the second right is subject to the qualifications in paragraph 2.

78. The Court has avoided defining "religion and belief" and has accepted many as qualifying – not just well-established world faiths like Christianity, Judaism and Islam but newer ones like Jehovah's Witnesses and Scientology. Among beliefs it has accepted pacifism, veganism and opposition to abortion but not advocacy of assisted suicide.

79. Generally it is **direct** manifestations of religion or belief that are protected, for example wearing a cross, turban or Islamic veil or having a kosher diet, not **indirect** ones like distributing pacifist leaflets to soldiers, as opposed to proclaiming pacifist principles.

80. **Paragraph 2** is in the common form explained above (on Articles 8-11 – see paras. 73-75 above).

81. Any restriction of the right must be **prescribed by law**. Thus, where officials broke up a meeting of Jehovah's Witnesses on lawfully rented premises with no legal authority, there was a breach (Kuznetsov v Russia).

82. The legitimate aims listed are **public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others**.

83. **Restrictions which have been upheld include:**

- Forbidding a nurse from wearing a cross which could pose a health risk to patients
- Curbs on religious dress, especially the wearing of the Islamic veil in schools or universities, where the Court has given a wide discretion to governments on grounds of the rights and freedoms of others
- Forbidding a prisoner from conducting religious rituals which disturbed others

84. **Restrictions not upheld include:**

- A person prosecuted for "proselytism" when he was merely seeking to persuade others of the virtues of his beliefs
- An airline check-in clerk who was not allowed to wear a cross because of company policy
- Refusing to grant a prisoner's request for a meat-free diet

85. **Issues of belief and its manifestation are often controversial and sensitive, especially in an increasingly pluralist society. Officials need to be sure they have clear legal authority before applying restrictions, as well as a legitimate aim proportionately applied.**

Freedom of expression (Article 10)

86. **Paragraph 1 states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."**

87. Freedom of expression is a **cornerstone of democracy** and key to the enjoyment of many other rights. The right protected is very widely drawn, going far beyond the freedom of the press. It covers political speech, commercial speech and artistic expression. The Court has stressed its constitutional importance and said **interference can be justified only by imperative necessities and exceptions must be interpreted narrowly**. It has also said expression protected by Paragraph 1 includes **"not only ideas that are favourably received or regarded as inoffensive... but also those that offend, shock or disturb the State or any sector of the population."** So opinions that might be regarded as extreme and offensive and art that might be considered obscene may in principle be expressed and displayed, subject to the qualified exceptions in paragraph 2, which are to be interpreted narrowly. **The presumption is in favour of free expression.**

88. **Paragraph 2** sets out the qualifications to the right, in the common pattern explained above, requiring restrictions to be (i) prescribed by law, (ii) for a permitted purpose and (iii) necessary in a democratic society, proportionate and non-discriminatory (see paras. 73-75

above). But this article also recognises that the exercise of freedom of expression “carries with it duties and responsibilities”. These words have been used by the Court, for example, to justify restrictions on public servants’ participation in political activities (Ahmed v UK).

89. The permitted aims for restrictions, formalities, conditions or penalties are:

- **National security, territorial integrity or public safety**
- **Prevention of disorder or crime**
- **Protection of health or morals**
- **Protection of the reputation or rights of others**
- **Preventing the disclosure of information received in confidence**
- **Maintaining the authority and impartiality of the judiciary.**

90. Few of the many cases decided on freedom of expression have complained of the actions of police or other officials dealing directly with the public. Usually the complaint concerns either the national laws applied, or the actions of senior officials, prosecutors or the courts in deciding to forbid the expression of unwelcome opinions or ideas or prosecute and convict people for expressing them. **For the police the safest course is to err on the side of permitting free expression and only restricting it where strong reasons for doing so for one of the stated aims exist, and where the restriction is proportionate and non-discriminatory.** Even where the ideas concerned are extreme, suppressing them requires strong justification. Great care should also be taken in issuing and executing search warrants of newspaper publishers’ premises; journalists have the right to protect their sources.

Freedom of assembly and association (Article 11)

91. Article 11 guarantees two rights to act collectively with others.

92. **Freedom of assembly** includes public or private meetings, marches, processions, demonstrations and sit-ins. The purpose may be political, religious or spiritual, social or another purpose; no limit has been imposed on purpose, but any assembly **must be peaceful**. Incidental violence will not mean an assembly forfeits protection unless it had a disruptive purpose.

93. **Positive obligations:** the state has a duty to protect those exercising their right of peaceful assembly from violence by counter-demonstrators. In one case the police had formed a cordon to keep rival demonstrators apart but failed to prevent physical attack and damage to property. The Court found they had not done enough to enable a lawful demonstration to proceed peacefully (United Macedonian Organisation Ilinden and Ivanov v Bulgaria).

94. **Restrictions or bans on assemblies require justification under Paragraph 2**, which is in the common form explained above, requiring restrictions to be (i) prescribed by law (ii) for a permitted purpose and (iii) necessary in a democratic society, proportionate and non-discriminatory (see paras. 73-75 above). The permitted purposes are:

- **National security or public safety**
- **Prevention of disorder or crime**
- **Protection of health or morals**
- **Protection of the rights and freedoms of others**

95. Authorities have substantial discretion in assessing whether a proposed assembly poses any risk of endangering public safety etc., which could justify interference, but the **presumption must be that a peaceful assembly be allowed**. It is not a breach to require prior notification or authorisation but refusing permission is an interference, which requires justification by the strict standards of paragraph 2. There can be a breach even if the assemblies went ahead in defiance of the refusal (Baczkowski v Poland).

96. The authorities need to be careful that restrictions are **non-discriminatory**. The fact that organisers are an unpopular group of individuals is not a sufficient reason to prevent their assembly. So, where an evangelical church was refused permission to hold a service in a park because it might cause discontent among the followers of the majority religion in the area, there was a breach. The role of the authorities in such situations had to be informed by “pluralism, tolerance and broadmindedness”. The same principles would apply to minority ethnic or political groups, or to other minorities like lesbians, gays, bisexuals and transsexuals (LGBT) wishing to hold marches and demonstrations.

97. As decisions on whether to allow demonstrations etc. are usually for **police**, this provision is very important. The key will usually be the **risk of violence**, intentional or not. Its presence may justify restrictions; its absence means restrictions are very unlikely to be justifiable.

98. **Freedom of association** is the right to associate with others to form bodies in which to pursue common objectives collectively. It specifically includes the right to form **trade unions** for the protection of members’ interests. As well as trade unions, two sorts of associations of particular importance are **political parties** and **religious bodies**.

99. Bans or restrictions on **political parties** are hard to justify. The Court has stressed that a plurality of parties is important for a democratic society and will require convincing and compelling reasons for a ban. The fact that a party’s programme wanted to debate the situation of part of the state’s population did not make it acceptable to ban it for threatening territorial integrity (United Communist Party of Turkey v Turkey). Similar considerations apply when registration as a political party is refused, which operates like a ban.

100. With **religious groups**, Article 11 read with Article 9 creates an expectation that believers will be able to associate freely, without state intervention. As with political parties, there is a duty of neutrality and impartiality. A refusal without good reason to re-register a church after a change in the law was in breach of Article 11 (Moscow Branch of the Salvation Army v Russia).

101. **Trade unions** have the right to bargain collectively and to enter into collective agreements (Demir and Baykara v. Turkey). The Court has treated restrictions on industrial action as interferences with freedom of association which the State is required to justify under paragraph 2. By a **specific exception to paragraph 2**, the exercise of Article 11 rights may be restricted for members of the armed forces, of the police or of the administration of the state. Any such restriction will be strictly construed by the Court.

102. Most cases on freedom of association complain of the laws of a state or the actions of senior officials or courts. But **police and registration officers** dealing with prospective or existing associations, especially trade unions and political parties and religious bodies, need to be aware of the duty of impartiality and the need for restrictions to be justified by compelling reasons.

Right to marry (Article 12)

103. **Article 12** says “**Men and women have the right to marry and to found a family according to the national laws governing the exercise of this right.**”

104. This only applies to marriage, not to cohabitation or civil partnerships. It also only applies to heterosexual marriage: the Convention does not require a state to grant same-sex couples the right to marry. But transsexuals may marry in their new gender. Marriage laws may vary from state to state, e.g. on issues like marriage with relatives as well as same-sex marriage.

105. Issues under this Article are unlikely to arise for police, but more likely for **registrars**, and for **prison officers**. Although recognising the right of prisoners to marry, the Court has nevertheless not found a right to conjugal visits for prisoners in Article 12 to enable them to found a family (but more than half the member states allow this). Cases of separation of spouses under deportation or immigration rules will usually be dealt with under Article 8, not Article 12.

Right to an effective remedy (Article 13)

106. **Article 13** requires the provision of effective national remedies for the breach of a Convention right.

107. Claims under this Article will usually involve the Court examining the domestic legal regime to see if it gives a remedy in the circumstances and whether that remedy is effective, so it essentially concerns lawmakers and the courts rather than officials dealing with the public. The Article specifically requires a remedy “notwithstanding that the violation has been committed by persons acting in an official capacity”, so **national laws giving immunity to public officials are contrary to the Convention.**

Prohibition of discrimination (Article 14)

108. **Article 14** requires that “**The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**”

109. Article 14 does **not give a free standing right**. It can only be used **in conjunction with another right** given by the Convention (or Protocols, if ratified). It may, however, be breached when read with that other right even if the other right on its own is not breached. NB Protocol 12 gives a free-standing right in the same terms as Article 14, which should make it more widely applicable, but it is not yet ratified by many states (see below).

110. **List of grounds not exhaustive:** The words “such as” and “or other status” flag up that the list is only illustrative. The Court has also recognised, for example, **conscientious objection, disability, illegitimacy and sexual orientation** as prohibited grounds of discrimination, and may add more.

111. **Discrimination is harder to justify on some grounds than on others:** though all the grounds are important, the Court has said it will require particular weighty reasons to justify discrimination on grounds of sex, sexual orientation, race, colour, nationality (except in regard to immigration), illegitimacy and religion.

112. **What is discrimination?** It is **treating people in analogous situations differently, or people in different situations alike, without objective and reasonable justification**. So, not all differential treatment is discrimination. A prisoner and a free person, for example are not in analogous situations, so different treatment may be justified. To illustrate the two main situations, where a lesbian was not allowed to adopt a child solely because of her sexual orientation, while other unmarried people were allowed to, there was a breach (people in analogous situations treated differently) (EB v France). Conversely, where a Jehovah's Witness who had been convicted of refusing to wear a uniform was denied the right to qualify as an accountant because of a previous conviction, there was also a breach, because he, with a very minor conviction, was treated the same as people in very different situations, with convictions for dishonesty and fraud (Thlimmenos v Greece).

113. **“Objective and reasonable justification”** are not words found in the Article; they have been implied into it by the Court, which treats them in a similar way to the permitted exceptions in the second paragraphs of Articles 8-11; that is the burden is on the state to prove the justification, which must also be proportionately applied (see paras. 73-75 above).

114. **Violence motivated by discrimination** is particularly serious and important for agents of the state authorised to use force (e.g. **Police or armed forces**) to avoid. In a case of an assault by police on a Roma individual during racial confrontations in a village the Court found a breach because there was evidence that the attack was racially motivated (Stoica v Romania). In another case, where two Roma conscripts were shot by police, the Court found no breach of Article 14 read with Article 2 because there was insufficient evidence of racial motivation, but there was a breach of a **procedural obligation** on the state to investigate properly cases where violence used by its agents might be motivated by discrimination (Nachova v Bulgaria). State toleration of discriminatory violence used by private persons can also be a breach, as where a congregation of one religious group was violently attacked by followers of another and the authorities refused to intervene to stop it and were indifferent to prosecuting the perpetrators (97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v Georgia).

115. **Indirect discrimination** is where a generally applicable law or policy has a disproportionately adverse effect on members of a particular group, even if there is no discriminatory intent. So a breach was found where a disproportionately high number of children from an ethnic group were sent to special schools for the less able, even though the policy was of general application. The problem was with how the policy had been applied (DH v Czech Republic).

116. **Discrimination on any of the grounds identified in Article 14 or by the Court can arise in almost any instance where officials deal with the public in relation to areas within the ambit of the Convention rights and freedoms. Great care and vigilance are needed by all officials to refrain from differential treatment that amounts to discrimination.**

Right of individual application to the Court (Article 34)

117. This is a **procedural** provision guaranteeing the right of any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of their rights under the Convention or its protocols to introduce an application before the Court. “Any individual” includes persons of unsound mind and minors. It is included here because it contains a substantive obligation on states **“not to hinder in any way the effective exercise**

of this right". This is particularly important in the case of individuals deprived of their liberty. No obstacle may be put in the way of them taking an application to the Court.

118. The Court also has power to indicate to a defendant state **interim measures** which it should take to preserve the current position, including the applicant's ability effectively to exercise the right of individual application, pending the Court's determination of the case. It will only do this where it considers that there is a real risk of serious, irreparable harm if the measure is not applied. Interim measures are thus similar to injunctions issued by national courts. States normally have an obligation to comply with them. They are most frequently issued where an applicant is challenging deportation or extradition on the ground that he or she would face a risk of ill-treatment in the destination state. If a state does not implement an interim measure ordered by the Court, for example by nevertheless removing a person to another country, this may amount to a violation of the obligation under Article 34.

PROTOCOL 1

Protection of property (Article 1)

119. This article lays down a general rule followed by two specific rules to protect the right to property.

General rule: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."

120. "**Possessions**" includes shares, patents, licences, leases and welfare benefits (provided they are enjoyed by legal right, not by discretion). In many cases concerning property expropriated under previous regimes in Eastern Europe it has been crucial whether the applicant's right survived in national law; a mere hope of restitution is not enough.

121. "**Peaceful enjoyment**" includes the right of access to the property. There can be positive obligations on the state to protect enjoyment of property rights, e.g. by properly maintaining dangerous installations near homes.

122. In cases of interference with property rights that do not obviously fall under one of the two specific rules set out below, the Court has applied the general rule and implied into it a test of "fair balance" between the individual and the general interest (see below).

First specific rule: Deprivation of property

123. Deprivation is only permitted if it is:

- Lawful
- In the public interest
- In accordance with the general principles of international law
- Reasonably proportionate ("fair balance" test)

124. States have a wide discretion over what is "in the public interest". Provided a legitimate aim is pursued e.g. social justice, it is acceptable that some people should get a windfall and others lose out.

125. The **“fair balance test”** applied by the Court is less stringent than the test of “necessary in a democratic society” found in Convention Articles 8-11. It requires the state to show it has struck a fair balance between the person’s right and the public interest. That will not be achieved if the individual (or company) has to bear an excessive burden, or where he or she has no or few procedural avenues to challenge the deprivation.

Second specific rule: Control of property

126. Under **paragraph 2** states may **“control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”**

Controls can involve, for example:

- Confiscation or forfeiture of assets by the courts or the revenue or customs officers
- Requirements to use property in a particular way, such as planning or rent controls
- Withdrawal of a licence, e.g. to sell alcoholic drinks

127. The control must be

- Lawful
- In the general interest or to secure the payment of taxes or penalties
- Respecting a “fair balance”

128. The discretion of the state under this rule is even wider than under the first rule: the laws the state may enforce to control use of property are those “it deems necessary” for that purpose. Applicants need to show they were required to shoulder an excessive burden, as where a rent-control scheme in force for eleven years imposed very severe restrictions on private landlords (Hutten-Czapska v Poland).

Duties of public officials

129. Action to confiscate or otherwise interfere with property rights is usually taken by lawmakers, senior officials and courts, but **customs and revenue officers, licensing authorities, rent control officers and other public officials** may also exercise powers in this area. They need to ensure

1. They have a legal basis for their action
2. It pursues a public interest
3. It strikes a fair balance between the individual and the general interest.

Right to education (Article 2)

130. **“No person shall be denied the right to education”**, which is in practice a right to access to such education as the state has undertaken to provide, and as regulated by that state. Regulations may, for example, make education compulsory up to a certain age, permit (or ban) home schooling, and allow schools to exclude unruly pupils. The Article does not require any particular system of education, still less access to a particular school. It is neutral as between public and private education and has been interpreted to guarantee freedom to establish private schools.

131. Education that is provided, whether public or private, must respect parents' religious and philosophical convictions. But so long as the curriculum and tuition are objective and pluralistic, the fact that it may conflict with some parents' convictions is not a breach.

Right to free elections (Article 3)

132. Rather than asserting rights, this Article puts an obligation on the states to “**hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the electorate in the choice of the legislature**”. But the Court has derived from this obligation a **right to vote** and a **right to stand for election**.

133. The Article does not require any particular electoral system and the states have a wide discretion in how they regulate elections, including the conditions to be fulfilled by would-be candidates for office. The principle of universal suffrage, however, is very strong and states will be strictly required to justify the loss of the vote by individuals or categories of persons, for example prisoners.

PROTOCOL 4

Prohibition of imprisonment for debt (Article 1)

“No-one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.”

134. The “**merely**” clause is important: the article does not forbid imprisonment where there is some extra element like fraud or negligence. What it does prevent is imprisonment solely on the ground of failing to pay a contractual debt or fulfilling some other contractual obligation.

Freedom of movement (Article 2)

135. This contains two rights:

- 1. Everyone lawfully within a state's territory may move freely within that territory and choose their residence there;**
- 2. Everyone may leave any country including their own.**

136. Restrictions on these rights are allowed under similar conditions to those for Convention Articles 8-11, i.e.

- In accordance with the law
- Necessary in a democratic society for specific aims, namely
- In the interests of national security, public safety and public order; prevention of crime; protection of health and morals; protection of the rights and freedoms of others.

137. “Everyone” includes non-nationals, as in Convention Article 1.

138. Restrictions on free movement are less severe than the deprivation of liberty dealt with in Convention Article 5. They can include things like house arrest, curfews, confinement to or exclusion from a particular town or area of country and obligations to report regularly to the

authorities. Acceptable reasons for imposing such restrictions include the risk that a suspect may abscond abroad, or divulge state secrets or meet with criminal (e.g. Mafia) associates.

139. Any restriction must be proportionate to the permitted aim pursued. In several decided cases restrictions on free movement, which had started off as justifiable, became unjustified when they were continued for several years (e.g. Labita v Italy).

140. Restrictions on free movement are usually imposed by courts but administered by the **police**, who need to be careful to monitor that the initial justification is and remains valid.

Prohibition of expulsion of nationals (Article 3)

141. **This is an absolute and unconditional right for a person not to be expelled from the territory of a state of which he or she is a national.**

142. Expulsion does **not include extradition**. It occurs where a person is obliged permanently to leave the territory of a state of which he or she is a national without being left the possibility of returning later. Whether someone is a “national” for the purpose of this provision will be determined by the national law of the state concerned.

Prohibition of collective expulsion of aliens (Article 4)

143. **This is an absolute and unconditional prohibition of the collective expulsion of aliens.**

144. “Expulsion” means the same as in article 3 above. Expulsion of a group will not be “collective” if the authorities have reasonably and objectively examined the case of each individual in the group.

PROTOCOLS 6 AND 13

Abolition of the death penalty

145. Protocol 6 abolishes the death penalty in peacetime but allows states to provide for its imposition in time of war or threat of war. Protocol 13 goes further and abolishes it altogether.

PROTOCOL 7

Procedural safeguards relating to expulsion of aliens (Article 1)

146. This guarantees that **an individual non-national lawfully resident in the territory of a state shall not be expelled except by a lawful decision and subject to a right:**

- To submit reasons against his or her expulsion
- To have his or her case reviewed
- To be represented for this purpose before the competent authority.

147. “Expulsion” means the same as in Protocol 4 Article 3, i.e. it does not cover extradition. It does not prohibit expulsion of individuals, but only gives certain procedural safeguards. Aliens facing deportation may also have rights under the Convention, for example Articles 2, 3, 5, 6 and 8 and Protocol 4 Article 4.

Right of appeal in criminal matters (Article 2)

148. This guarantees that **everyone convicted of a criminal offence by a tribunal shall have the right to have his or her conviction or sentence reviewed by a higher tribunal.**

149. States have a lot of discretion on how this provision is implemented so long as they do not destroy the essence of the right. Thus, they do not have to allow an appeal on the merits of the judgment, may restrict the right to points of law only and may require that leave to appeal be sought first.

Compensation for wrongful conviction (Article 3)

150. This only gives a right of compensation where a conviction has been overturned or a pardon granted because new or newly discovered facts show conclusively that there has been a miscarriage of justice.

Right not to be tried or punished twice (Article 4)

151. This prohibits trying or punishing someone again for an offence of which he or she has already been acquitted or convicted. There are exceptions under paragraph 2 if new or newly discovered facts arise or there was a fundamental defect in the earlier proceedings. Complicated situations can arise where one set of facts gives rise to more than one offence or more than one procedure, e.g. where someone was convicted of drink-driving and in later proceedings had his licence taken away; the latter procedure was viewed as part of the sanction for the offence (Nilsson v Sweden). Only if two separate offences rest on identical facts or facts that are substantially the same will there be a breach.

Equality between spouses (Article 5)

152. This gives spouses equal rights under private law between them and in their relations with their children during a marriage and in the event of its dissolution. It does not prevent the state taking measures to protect children (which may raise issues under Article 8).

PROTOCOL 12

153. This protocol repeats the **prohibition on discrimination** in identical language to that in Convention Article 14, but with the **key difference that it makes it a free standing right, not tied to the ambit of another Convention right.** So far relatively few states are parties and there is very little decided case law, so it is hard to give guidance on its likely effect.

PART II CHECKLIST FOR PUBLIC OFFICIALS

This checklist is designed to direct officials to the most relevant articles and some of the issues they need to consider in their various job situations. The issues listed are not exhaustive. For the detailed considerations on each article see PART I above. References to article numbers are to the Convention except where a Protocol is specified.

Rights and issues I need to consider when my job involves:

Use of force

Articles 2 Right to life, 3 Prohibition of torture, 8 Respect for private and family life, 14 Prohibition of discrimination.

- Is there a justification for use of force (defence of self or others, effecting an arrest, quelling a riot)?
- Is the force strictly necessary and proportionate to the aim pursued, or could lesser force achieve the desired result?
- Does the force amount to torture or inhuman treatment?
- Have any injuries been promptly examined by a doctor?
- Are adequate records being kept against the possible need for an enquiry into the circumstances of the use of force?

Protection of others from violence, injury and risk to life

Articles 2 Right to life, 3 Prohibition of torture, 8 Respect for private and family life, 14 Prohibition of discrimination, Protocol 1 Article 1 Protection of property.

- Do I, or should I know of risks or threats of violence, including domestic violence, to someone I have a duty to protect (e.g. as a police officer)?
- Is a detainee or psychiatric patient in my charge at risk of harm from themselves or others?
- Have all necessary and reasonable steps been taken to assess the person's medical condition, especially if there is an indication that they may have been injured?
- Are there risks of installations I am in charge of (e.g. municipal waste plants) threatening homes or lives of people living nearby?

Being in charge of persons deprived of their liberty (in any context)

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 14 Prohibition of discrimination, 34 Right of individual application, Protocol no. 4 Article 2 Freedom of movement

- Have less severe measures than deprivation of liberty been considered and found insufficient?
- Are the conditions where the person is being held adequate as to cleanliness, food and bedding and not overcrowded?
- Where persons belonging to vulnerable minority groups are detained, are they being treated without discrimination?
- Have all necessary and reasonable steps been taken to assess the detainee's medical condition, especially if there is an indication that they may have been injured?
- Are detainees assessed early on for risk of self-harm and those found to be at such risk regularly monitored?
- Are detainees protected from violence at the hands of other detainees?

- Are vulnerable detainees (due to illness, disability, age, sexual orientation etc.) given appropriate care and protection?
- Are detainees given the right to correspond, especially with their lawyers and the courts?
- Is any interference with this right lawful, for a legitimate permitted aim and proportionate?
- Is the right of detainees to apply to the European Court of Human Rights hindered in any way?
- Have remand prisoners been fully informed of the nature and cause of the accusation against them?
- Have they been given adequate time and facilities, especially access in private to their lawyers, to prepare their defence?

Arresting and detaining people on suspicion of committing a criminal offence

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 7 No punishment without law, 8 Respect for private and family life, 14 Prohibition of Discrimination, Protocol no. 4 Article 2 Freedom of movement.

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- Is the arrest allowed under Article 5, especially 5(1)(c) and (f)?
- Have persons arrested been told their rights and the reason for their arrest as soon as possible?
- Are there procedures to bring them promptly before a court?
- Have they been given access to a lawyer before interrogation starts?
- In specific situations like offences involving children and sexual offences, has the need for special interviewing procedures been considered?
- Was the offence for which the arrest was made in force at the time when it was committed?

Dealing with would-be immigrants

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 14 Prohibition of discrimination, Protocol 4 Article 4. Protocol 7 Article 1, 34 Right of individual application

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- Is any arrest or detention justified under Article 5 (1) (f)?
- Are would-be immigrants being kept separately from persons detained within criminal proceedings and from convicts?
- Have the specific accommodation needs of families, women and children been met?
- Is any force used to restrain reluctant deportees moderate and proportionate?
- Where would-be immigrants have family in the country, have their rights of family life been considered and respected?
- Where groups of non-nationals are to be expelled, have each of their cases been examined individually?
- Have individuals facing expulsion been given the procedural rights of Protocol 7 Article 1?

Looking after psychiatric patients

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 34 Right of individual application.

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- Was the detention properly authorised on medical advice?
- Is the medical necessity for the detention regularly monitored?
- Is any force used to restrain the patient medically sanctioned and proportionate to the need?
- Does the patient or his/ her family have adequate rights to challenge the continuing need for his/ her detention?
- Have they been informed of these rights?

Eavesdropping or secretly monitoring communications

Article 8 Respect for private and family life, home and correspondence.

- Is the bugging or monitoring authorised by law?
- Does it pursue a legitimate permitted aim e.g. national security, prevention of crime?
- Does it meet a “pressing social need”?
- Is it proportionate to the aim and non-discriminatory?
- Has the scope and duration of the interference been judicially authorised?
- Does actual eavesdropping or monitoring comply with the authorised scope and duration?

Dealing with family issues like adoption and taking children into care

Articles 3 Prohibition of inhuman and degrading treatment, 8 Respect for private and family life, 6 Right to a fair trial, 14 Prohibition of discrimination.

- Is any interference with family life in accordance with law, for a permitted aim (e.g. the rights of the children) and proportionate to that aim?
- Have the best interests of the child been properly considered?
- Have the parents and other interested parties been given full and timely information and the opportunity to contribute to decisions on the future of the children, especially where those are irrevocable or hard to reverse?
- Do parents and others have the right to challenge the decision before an independent and impartial tribunal?
- Have they been informed of their rights of challenge and the time limits for doing so?
- Are children at such risk of harm at the hands of their parents or guardians as makes it necessary to take them into care?

Authorising or policing meetings or demonstrations

Articles 2 Right to life, 3 Prohibition of torture, 9 Freedom of religion, 10 Freedom of expression, 11 Freedom of assembly and association.

- Is the presumption in favour of the right to free expression being applied?
- Is there a legitimate reason (e.g. maintenance of public order, risk of violence) to refuse permission for a meeting or demonstration?

- Is any interference with any of the rights in the three articles mentioned in accordance with law, for a permitted aim and proportionate?
- Where the gathering has a religious purpose, have the rights in Article 9 been respected?
- Have necessary steps been taken to protect the demonstrators, including where simultaneous, conflicting demonstrations are planned?

Dealing with planning applications

Articles 6 Right to fair trial, 8 Respect for private and family life and home, 14 Prohibition of discrimination, Protocol 1 Article 1 Protection of property.

- Is any interference with a person's right to respect for his/ her home in accordance with law, for a permitted aim (e.g. the rights of others) and proportionate?
- Does a person whose property or family rights have been affected by the planning decision have the right to challenge it before an independent and impartial tribunal?
- Has the person's right to peaceful enjoyment of his/ her property been affected?
- If so, has the interference struck a fair balance between the individual and the general interest?
- If the person affected is a member of a vulnerable group, e.g. Roma or travellers, has he or she been treated differently from others, and, if so, is there objective and reasonable justification for the different treatment?

Taking decisions affecting a person's right to carry on a business, trade or profession

Article 6 Right to fair trial, Protocol 1 Article 1 Protection of property.

- Is there a legal basis for the decision?
- Is there a public interest for the decision?
- Does the decision strike a fair balance between the individual and the general interest?
- Does the individual have the right to challenge the decision before an independent and impartial tribunal?

FLOWCHART

Do you touch on any of the Convention rights in your work?

↓
YES
 ↓

Is there a victim?



NO



Check again-remember the Convention rights have broad application

↓
NO
 ↓

↓

YES

↓

Can the Convention right be Interfered with legitimately?



NO



You may be in breach

↓

YES

↓

Is your action in accordance with law?



NO



You may be in breach

↓

YES

↓

Are you pursuing a legitimate permitted aim?



NO



You may be in breach

YES

↓

Is your action necessary in a democratic society (answers a pressing social need and is proportionate)?



NO



You may be in breach

YES

↓

Your action may be Convention compliant, but check again.

NB: When in doubt, seek guidance from senior officials and where possible take legal advice. The above chart fits the pattern of several Convention articles (especially 8-11) but not all: some are absolute, others only permit specified exceptions. Check PART I for the details.