

**Arrest and Provisional Detention: The Obligations of  
the UAE under Article 14 of the Arab Charter on  
Human Rights**

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## **ABSTRACT**

### **Arrest and Provisional Detention: The Obligations of the UAE under Article 14 of the Arab Charter on Human Rights**

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This thesis explores the compatibility of UAE law on arrest and provisional detention with Article 14 ArCHR.

Given the lack of any report by the UAE on the measures which they have taken to give effect to the rights recognised in the ArCHR and the absence of effective institutions under the ArCHR to provide authoritative interpretation of the Charter's Articles, this thesis advances an interpretation of Article 14, drawing on the interpretation of Article 9 ICCPR under the HRC and Article 5 ECHR under ECtHR. In the case of the ICCPR, this is because the wording is similar and it is a universal instrument to which some parties to the Arab Charter are also parties. In the case of the ECHR, it is because the words are similar and the Strasbourg Court has considered aspects of the interpretation and application of those provisions in a number of contexts.

This considered interpretation will be of assistance to decision makers in the UAE and other parties to the ArCHR.

This thesis' key finding is that, while UAE law on arrest and provisional detention is compliant with Article 14 ArCHR or, arguably, so in many respects, there are other incompatible aspects. In particular, the Public Prosecutor, rather than a court deciding some key matters means that UAE law fails to comply with the right to be brought promptly before a judge or other judicial officer and the right to have the lawfulness of the arrest or detention decided quickly by a court. Accordingly, it recommends that the UAE achieves compliance by requiring that the above-mentioned procedures are best undertaken by a court. This is guided by the UK system because of the ways in which it complies with the requirements of the ECHR provides lessons for the UAE's implementation of Article 14 ArCHR.

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## **LIST OF ABBREVIATIONS**

ArCHR	Arab Charter on Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FLCP	Federal Law of Criminal Procedure No. 35 (1992)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
OHCHR	Office of the High Commissioner on Human Rights
PACE	Police and Criminal Evidence Act 1984
UN	United Nations
UNCAT	United Nations Convention Against Torture
UNGA	United Nations General Assembly

# INTRODUCTION

## 1. Overview

In most States, the police and prosecuting authorities arrest and detain people in certain situations, such as the suspicion of having committed a crime; in order to prevent a person from committing a crime; or to prevent the suspect from fleeing after committing an offence. Normally, the arrestees and the detainees are kept in detention for periods of time (weeks, months, and even years) before a decision is arrived at in a criminal trial. In other words, they are deprived of their liberty only for being suspects, and before being proven guilty.<sup>1</sup> Arrest and provisional detention are amongst the most significant issues of disagreement between State authorities and individuals. Humans have tried to free themselves of all restrictions, especially those which would deprive them of their liberty, while, in the State, governments would like to protect the security, lives and property of individuals. Consequently, States are working to strengthen their powers to perform their required duties with regard to protecting their communities. They are working, also, to strengthen an individual's rights in order to prevent any abuse.

Since the State can breach the right to liberty by ordering an arrest or detention, international human rights instruments such as, the Arab Charter on Human Rights (ArCHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights and Fundamental Freedoms (ECHR), contain provisions for the protection of liberty.<sup>2</sup>

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<sup>1</sup> UN, *Human rights and pre-trial detention: A Handbook of International Standards Relating to Pre-Trial Detention*, (Professional Training Series No 3, Centre for Human Rights Crime Prevention and Criminal Justice Branch, 1994), (Preface) 1; Amnesty International, *Fair Trials Manual* (Amnesty International Publications, December 1998), 33.

<sup>2</sup> In particular, under Articles 14 ArCHR, 9 ICCPR, and 5 ECHR.

Firstly, these instruments delineate the conditions or requirements for the deprivation of liberty; these conditions or requirements are that any arrest or detention must be in accordance with a procedure as prescribed by law; and no one shall be subject to arbitrary deprivation of liberty. Also explicitly or through interpretation, the instruments set out the permitted grounds for the deprivation of liberty. These grounds are bringing a person before the competent legal authority on the reasonable suspicion of their having committed an offence; preventing a person from committing a crime, when it is reasonably considered to be necessary; and preventing a person from fleeing after committing a crime.<sup>3</sup>

Secondly, these instruments provide safeguards against abuse and afford protection to the person being detained provisionally. The safeguards set down are: the right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself; the right to be promptly brought before a judge or other judicial officer; the right to a trial within a reasonable time or to release pending trial; the right to have the lawfulness of the detention decided quickly by a court; the right to compensation in the event of any unlawful deprivation of liberty; and (but only expressly in the ArCHR), the right to contact with family members and relatives; and the right to have a medical examination.

The regulations strike a balance between the security, as aimed by States, and the liberty which is enjoyed by individuals. The instruments restrict the power of the public

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<sup>3</sup> Only the European Convention on Human Rights, under Article 5 (1) (c), mentions the grounds for provisional detention in terms of criminal procedure, while the interpretation of Article 9 ICCPR provides such grounds. See, for example, the Human Rights Committee's statement in *Hugo van Alphen v. The Netherlands*, that any arrest or detention must not only be legal, but must also be reasonable, for example, to prevent fleeing, tampering with evidence or the recurrence of crime. *Hugo van Alphen v. The Netherlands*, Communication No 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para 5.8.

authorities to arrest and detain a person, unless absolutely necessary,<sup>4</sup> while individuals are able to enjoy liberty and can be deprived of their liberty only in limited situations.<sup>5</sup>

Although international human rights instruments set out a paradigm of an arrest and provisional detention regime in normal circumstances, they do not provide any particular procedural requirements for it in extraordinary situations. Rather, they set out only some general restrictions relating to extraordinary circumstances in the form of derogations from the requirements of certain of their provisions. These include stating that in an exceptional situation of an emergency, which threatens the life of the nation, the measures, which are used, must be compatible with the exigencies of the situation, and should not be inconsistent with the other requirements of International Law.<sup>6</sup> Also, they mention what constitutes an extraordinary situation, and list the rights from which there is no derogation. These are such as the right to life; the right to humane treatment; freedom from slavery; freedom from torture; and others. Notwithstanding, the conventions make no mention of detainees' rights in setting out the rights from which there is no derogation.<sup>7</sup> Consequently, does derogation apply or not to all detainees' rights? Or is there derogation from some detainees' rights but not from certain others?

## **2. Purpose, themes and scope of the study**

Firstly, the main objective of this study is to provide an authoritative interpretation of Article 14 ArCHR, and to determine the extent to which UAE law is compatible with its

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<sup>4</sup> M. Bedri Eryilmaz, *Arrest and Detention Powers in English and Turkish Law and Practice in the Light of the European Convention on Human Rights* (Martinus Nijhoff Publishers, 1999), 1.

<sup>5</sup> Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (Human Rights Handbooks, No 5, Council of Europe, 2002), 8.

<sup>6</sup> Article 4 ArCHR, Article 4 of ICCPR and Article 15 ECHR.

<sup>7</sup> Only the Arab Charter on Human Rights, under Article 4 (2), lists Article 14 (6), which contains the right to review detention, within the non-derogable rights.



requirements. Such guidance may be of considerable assistance to decision makers, in the UAE, and to other Arab countries which are parties to the ArCHR.

Since the treaties are a source of international law and ‘the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised’, each State should respect its international treaty obligations generally, and more specifically, those with respect to human rights.<sup>8</sup> Otherwise, the State will not be trusted or respected.

The UAE has not signed up to any international human rights instruments. In other words, the UAE is not a party to the ICCPR (or, obviously, the ECHR) but it is a party to the ArCHR. This means that, for the UAE, the ArCHR is the only international human rights instrument which offers protection. Therefore, in the UAE, its terms and their interpretation are central to the protection of human rights in the UAE. Consequently, it is very important to offer an appropriate interpretation for one of ArCHR’s Articles (Article 14), which provides the right to liberty, and which may encourage other people to find a suitable interpretation for the other Articles. This may help to determine where there is a shortfall in national law, contrary to the Charter’s requirements; and guide the decision makers of the UAE (and other Arab States) and enable them to prescribe laws which are compatible with the requirements of the ArCHR. Also, the importance of this work may lie in it providing the basis for further research (e.g., on whether or not this examination of ‘UAE law in the books’ on arrest and provisional detention corresponds with ‘UAE law in action’).

Despite the commitment of the UAE to uphold human rights, reflected in its adherence to the Arab Charter on Human Rights and, more recently, to the United Nations

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<sup>8</sup> The preambles of Vienna Convention on the Law of Treaties 1969.

Convention Against Torture (UNCAT),<sup>9</sup> concerns have been expressed by the office of the United Nations High Commissioner for Human Rights (UNHCHR)<sup>10</sup>, the European Parliament (EP)<sup>11</sup>, as well as Human Rights Watch<sup>12</sup> and Amnesty International.<sup>13</sup> Some of these concerns bear upon the subject of this thesis, particularly the deprivation of liberty; overlong provisional detention, incommunicado detention for political reasons and the resort to torture. It is not the place of this thesis to confirm or repudiate these concerns. Rather, it is hoped that the guidance it proffers on the application of Article 14 ArCHR and its recommendation of a robust regime of arrest and provisional detention, with manifestly independent court supervision (see Chapter 5) will help to confirm the UAE's commitment to its obligations and to dispel such concerns.

The Arab Charter of Human Rights of 2004, which entered into force on 15 March 2008, is intended to be compatible with international standards of human rights. During the drafting of the Charter, the Arabic Commission of Human Rights was guided by the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.<sup>14</sup>

Article 45 (1) ArCHR provides for the establishment of an Arab Human Rights Committee and Article 45 (7) states that '...The Committee shall establish its own rules

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<sup>9</sup> On 19 July 2012 the UAE adhered to the United Nations Convention against Torture.

<sup>10</sup> UN General Assembly, 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, United Arab Emirates' (Human Rights Council, Working Group on the Universal Periodic Review, 15th session, A/HRC/WG.6/15/ARE/3, 9 November 2012, para 18.

<sup>11</sup> The European Parliament, 'Resolution of 26 October 2012 on the Human Rights situation in the United Arab Emirates (2012/2842(RSP))'.

<sup>12</sup> Human Rights Watch, 'Word Report (2013)', United Arab Emirates, 623.

<sup>13</sup> Amnesty International, 'United Arab Emirates, Crackdown on fundamental freedoms contradicts human rights commitments' (Submission to the UN Universal Periodic Review) (July 2012).

<sup>14</sup> The League of Arab States website, 'The Functions of the Management of Human Rights' <[http://www.arableagueonline.org/las/arabic/details\\_ar.jsp?art\\_id=3592&level\\_id=901](http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=3592&level_id=901)> accessed 07 March 2011.

of procedure and methods of work'. Therefore, the Committee adopted its provisional rules of procedure which contains 20 Articles. Article 10 of these provisional rules states that the Committee shall exercise its functions in accordance with the Charter. This means that under Article 48 ArCHR, which provides its function clearly. It states that:

1. The State's parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration.
2. Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the State's parties to supply it with additional information relating to the implementation of the Charter.
3. The Committee shall consider the reports submitted by the State's parties under paragraph 2 of this Article in the presence of the representative of the State party whose report is being considered.
4. The Committee shall discuss the report, comment thereon, and make the necessary recommendations in accordance with the aims of the Charter.
5. The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General.
6. The Committee's reports, concluding observations and recommendations, shall be public documents which the Committee shall disseminate widely.

Until now (the date of submission of the thesis), the UAE has not submitted any report regarding the measures which they have taken to give effect to the rights and freedoms

recognised in the Arab Charter. Only Algeria, Jordan, Qatar and Bahrain have submitted such reports.<sup>15</sup>

Article 44 ArCHR requires the parties, in their national law, to give effect to the ArCHR's requirements. In turn, this requires an authoritative interpretation of the ArCHR's provisions in order to determine where there is some shortfall in national law as against the Charter requirements. Despite this, there is no interpretation by the Arab Committee of Human Rights of the ArCHR's Articles.<sup>16</sup> In other words, it does not adopt general comments on Articles of the Charter. The importance of these comments (as explained by OHCHR) is that they 'provide guidance on the implementation of a convention. They cover a variety of subjects ranging from comprehensive interpretation of substantive provisions to general guidance on the information on specific articles of the treaty that States should submit in their reports.'<sup>17</sup>

In addition, there is no role provided under the Arab Human Rights Committee to examine individual complaints, with regard to alleged violations of the Charter, by State parties.<sup>18</sup> This leads to the lack of case-law study, which helps to clarify the requirements of the ArCHR's Articles.

As a result of the absence of effective interpretation through the Arab Human Rights Committee, decision makers in any Arab State, and in particular, the United Arab

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<sup>15</sup> Jordan sent its report on 28 October 2010 and it was discussed on 01-02 April 2012; Algeria sent its report on 28 April 2011 and it was discussed on 25-26 May 2012; Qatar sent its report on 1 July 2012 and was discussed on 17-18 June 2013 and Bahrain sent its report on 25 August 2012 and was discussed on 18-19 February 2013.

<sup>16</sup> Compared with the Human Rights Committee it has four Monitoring Functions, which are: examination of reports submitted by State parties, adoption of general comments on ICCPR's Articles, assessment of inter-state complaints and consideration of individual complaints. For more detail about the functions of the Human Rights Committee, see OHCHR, *Civil and Political Rights: The Human Rights Committee* (Fact Sheet No 15 (Rev.1), 2005).

<sup>17</sup> OHCHR, *Working with the United Nation Human Rights Programme: A Handbook for Civil Society*, (2008), 43.

<sup>18</sup> Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) 10 (1) Human Rights Law Review 169, 174; Abdullahi A. An-Na'im, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 Hum. Rts. Q. 701, 705.

Emirates (UAE) (the country of the author), can face difficulties when they come to interpreting the ArCHR's Articles and responding to the Charter's requirements. Therefore, it is important for the Arab States to have a clear picture of what is required.

Although the majority of the ArCHR State Parties are also State Parties to the ICCPR, they still need to have an interpretation of the ArCHR's Articles.<sup>19</sup> This is because, under the ArCHR, there are some requirements for which there are no explicit statements in the ICCPR. For example, Article 14 ArCHR provides the right to contact with family members and the right to have a medical examination, while there are no parallels under Article 9 ICCPR.

Secondly, one of the themes of the present thesis is to clarify the meaning of the deprivation of liberty. This is because the deprivation of liberty is similar to a restriction on the liberty of movement, in terms of its nature and principles. Despite these facts, both the two restrictions are different in degree and intensity. In case of the deprivation of liberty, Article 14 ArCHR should be raised as it provides the right to liberty, while if it is merely a restriction on liberty, Article 26 ArCHR should be raised because it regulates the right to freedom of movement.

The concept of a deprivation of liberty has given rise to some difficulties of interpretation at the margins. For example, in *Gillan*, there was a deprivation of liberty because the applicants were stopped and searched for a period of time that did not exceed 30 minutes.<sup>20</sup> In contrast, in *Austin*, although the applicant was forced to remain

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<sup>19</sup> As at 08 May 2011 there are 11 parties to the Arab Charter: these are Jordan, Algeria, Bahrain, Libya, Syrian Arab Republic, Palestine, the UAE, Yemen, Qatar, the KSA (Kingdom of Saudi Arabia) and Lebanon. Of these, the following are also parties to the ICCPR: these are Jordan, Algeria, Bahrain, Libya, Syrian Arab Republic, Yemen, and Lebanon.

<sup>20</sup> *Gillan and Quinton v. The United Kingdom*, App no 4158/05 (ECHR 12 January 2010), para 57.

in a location for 7 hours in a police cordon or ‘kettle’, which is containment of a group of people in a public place by the police, there was no deprivation of liberty.<sup>21</sup>

Consequently, under Article 14 ArCHR, the national law must make clear provision for those situations in which there may be a deprivation of liberty.

Finally, the current study emphasised that the detention of a suspect needs to be monitored and supervised by an independent judicial authority. This is because the independent judicial authority protects an individual’s rights against the abuse of power, such as maltreatment, torture, inhuman or degrading treatment, physical and psychological damage. It also protects against the danger of false confession and wrongful conviction, which is an injustice to society, as well as to the victim of maltreatment and the victim and family of the person who suffered as a result of the crime in question, also protecting the judicial system and the administration of justice from being tainted. The independent judicial authority has the freedom to make a fair and impartial decision based solely on the facts presented and the applicable laws.

To prevent the maltreatment of the suspect and to protect the police authorities from damaging false allegations of maltreatment, each State should establish an internal system of review and monitoring of detention. For the UAE, this may also, help its government to comply with UNCAT and to fulfil its obligation under Article 8 ArCHR that provides the right of prohibition of torture. Article 8 (1) states that ‘Each State party shall protect every individual subject to its jurisdiction from such practices [physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment] and shall take effective measures to prevent them.’

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<sup>21</sup> *Austin and others v. the United Kingdom* App no 39692/09, 40713/09 and 41008/09 (ECHR, 15 March 2012), para 67.

Understanding the operation of Article 14, within a national legal order, requires consideration of the national legal order. Hence, there will be a consideration of the national law of the UAE. However, it will be useful to compare the UAE's procedures with those in England and Wales (as part of the United Kingdom) which is a State Party to the ECHR. This is significant because of the ways in which England and Wales comply with the ECHR's requirements; these provide lessons for the UAE's implementation of Article 14 ArCHR. Furthermore, this will also provide an opportunity to examine the similarities and differences between the approach of a civil law country (UAE) and a common law country (United Kingdom).

### **3. Justifying interpreting Article 14 ArCHR in light of Article 9 ICCPR and Article 5 ECHR**

During the drafting of the Charter, the Arabic Commission of Human Rights was guided by the ICCPR. It is, therefore, appropriate to consider the meaning of Article 14 ArCHR in the light of the interpretation of Article 9 ICCPR, whose language is very similar to Article 14 ArCHR. Also, it is a universal instrument to which some parties to the ArCHR are also parties emphasising the need for a consistent interpretation of the two instruments.

Despite European States having different cultural, historical and social contexts from the Arab States, it is appropriate to draw on an interpretation of Article 5 ECHR in determining proper interpretation of Article 14 for the following reasons. Firstly, Article 5 ECHR contains corresponding provisions, which have been subject to detailed analysis in judgments made by the Strasbourg Court thus helping fill gaps in interpretation of the ICCPR article.

Secondly, the international human rights instruments ‘are surely on the “universalist” side of this debate [on the question of the ‘universal’ or ‘relative’ character of the human rights]. The landmark instrument is the *Universal Declaration of Human Rights*, part of which have clearly become customary international law’.<sup>22</sup> Also, in all human rights instruments, the normative should be the same in principle, to reflect the Universal Declaration of Human rights that was declared ‘as a common standard of achievement for all peoples and all nations’.<sup>23</sup> For example, it is mentioned expressly in the introduction of the ECHR that through the Convention, the European States determined ‘to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’.<sup>24</sup>

Also, it is mentioned in the preamble of the ICCPR that ‘the States Parties to the present Covenant, ... Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms’.<sup>25</sup> Article 1 (3) of the Charter of the United Nations states that ‘The Purposes of the United Nations are: to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’

Furthermore, in the Vienna Declaration and Programme of Action, it was stated that ‘All human rights are universal, indivisible and interdependent and interrelated’<sup>26</sup>.

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<sup>22</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (Law, Politics and, Morals, 3<sup>rd</sup> edn, OUP 2007) 518.

<sup>23</sup> Ibid 930.

<sup>24</sup> See the introduction of the ECHR.

<sup>25</sup> See the preamble of the ICCPR.

<sup>26</sup> Vienna Declaration and Programme of Action (1993), pt 1, para 5.



Despite this fact, the historical and cultural context may affect the universality of human rights in three ways. Firstly, in the substance of the human rights that is protected. Each society has different perceptions of what is right and wrong. Therefore, the substances of certain human rights could be different. Secondly, it may affect the interpretation of the individual's rights. This is because the interpretation of human rights can depend on cultural perspectives. Finally, the cultures may affect the implementation of the human rights.<sup>27</sup> For example, for the right to a fair trial, some States use an Anglo-American jury and others may not.<sup>28</sup>

The rights that may be culturally relative are for example, gender, religion, concepts of marriage and family. This means that, with regard to these rights, 'universal values become secondary'.<sup>29</sup> In contrast, the right to liberty is one of the rights that have universal terms, which 'neither in the definitions of rights nor in the limitation clauses (such as limitation of rights because of public order or policy or public health) does the text of these basic instruments make any explicit concession to cultural variation.'<sup>30</sup>

However, where the interpretations of ICCPR and ECHR differ, then since the ICCPR is a universal instrument to which some parties to the ArCHR are also parties, during the interpretation of Article 14 ArCHR the interpretation of the ICCPR should prevail.

#### **4. Methodology of the study**

Since this thesis is seeking to provide an authoritative interpretation of Article 14 ArCHR in the light of interpretations of analogous instruments (Articles 9 ICCPR and 5

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<sup>27</sup> Hossain MD. Shanawez, 'Human Security in Asia: by Universal Human Right or Cultural Relativism?' <<http://humansecurityconf.polsci.chula.ac.th/Documents/Presentations/Shanawez.pdf>> accessed 15 May 2013.

<sup>28</sup> Henry J. Steiner, Philip Alston and Ryan Goodman (n 22) 518.

<sup>29</sup> Elisabeth Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 *Journal of Comparative Social Welfare* 23, 29.

<sup>30</sup> Henry J. Steiner, Philip Alston and Ryan Goodman (n 22) 518.

ECHR), the following methodologies will be adopted. These are Case law study; Legal analysis; and Critical analysis.

#### *4.1 Case law study*

The case law study will focus on cases and judgments related to arrest and provisional detention. These cases can be found in the records of the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR).

#### *4.2 Legal analysis*

The legal analysis will examine Articles in international human rights instruments, which related to arrest and provisional detention. In particular, Articles 14, 9 and 5 of the ArCHR; ICCPR; and the ECHR respectively.

#### *4.3 Critical analysis*

A critical analysis approach includes analysing related existing academic and theoretical material. This means analysing written legal literature that involves the right to liberty and the procedures of deprivation of liberty, and that can be found in books and articles.

### **5. Definition of arrest and provisional detention**

The thrust of all key human rights instruments is to prohibit the arbitrary deprivation of liberty. What constitutes a deprivation of liberty can be controversial, as well as what constitutes an arbitrary action.<sup>31</sup> For example, in *Austin and others v. the United Kingdom*, the ECtHR stated that it was the first time it had considered the application of

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<sup>31</sup> For example in *Guzzardi v. Italy*, the European Court of Human Rights provided that ‘The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion...’ *Guzzardi v. Italy*, App no 7367/76 (EHRR, 6 November 1980), Series A no 39, paras 93.

Article 5 (1) in the holding of people in a police cordon or ‘kettle’, which is containment of a group of people in a public place by the police.<sup>32</sup> It emphasised that, in order to find out whether or not a measure has involved a deprivation of liberty, it is important to investigate ‘...a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’<sup>33</sup>

‘Arrest’ and ‘detention’ are the two cases of the deprivation of liberty, and both cover any deprivation of liberty in general (criminal or non-criminal procedures). This thesis concentrates only on ‘arrest’ and ‘provisional detention’ in terms of criminal procedures.

There are many definitions of ‘arrest’ and ‘provisional detention’. Consequently, clarifying the meanings of these terms, which are central to the topic of the present thesis, should help the reader to understand the field of which this thesis purports to investigate.

Firstly, the term ‘arrest’ indicates the action of the deprivation of personal liberty and, in general, includes the period up to the time when the person is brought before the competent authority.<sup>34</sup> For example, in UAE law, ‘arrest’ is a deprivation of a person’s liberty for a limited period of time (up to 72 hours) and is permitted as a prelude to legal action, such as an investigation or a trial.<sup>35</sup>

Finally, there is no specific definition of the term ‘provisional detention’ since it can be used for both a criminal and a non-criminal procedure. On the one hand, for a criminal

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<sup>32</sup> *Austin and others v. the United Kingdom* (n 21), para 52.

<sup>33</sup> *Ibid* para 57.

<sup>34</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publisher, 1993), 169.

<sup>35</sup> Judah H. Jihad, *Explain in brief the UAE Federal Law of Criminal Procedure: Claims arising from the crime, The preparations for the criminal case*, vol 1, (Al Bayan Press, Printing and Publishing Establishment, 2006), 284.

procedure, the ECtHR in *Kolevi v. Bulgaria* used the term ‘provisional detention’ for the pre-trial detention.<sup>36</sup> Also, the HRC in *Ali Medjnoune v. Algeria* used the term ‘provisional detention’ for the same procedure (pre-trial detention).<sup>37</sup> On the other hand, in *Shulepova v. Russia*, the ECtHR called the detention of a person considered to be of unsound mind as ‘provisional detention’.<sup>38</sup>

Since this thesis concentrates on ‘provisional detention’ as a criminal procedure, it means that it is the procedure of keeping a person in detention from arrest up to trial or sentencing.

The reason for choosing this term, despite the fact that it can be applied to two different types of procedure (criminal or non-criminal), is that the majority of Arab States use this term for their criminal procedures. For example, Article 106 of the UAE Federal Law of Criminal Procedures uses ‘provisional detention’ to refer to keeping the accused in detention during the investigation stage.<sup>39</sup>

## **6. Organisation of the study**

Following this introduction, this study includes five chapters.

Chapter 1 provides an analysis of the arrest and provisional detention regulations in the UAE and in England and Wales. This chapter explains how arrest and provisional detention (in the context of both ordinary crime and counter-terrorism) is regulated

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<sup>36</sup> *Kolevi v. Bulgaria*, App no 1108/02 (ECHR, 5 November 2009), paras 31, 32.

<sup>37</sup> *Ali Medjnoune v. Algeria*, Communication No 1297/2004, U.N. Doc. CCPR/C/87/D/1297/2004 (2006) (9 August 2006), para 4.2.

<sup>38</sup> *Shulepova v. Russia*, App no 34449/03 (ECHR, 11 December 2008), paras 47-51.

<sup>39</sup> For more examples, see Articles 123 of the Algerian Law of Criminal Procedures, 134 of the Egyptian Law of Criminal Procedures, 53 of the Omani Law of Criminal Procedures, 110 of the Qatari Law of Criminal Procedures, etc.

currently in the UAE, and how this compares with the approach adopted with regard to the regulation of arrest and provisional detention in England and Wales.

Therefore, this analysis consists of: an overview of the organisation of criminal justice; the situations which allow arrest; the people who have the power to carry out arrests and impose provisional detention; the duration of arrest and provisional detention; and detainees' rights following the deprivation of liberty.

Chapter 2 defines the concepts of liberty; its deprivation; and the basis upon which such deprivation is permitted. This chapter and Chapter 3 support the answer to the following question. To what extent do, or should, provisions of the ICCPR and the ECHR properly inform the interpretation of Article 14 ArCHR, both in relation to its substantive limits and the procedural guarantees required?

Chapter 3 concentrates on rights following the deprivation of liberty, and analyses the procedural guarantees in Article 14 ArCHR. These rights are of great importance, and ensure that no arbitrary deprivation of liberty takes place.

Chapter 4 answers the question of: to what extent are the requirements of deprivation of liberty and guarantees following this deprivation affected during counter-terrorism regimes and times of public emergency? Therefore, this chapter examines the flexibility under Article 14 ArCHR to deal with sensitive issues, such as terrorism. Also, it examines whether or not Article 14 is properly modifiable in times of an exceptional situation of emergency, which threatens the life of the nation.

Chapter 5 evaluates the regulation of arrest and provisional detention in UAE law. This is done in order to identify the areas in which the regulation of arrest and provisional detention in UAE Law is compliant with the requirements of the ArCHR; those in

which UAE Law is questionably compliant; and those in which UAE Law appears not to comply. In addition, it identifies what changes might need to be made to UAE law to ensure complete compliance with the ArCHR. This chapter provides the answer to the following question. Does the regulation of arrest and provisional detention in the UAE comply fully with the standards set by Article 14 ArCHR? Where it does not, further reforms are suggested which would ensure compliance with the ArCHR's standards.

These chapters will be followed by a conclusion, which will finish the thesis by indicating that: firstly, it is legitimate to use interpretations of corresponding provisions of the ICCPR and ECHR to guide interpretation of Article 14 ArCHR. Secondly, the study has examined UAE law, and compared it with the requirements identified in Article 14. Thirdly, the thesis has noted particular provisions of Article 14 which are not found in the corresponding provisions of the ICCPR and ECHR. Finally, there is need for some minor amendments to UAE Law, and one necessary major change which will be required if UAE law is to be compliant with Article 14. However, the UAE could benefit from some empirical studies of the law in action of the type which have been conducted in relation to the operation of the law in action in England and Wales, which have established that the law in action does not always fully reflect the requirements of the law in the books.<sup>40</sup>

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<sup>40</sup> There have been many studies of the law in action in the United Kingdom, which are effectively summarized in Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice*, (4<sup>th</sup> edn, OUP 2010). There are not yet any corresponding empirical studies of the operation of the law in action in the UAE.

## **CHAPTER 1**

# **REGULATION OF ARREST AND PROVISIONAL DETENTION IN UAE LAW AND THE LAW OF ENGLAND AND WALES**

### **1. Introduction**

This chapter provides a comparative analysis of arrest and provisional detention regulations (in the context of both ordinary crime and counter-terrorism) in the UAE and in England and Wales.

Examining whether or not UAE law complies with the requirements of Article 14 ArCHR is one of the purposes of the current study. Therefore, exploring the UAE regulations concerning arrest and provisional detention; and the procedural guarantees protecting those deprived of liberty is very significant to achieve this aim.

Also, one of the purposes of the present thesis is to offer guidance to decision makers in the UAE, so, analysing the law of England and Wales is important. This is because the ways in which England and Wales comply with the requirements of the European Convention on Human Rights might provide lessons for the UAE's implementation of Article 14 ArCHR.

The first part of this chapter clarifies the key features of arrest and provisional detention in the UAE, and the second part does the same for England and Wales.

### **2. UAE law**

Before analysing the arrest and provisional detention system in the UAE, it is important to have a brief overview of the organisation of the criminal justice system in the UAE.

The UAE is a civil law jurisdiction. This ‘may be defined as that legal tradition which has its origin in Roman law, as codified in the *Corpus Juris Civilis of Justinian*, and as subsequently developed in Continental Europe and around the world..... Civil law is highly systematised and structured and relies on declarations of broad, general principles, often ignoring the details.’<sup>1</sup> Codified law is the key source of this kind of jurisdiction.<sup>2</sup> In the UAE, as a country under Civil law, the role of the Federal Highest Court is to interpret the provisions of the Constitution, when so requested by any Union authority or by the government of any Emirate. Any such interpretation shall be considered binding on all.<sup>3</sup> In contrast, in a common law regime, the court’s decisions is one source of the Constitution.

UAE law is derived from the legal system of Egypt, which was influenced by French and Roman law.<sup>4</sup> Article 7 of the Constitution of the UAE states that ‘Islam is the official religion of the Union. The Islamic Tiara’s shall be a main source of legislation in the Union.’ The UAE legal system ‘is comprised of a mix of Islamic and European concepts of civil law’.<sup>5</sup> In general, although the criminal and civil laws are written by the legislative authority, they are influenced by the principles of Sharia, while ‘social laws, such as family law, divorce or succession’ are completely and directly taken from Sharia law.<sup>6</sup>

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<sup>1</sup> William Tetley, ‘Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)’ (1999-2000) 60 La. L. Rev. 677, 683.

<sup>2</sup> Dominik Lengeling, ‘Common law and civil law differences, reciprocal influences and points of intersection’ (Law firms, Patrick Schindler / Schleifenbaum & Adler, Toronto / Siegen 2008), 6 <[http://www.consulegis.com/fileadmin/downloads/thomas\\_marx\\_08/DLengeling\\_paper.pdf](http://www.consulegis.com/fileadmin/downloads/thomas_marx_08/DLengeling_paper.pdf)> accessed 24 March 2013.

<sup>3</sup> The Constitution of the UAE, art 99 (4).

<sup>4</sup> Christian Ule and K. Florian Buchler, ‘United Arab Emirates’ (MENA Legal, dispute resolution, 2006), 186 <<http://www.scribd.com/doc/59418465/United-Arab-Emirates>> accessed 11 September 2012.

<sup>5</sup> Ahmed Aly Khedr and Bassam Alnuaimi, ‘A Guide to United Arab Emirates Legal System’ (GlobaLex, June 2010) <[http://www.nyulawglobal.org/Globalex/United\\_Arab\\_Emirates.htm#legal\\_system](http://www.nyulawglobal.org/Globalex/United_Arab_Emirates.htm#legal_system)> accessed 11 September 2012.

<sup>6</sup> Ibid.



The Federal Constitution provides guarantees for the protection of human rights.<sup>7</sup> Regarding the right to liberty and an accused's rights, the protections are regulated under Articles 26, 27 and 28. Article 26 mentions that everyone has the right to liberty, no one shall be arrested, searched, detained or imprisoned except in accordance with the provisions of law. It adds that no one shall be subjected to torture or to degrading treatment. Article 27 states that 'The law shall define crimes and punishments. No penalty shall be imposed for any act of commission or omission committed before the relevant law been promulgated.' Article 28 regulates the presumption of innocence; the right to have a lawyer; and the prohibition of harming the accused either physically or morally.

### *2.1 Overview of the organisation of criminal justice*

The UAE Federal Law of Criminal Procedure No. 35 (1992) (FLCP) covers everything relating to criminal cases, from the beginning until the conclusion of the trial. This includes the roles of the three institutions involved in the criminal process: the Judicial Police Officers; the Public Prosecution; and the Courts. Furthermore, it provides some principles to protect people from torture or arbitrary treatment. Firstly, no criminal sanction can be imposed against any person unless s/he is proved guilty according to this law. Secondly, no person can be arrested, searched, or detained, except in the circumstances and conditions set forth in the law. Moreover, arrest or detention must be in the appropriate facility and for the period specified by the competent authority. Finally, there is a prohibition against harming the accused either physically or morally, and a prohibition against torture and degrading treatment.<sup>8</sup>

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<sup>7</sup> The Constitution of the UAE, arts 25- 44.

<sup>8</sup> FLCP, art 2.

Under UAE law, the term ‘accused’ describes a person to whom the commission of a crime is attributed. This means that one of the following procedures may be taken against him/her. Firstly, any procedure which may deprive him/her of liberty, such as arrest, apprehension and arraignment; secondly, an indictment may be directed to the person before the judiciary authority (the Public Prosecution); and, finally, the person may receive a subpoena to present himself/herself before a court.<sup>9</sup>

In UAE law, there are two stages to the criminal justice system: firstly, the gathering of evidence of the crime and the arrest of the perpetrators; and secondly, the criminal case.

#### 2.1.1 Gathering evidence of the crime and searching for the perpetrators

The stage of gathering evidence of the crime and searching for the perpetrators is considered as preparatory work leading up to the criminal case, but it is not considered to be a stage of the criminal case. For clarification, the criminal case starts after the first investigation procedure taken by the Public Prosecutor, while this stage is usually performed by the Judicial Police Officer.<sup>10</sup>

Judicial Police Officers are the category of officials who are authorised by law to gather evidence of crimes and arrest their perpetrators.<sup>11</sup> These Officers can be divided into two broad sub-categories: the first group have the capacity of Judicial Police Officer for all crimes which take place in their territorial jurisdiction;<sup>12</sup> whilst the other group are

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<sup>9</sup> Judah H. Jihad, *Explain in brief the UAE Federal Law of Criminal Procedure: Claims arising from the crime, The preparations for the criminal case*, vol 1, (Al Bayan Press, Printing and Publishing Establishment, 2006), 74.

<sup>10</sup> Article 30 FLCP states that the judicial police should inquire about crimes, search for their perpetrators, and collect the information and evidence necessary for investigation and indictment.

<sup>11</sup> Fethiyeh Qorari and Ghannam Mohammad, *The General Principles of the UAE Federal Law of Criminal Procedure No 35* (2<sup>nd</sup> edn, Brighter Horizon Publisher 2011), 109.

<sup>12</sup> The power of a judicial police officer is restricted to their territorial jurisdiction. For example, a sea port officer acts as a judicial police officer only in his/her sea port jurisdiction.

only allowed to act as Judicial Police Officers when the crimes in question relate to the performance of their duties.

Article 33 determines who falls into the first category of Judicial Police Officers. They are: members of the Public Prosecution;<sup>13</sup> officers, non-commissioned officers and lower-ranked members of the Gendarmerie; officers, non-commissioned officers and lower-ranked members of the Frontier Guards and the Coast Guards; passport officers; sea port and airport officers from the Police and armed forces; officers and non-commissioned officers of the Civil Defence; municipal inspectors; inspectors of the Labour and Social Affairs Ministries; Ministry of Health inspectors; and other civil servants authorised to act as Judicial Police Officers under the laws, decrees and regulations in force.

Article 34 determines the second category of Judicial Police Officer. The Minister of Justice (after an agreement with the competent minister or authority) may grant civil servants the character of Judicial Police Officers. In such a case, these civil servants will act as Judicial Police Officers only when the crimes in question relate to the performance of their normal duties. This usually happens where there does not already exist a specific category of Judicial Police Officer competent to deal with a certain crime.

The role of Judicial Police Officers in the criminal process is limited to: inquiring about crimes; searching for their perpetrators; and collecting the necessary information and evidence for investigation and indictment.<sup>14</sup> Such Officers do not have the power to investigate and direct indictments against a person. They can only question the accused

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<sup>13</sup> Although the Public Prosecutor performs some of the procedure at this stage, the criminal case will not be started because this stage is only to gather evidence of a crime; the criminal case will begin after the first investigation by the Public Prosecutor as part of Judicial.

<sup>14</sup> FLCP, art 30.

about the crime and take statements from those who may have information about criminal acts.<sup>15</sup> For clarification, suspects can face two different procedures: questioning and interrogation. The first procedure merely involves questioning suspects and taking statements from witnesses. This can be done by a Judicial Police Officer. During the interrogation procedure a person is expected to discuss the charges against him/her in far greater detail and will be presented with all the evidence held against them.<sup>16</sup> Judicial Police Officers do not have the authority to carry out this second procedure; this role is reserved to the Public Prosecutor.

#### 2.1.1.1 Arrest without warrant

Arrest (the deprivation of a person's liberty for a limited period of time) is permitted as a prelude to legal action, such as investigation or trial.<sup>17</sup> Arrest can be carried out with or without a warrant. In the stage of gathering evidence of a crime an arrest is usually carried out without a warrant as warrants need to be issued by the Public Prosecutor during the investigation.

Authorities with the power to arrest without a warrant can be divided into in three groups: Judicial Police Officers; Public Authority Members;<sup>18</sup> and normal persons.<sup>19</sup>

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<sup>15</sup> FLCP, art 40.

<sup>16</sup> Mohammad Ali and Khalid Almuhairei, *The UAE Federal Law of Criminal Procedure: Jurisprudence and Judiciary* (Alfateh Publisher 2000), 450. See also, The Federal Highest Court, Sharia and Criminal 29 January 2007, Appeal No. 587 for the 27<sup>th</sup> judicial year, para 5; the Federal Highest Court, State Security 02 June 2006, Appeal No. 42 for the 31<sup>st</sup> judicial year, para 1; the Federal Highest Court, Sharia and Criminal 14 June 2003, Appeal Nos. 275, 276 for the 23<sup>rd</sup> judicial year, para 5.

<sup>17</sup> Judah H. Jihad (n 9) 284.

<sup>18</sup> Article 49 FLCP states that in the case of felonies, as well as in that of misdemeanors sanctioned by a penalty other than fine, the public authority officers have to arraign the accused and deliver him to the nearest judicial authority officer.

<sup>19</sup> Article 48 FLCP states that whoever has caught the offender red-handed during the perpetration of a felony or a misdemeanor must deliver him to the nearest public authority officer without the need for an order of apprehension.

Since, usually, Judicial Police Officers make arrests without a warrant, this chapter focuses on their role and powers.

A Judicial Police Officer can arrest any person without a warrant from the Public Prosecutor if there is sufficient evidence to suggest that s/he has committed a crime in any of the following circumstances. These are: firstly, where s/he has committed a felony;<sup>20</sup> secondly, if s/he is caught in the act of committing a misdemeanour which is punishable by a penalty other than a fine; thirdly, in the case of a misdemeanour sanctioned by a penalty other than a fine where it is feared that the accused will flee; finally, in cases of misdemeanours including theft; deceit; breach of trust; severe transgression; assault of public authority officers; violation of public morals; and misdemeanours concerning arms, ammunitions, intoxicants and dangerous drugs.<sup>21</sup>

Despite the fact that UAE law provides no clear definition of the ‘sufficient evidence’ which is required to arrest without a warrant, the Dubai Court of Cassation has stated that this means that it could be concluded from the available evidence that the person is the perpetrator and it does not mean that the person must be charged;<sup>22</sup> it must only be sufficient to convince the Judicial Police Officer that an indictment could be brought against the person.<sup>23</sup> In other words, sufficient evidence should indicate that the arrested

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<sup>20</sup> Article 26 of the Federal Penal Code, No. 3 (1987) states that crimes are of three kinds: felonies, misdemeanours, and contraventions. Firstly, a felony is a crime sanctioned by any of the following penalties: any of the dogmatic sanctions or punitive punishments (except for drunkenness or slander); capital punishment; life imprisonment; or temporary incarceration (art 28). Secondly, a misdemeanour is a crime sanctioned by one or more of the following penalties: imprisonment; a fine exceeding a thousand Dirhams; or blood-money (art 29). Finally, a contravention is every act or omission sanctioned in the laws or regulations by one or both of the following penalties: detention for a period not less than twenty four hours and not more than ten days; or a fine not exceeding a thousand Dirhams (art 30).

<sup>21</sup> FLCP, art 45.

<sup>22</sup> Dubai Court of Cassation, 09 July 2005, Appeal No. 236 for the year of 2005 (criminal), Set of provisions and legal principles issued in penal matters, No. 16 (2005), 332.

<sup>23</sup> Dubai Court of Cassation, 31 August 2008, Appeal No. 276 for the year of 2008 (criminal), Set of provisions and legal principles issued in penal matters, No. 19 (2008), 213.

person committed the crime,<sup>24</sup> and this evidence must be clear and concrete; mere suspicion or conjecture does not justify arrest.<sup>25</sup> For example, in Appeal No. 68, the Federal Highest Court found that an arrest had taken place with sufficient evidence since the applicant was trying to hide counterfeit currency in his socks just before he was arrested.<sup>26</sup> In contrast, the Dubai Court of Cassation stated that a suspect's confusion or abnormal behaviour alone is not sufficient evidence to allow a Judicial Police Officer to arrest him/her without a warrant.<sup>27</sup>

#### 2.1.1.1.1 Period of arrest

A person could be arrested by a Judicial Police Officer or a Public Prosecutor. In the case of the arrest being made by a Judicial Police Officer, Article 47 FLCP states that a Judicial Police Officer must hear the deposition of the accused immediately upon his/her arrest.<sup>28</sup> It adds that s/he must either release the arrestee or send him/her to the Public Prosecutor within 48 hours. Consequently, the Judicial Police Officer can arrest a person for a maximum period of 48 hours. There is an exception to this procedure which can extend the period of arrest to up to 72 hours. Under Article 104, the member of the Public Prosecution must immediately interrogate the arrested person [on seeing him/her within 48 hours from the time of the arrest], or if this is impossible, s/he should be put in one of the specialised places of detention until his/her interrogation. The period of this procedure must not exceed 24 hours.

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<sup>24</sup> The Federal Highest Court, Sharia and Criminal 09/10/2007, Appeal No. 403, 405 for the 28<sup>th</sup> judicial year, para 2.

<sup>25</sup> Mohammad Ali and Khalid Almuhaire (n 16) 571.

<sup>26</sup> The Federal Highest Court, State Security 28 July 2003, Appeal No. 68 for the 31<sup>st</sup> judicial year, para 2.

<sup>27</sup> Dubai Court of Cassation, 04 February 2008, Appeal No. 485 for the year of 2007 (criminal), Set of provisions and legal principles issued in penal matters, No. 19 (2008), 213.

<sup>28</sup> The Judicial Police Officer must hear and record all the deposition and the statement of the accused as this stage is the stage in which evidence of a crime is gathered. This is why Article 35 FLCP states that the judicial police officers must accept incoming notifications and complaints about the offences. They must obtain any necessary clarifications and perform the necessary inspections in order to facilitate the examination of the facts reported to them or those that have come to their knowledge by any means. They have to take all precautionary measures necessary for the preservation of the crime's evidences.

Secondly, where a person is arrested by the Public Prosecutor, Article 47 states that the Public Prosecutor should interrogate the arrested person within 24 hours, after which s/he must either order his/her arrest or release him/her. This means the total period of this arrest is 24 hours.

To sum up, the maximum period for arrest under the authority of a Judicial Police Officer is 48 hours. However, the maximum period for arrest could be only 24 hours if the arrest was carried out by the Public Prosecutor. Overall, the maximum period of arrest is 72 hours.

#### 2.1.2 The criminal case and the Public Prosecutor

The criminal case stage starts after the first procedure that taken by the Public Prosecutor to investigate the case.<sup>29</sup> Therefore, the position and role of the Public Prosecutor should be clarified.

##### 2.1.2.1 The Public Prosecutor

The position and role of the Public Prosecutor is not regulated in the Constitution of the UAE. The UAE Federal Law of Criminal Procedure covers everything relating to this officer. Article 5 FLCP states that the Public Prosecutor is a part of the Judiciary, s/he has the duty to investigate crimes and to direct indictments in accordance with the provisions of the Law of Criminal Procedure.<sup>30</sup> S/he has the exclusive right to bring criminal cases to courts and pursue them.<sup>31</sup> As such, the Prosecutor must track all cases, from the court of first instance to the highest court of appeal until the trial's

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<sup>29</sup> Judah H. Jihad (n 9) 38.

<sup>30</sup> FLCP, art 5.

<sup>31</sup> FLCP, art 7.

conclusion.<sup>32</sup> A member of the Public Prosecution must attend in each of these hearings.<sup>33</sup>

In the UAE, the courts regard the Public Prosecutor as an *Impartial Adversary*; s/he works within his/her authority to ensure access to justice, whether for the benefit of society, which is protected by law, or for the benefit of the accused.<sup>34</sup> The Public Prosecutor is given the exclusive right to bring criminal cases to courts and pursue them because s/he is an original adversary in the case, but his/her adversarial role is impartial aimed to protect the community from crime.<sup>35</sup> In other words, the Public Prosecutor is impartial in the sense that s/he acts not out of self-interest, but is acting on behalf of the community that s/he represents, applies the law and gives access to justice.<sup>36</sup> Also, s/he is accepted as a representative of the people and his/her role is in searching for the truth, whether the verdict is ‘proven guilty’ or ‘innocent’.<sup>37</sup>

Although the position and role of the Public Prosecutor is important, it could be argued that in UAE law, the Public Prosecutor does not have the characteristic of independence demanded by Article 14 ArCHR as interpreted in the light of Article 9 ICCPR and Article 5 ECHR.<sup>38</sup>

Sherif Kamel states that the Public Prosecutor has the characteristic of independence from the court of trial and other courts. He adds that the independence of the Public

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<sup>32</sup> Judah H. Jihad (n 9) 49.

<sup>33</sup> Article 162 FLCP states that a member of the public prosecution must attend the hearings of the criminal court which has to hear him and rule over his demands.

<sup>34</sup> The Federal Highest Court, Sharia and Criminal 24 September 2005, appeal No. 640, for the 26th judicial year, para 3.

<sup>35</sup> The Federal Highest Court, Sharia 02 September 2002, appeal No. 110, for the 23<sup>rd</sup> judicial year, para 2.

<sup>36</sup> Abdo Ghoussoub, *Brief in the UAE Federal Law of Criminal Procedure* (Majid Publisher 2011) 224, 225.

<sup>37</sup> Medhat Ramadan, *Brief explanation in the UAE Federal Law of Criminal Procedure* (University of the UAE Press) 66.

<sup>38</sup> See Chapter 3, section 5: The right to be promptly brought before a judge or other judicial officer; Chapter 3, section 7: The right to have the lawfulness of the arrest or detention decided without delay by a court.



Prosecutor is obvious in that, despite s/he being part of the Judiciary, s/he has the duty to direct indictments without trial, and the function of indictment, which is carried out by the Public Prosecutor, is independent of the function of the trial, which is carried out by the judge of the court.<sup>39</sup>

Fethiyeh Qorari and Ghannam Mohammad argue that despite the contrast between those two functions, the Public Prosecutor performs the duty to direct the indictment, s/he is an adversary in the case, and has a role in the investigation. Therefore, s/he does not have the characteristic of independence as required, but instead is one of the parties to the legal dispute.<sup>40</sup> Judah Jihad adds that consequently, the Public Prosecutor's decision is biased towards the investigation that s/he has conducted and evidence that s/he has gathered, and then direct the indictment and deprive the liberty of the accused.<sup>41</sup>

In conclusion, in UAE law there is no 'Investigating Magistrate' who has a duty to investigate the cases. The Public Prosecutor has a duty to investigate crimes and to direct indictments. Chapter 5 of the present thesis will show how the Public Prosecutor - despite being considered in UAE law as part of the judiciary- cannot carry out some procedures that are required to be carried out by a judicial authority. This is because the Public Prosecutor does not have the character of independence from the parties to the case, because s/he is one of them.

#### 2.1.2.2 The criminal case

In UAE law, the stage of criminal case has three sub-stages; these are the starting stage; the indictment stage; and the trial stage.

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<sup>39</sup> Sherif Kamel, *The Principles of the UAE Federal Law of Criminal Procedure* (University of Jazeera 2011) 52.

<sup>40</sup> Fethiyeh Qorari and Ghannam Mohammad (n 11) 42.

<sup>41</sup> Judah H. Jihad (n 9) 44.

Firstly, the starting stage; during this stage, after investigation, the Public Prosecutor decides whether or not the case presented is as a criminal offence, and whether or not there is sufficient evidence against the person.<sup>42</sup> Consequently, on the one hand, if a person's actions are not considered to be a criminal offence; the evidence against a person are insufficient or there are other reasons to prevent a person being charged, the Public Prosecutor must issue a nonsuit order and order the person's release.<sup>43</sup> On the other hand, if all circumstances are adequate to direct the indictment against a person then the case will be transferred to the indictment stage.

In the indictment stage, the Public Prosecutor directs an indictment against the accused after deciding that all the situations of the case are sufficient to do so. Furthermore, as s/he has the exclusive right to bring criminal cases to court and pursue them,<sup>44</sup> s/he shall transfer the case to the competent criminal court (the trial stage) – as will be mentioned in the following passages.

The trial stage includes all the procedures taken by the court, from receiving the case until the trial's conclusion (conviction or acquittal).<sup>45</sup> During this stage, the Public Prosecutor must track all cases from the first instance in court to the highest court of Appeal, until the trial's conclusion.<sup>46</sup> A member of the Public Prosecution must attend each of these hearings.<sup>47</sup>

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<sup>42</sup> Judah H. Jihad (n 9) 38.

<sup>43</sup> Article 118 FLCP states that, subsequent to the investigation done by the Public Prosecutor, s/he may issue a nonsuit order and order the release of the accused unless s/he is detained for another reason.

<sup>44</sup> FLCP, art 7.

<sup>45</sup> Judah H. Jihad (n 9) 38.

<sup>46</sup> Ibid 49.

<sup>47</sup> Article 162 FLCP states that a member of the Public Prosecution must attend the hearings of the criminal court which has to hear him/her and rule on his/her demands.

Regarding criminal cases, there are three layers of court in UAE law: the Court of First Instance; the Court of Appeal; and the Highest Court. Firstly, the Public Prosecutor submits the case to the Court of First Instance. This Court is further divided into two divisions: the Misdemeanours and Contraventions Court deals with misdemeanours and contraventions; while the Felony Court deals with felony crimes.<sup>48</sup> The First Instance Court, after investigating the case presented, provides its conclusion, whether this is the acquittal or conviction of the accused. In the case of an acquittal, Article 211 states that should the act not be established or should the law not punish it, the court shall declare the accused innocent and s/he shall be released in the case that s/he is detained for this act alone. The Federal Highest Court provides for two circumstances which would lead to the act being declared 'not established'. Firstly, if there is doubt about the charge directed against the accused the judge shall acquit the accused from the charge.<sup>49</sup> This is because it is considered that a person is innocent until proven guilty.<sup>50</sup> So, when there is doubt, this should be interpreted in favour of the accused.<sup>51</sup> Secondly, an act may be declared as 'unestablished' if the evidence against the accused is not enough to convict him/her.<sup>52</sup> In contrast, if the act is established and constitutes a punishable one, the First Instance Court shall order the penalty, as prescribed by the law, to be applied.<sup>53</sup> The FLCP provides some principles for the First Instance Court. Firstly, the Court is not

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<sup>48</sup> FLCP, arts 120, 121.

<sup>49</sup> The Federal Highest Court, Criminal 29 May 2006, Appeal No. 90, for the 27<sup>th</sup> judicial year, para 3; the Federal Highest Court, Sharia and Criminal 06 May 2006, Appeal No. 479, for the 27<sup>th</sup> judicial year, para 2; the Federal Highest Court, State Security 05 December 2005, Appeal No. 525 for the 33<sup>rd</sup> judicial year, para 2; the Federal Highest Court, Criminal 31 October 2005, Appeal No. 26, for the 27<sup>th</sup> judicial year, para 2; the Federal Highest Court, Sharia and Criminal 24 September 2005, Appeal No. 640, for the 26<sup>th</sup> judicial year, para 9; the Federal Highest Court, State Security 24 February 2003, Appeal No. 314 for the 30<sup>th</sup> judicial year, para 2.

<sup>50</sup> The Federal Highest Court, Sharia and Criminal 17 April 2007, Appeal No. 100, for the 29<sup>th</sup> judicial year, para 3.

<sup>51</sup> The Federal Highest Court, State Security 08 April 2003, Appeal No. 89 for the 29<sup>th</sup> judicial year, para 2.

<sup>52</sup> The Federal Highest Court, Criminal 25 November 2006, Appeal No. 5, for the 24<sup>th</sup> judicial year, para 1; the Federal Highest Court, State Security 24 June 2002, Appeal No. 287 for the 29<sup>th</sup> judicial year, para 1.

<sup>53</sup> FLCP, art 212.

bound to follow what is written in the preliminary investigation or the collection of evidence reports unless there is a law to the contrary.<sup>54</sup> Secondly, the judge shall decide the case according to his/her personal conviction; however s/he may not base his/her judgment on evidence that was not submitted by the parties during the hearings.<sup>55</sup> Thirdly, the court may not condemn the accused for an act other than that mentioned in the referral order or the subpoena, and it may not condemn a person other than the accused against whom the action is brought.<sup>56</sup> Next, the court, in its judgment, may change the legal characterisation of the act imputed to the accused and it may amend the charge as it deems appropriate according to what the investigation or the oral pleadings may reveal. The court must draw the attention of the accused to this change and allow him/her a respite to prepare his/her defence in accordance with the new characterisation or amendment, if s/he so asks.<sup>57</sup> Finally, the judgment must include the reasons on which it is based and each judgment finding the accused guilty must include a description of the punishable act; the circumstances surrounding its perpetration; and references to the provisions of the law according to which the judgment was rendered.<sup>58</sup>

Then the accused may go to the Court of Appeal in order to appeal against the judgments rendered by the criminal courts of first degree.<sup>59</sup> Finally, the accused has a further opportunity to appeal to the Highest Court. In the UAE, there are three divisions of the Highest Court: the Dubai Court of Cassation, which is competent for Dubai cases; the Ras Al-Khaimah Court of Cassation, which deals with Ras Al-Khaimah cases; and the Federal Highest Court which handles cases from the rest of the country.

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<sup>54</sup> FLCP, art 208.

<sup>55</sup> FLCP, art 209.

<sup>56</sup> FLCP, art 213.

<sup>57</sup> FLCP, art 214.

<sup>58</sup> FLCP, art 216.

<sup>59</sup> FLCP, art 230.

It should be indicated that the national courts deal only with domestic law. The ArCHR is not part of UAE law and cannot be used to argue or decide a case in UAE courts. Article 10 of the UAE Federal Law of the Federal Judicial Corps No. 3 (1983) expressly states that the federal courts shall deal with all disputes and crimes according to the provisions of the Constitution. Article 27 of the Constitution of the UAE provides that ‘crimes and punishments shall be determined by the law. No penalty shall be imposed for any act or omission committed prior to promulgation of the relevant law.’

#### 2.1.2.3 Arrest warrant

UAE law enables arrest under a warrant from the Public Prosecutors. These warrants are issued when they wish to investigate a person for an offence which permits provisional detention.<sup>60</sup> Such offences include any felony or misdemeanour which is punishable by any means other than a fine.<sup>61</sup>

The Federal Highest Court provides a check on the Public Prosecutor’s power to issue an arrest warrant. Where there is a lack of sufficient evidence which the accused has committed the crime ascribed to him/her,<sup>62</sup> the Federal Highest Court can declare the Public Prosecutor’s arrest warrant invalid.<sup>63</sup> There are some exceptions which allow the Public Prosecutor to issue arrest warrants despite an offence not being in a category that normally permits provisional detention. These are: firstly, where the person has failed to fulfil an order to appear before the Public Prosecutor and does not have an acceptable excuse;<sup>64</sup> secondly, where there is an expectation that the person might flee;<sup>65</sup> thirdly,

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<sup>60</sup> FLCP, art 101.

<sup>61</sup> FLCP, art 106.

<sup>62</sup> See the explanation of the meaning of sufficient evidence in section 2.1.1.1: Arrest without warrant.

<sup>63</sup> The Federal Highest Court, Sharia and Criminal 21 May 2006, Appeal No. 683, for the 26<sup>th</sup> judicial year, para 2.

<sup>64</sup> FLCP, art 102.

<sup>65</sup> Ibid.

where the person has no known place of residence;<sup>66</sup> and finally, if the accused is caught red-handed.<sup>67</sup> Once an arrest warrant is issued, a member of a relevant public authority must be assigned the task of arresting the person and bringing him/her before the Public Prosecutor.<sup>68</sup>

#### 2.1.2.4 Provisional detention

The provisional detention procedure is similar to that of arrest in that it deprives a person of his/her liberty for a limited period of time.<sup>69</sup> The main difference between them is that a provisional detention must be ordered by a judicial authority, such as the Public Prosecutor during the investigation stage, or by the court during the trial.

Firstly, the provisional detention could be ordered by the Public Prosecutor during the investigation stage. As was mentioned previously, the Public Prosecutor must interrogate the suspect within 24 hours, after which they must either order a provisional detention or release him/her. The ordering of provisional detention by the Public Prosecutor is conditional on the availability of sufficient evidence and is possible only where the offence is a felony or a misdemeanour punishable by means other than a fine.<sup>70</sup>

Secondly, if the accused has been referred to a court, then, that court can order that the accused be provisionally detained.<sup>71</sup>

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<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> FLCP, art 101.

<sup>69</sup> Dubai Court of Cassation, 27 March 2004, Appeal No. 461 for the year of 2003 (criminal), Set of provisions and legal principles issued in penal matters, No. 15 (2004), 88.

<sup>70</sup> FLCP, art 106.

<sup>71</sup> FLCP, art 116.

The Public Prosecutor can order provisional detention for an initial period of 7 days. This period may be renewed for a further period not exceeding 14 days.<sup>72</sup> In other words, the Public Prosecutor can detain the accused for a maximum period of 21 days.

Despite the length of this period, Article 110 provides no limits on the Public Prosecutor's power to keep the accused in detention for the maximum period of 21 days. This means that this detention is at the complete discretion of the Public Prosecutor.<sup>73</sup> If, however, the investigation necessitates the continuation of provisional detention beyond 21 days, the Public Prosecutor must present the case to a competent criminal court. Then the judge must review the papers and hear the statement of the accused before making a decision.<sup>74</sup> The court can extend the period of provisional detention by a period not exceeding 30 days. This extension is subject to renewal.

UAE law does not determine a maximum period for provisional detention during investigation; the judge of the competent criminal court can repeatedly extend the period of provisional detention by a further renewable period of up to 30 days. This could lead to the duration of the accused's provisional detention exceeding the length of the prison sentence applicable to his/her offence.

Furthermore, the FLCP does not provide any maximum period for provisional detention during the trial. Again, this could lead to the duration of the accused's provisional detention exceeding the length of the prison sentence applicable to his/her offence.

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<sup>72</sup> FLCP, art 110.

<sup>73</sup> This is because, according to Article 5 FLCP, the Public Prosecution is an institution that forms part of the Judiciary, and has a duty to investigate crimes and to direct indictments in accordance with the provisions of the Law of Criminal Procedure.

<sup>74</sup> The accused must be presented before the judge who shall hear his/her statement before extending the period of provisional detention. In the case of his/her absence, s/he may submit a grievance to the president of the court against the order issued in his/her absence extending the detention. The grievance should be submitted within three days of his/her notification of the order. FLCP, art 110.

### 2.1.3 Arrest and provisional detention in terrorism offences

Article 2 of the Federal Decree Law No. 1 (2004) on Combating Terrorism Offences provides what is considered to be a terrorism offence. It is every action, or the refrainment from any action, by the perpetrator, in execution of an individual or collective criminal project, with the goal of terrorising or intimidating people. This action or refrainment will be a terrorist crime if it meets at least one of the following conditions. Firstly, it involves the disturbance of public order or endangering the safety and security of the society at risk. Secondly, hurting persons or exposing their lives, freedoms or security to danger - this includes the following categories of people and their family members: kings; presidents of States; prime ministers; ministers; and any representative or official of the State or an international organisation with governmental capacity. Thirdly, it involves damaging the environment or damaging, invading, or causing the operations of a facility, public or private property to stop. Finally, it involves the exposure of natural resources to danger.

In the UAE, terrorism is considered as a criminal offence and the Federal Decree Law on Combating Terrorism Offences provides particular punishments for the different kinds of terrorism offences.

#### 2.1.3.1 Arrest

The UAE Federal Decree Law on Combating Terrorism Offences does not provide any special requirements for an arrest in the case of terrorism offences. Article 42 provides that ‘with regards to any matter not provided for in the provisions of the present decree law, the provisions of the Penal Code and the Law of Criminal Procedures shall apply.’ Therefore, the procedure of arrest should remain the same as that for an ordinary crime,



which is provided under Article 47 FLCP (a Judicial Police Officer must either release the arrested person, or send him/her to the Public Prosecutor [as part of the Judiciary] within 48 hours).<sup>75</sup>

#### 2.1.3.2 Provisional detention

Relating to provisional detention, the UAE Federal Decree Law No. 1 (2004) on Combating Terrorism Offences provides only one exemption from its standard procedure, as set by the Law of Criminal Procedure, in the case of a terrorism offence. This exemption allows the Public Prosecutor to keep the accused for an initial period of 14 days in provisional detention, before sending the case to court for trial. This period is extendable by the Public Prosecutor for other similar periods, not exceeding 6 months, provided that the interests of the investigation so require it. The competent court can also extend the latest period of provisional detention [the UAE Federal Decree Law does not provide a maximum period for this extension].<sup>76</sup>

Herewith, it should be mentioned that, since the UAE Federal Decree Law only provides one exemption for provisional detention, all other procedures relating to provisional detention should remain the same. For example, such detention must be ordered by a judicial authority; it must be done after investigation and with the existence of sufficient evidence.<sup>77</sup>

### 2.2 *Rights following the deprivation of liberty*

In UAE law, there are some established procedural guarantees for a person under arrest or in detention. These are: the right to be heard; the right to be informed of the reason

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<sup>75</sup> See section 2.1.1.1.1: Period of arrest.

<sup>76</sup> The UAE Federal Decree Law No. 1 (2004), art 35.

<sup>77</sup> See section 2.1.2.4: Provisional detention.

for arrest and the charge against him/her; the right to have a lawyer; the right to a judicial review of detention; the right to have an interpreter; the right to silence; the right to contact with family members and relatives; the right to have medical care; and the right to silence.

#### 2.2.1 The right to be heard immediately

The arrestee must be heard by the Judicial Police Officer immediately after his/her arrest. Also the Public Prosecutor must interrogate him/her within 24 hours of being brought before the Public Prosecutor.<sup>78</sup> This right is important as it means that the arrestee will be released (by a Judicial Officer or the Public Prosecutor) if s/he proves his/her innocence.<sup>79</sup>

#### 2.2.2 The right to be informed of the reason for arrest and the charge against oneself

There is no explicit requirement under UAE law to inform the arrestee promptly of the reason for his/her arrest or for him/her being brought before a Judicial Police Officer. Rather it is implicit in Article 47. This states that the arrestee must be heard by the Judicial Police Officer immediately after his/her arrest and that s/he must be given the opportunity to prove his/her innocence. The opportunity to submit proof of innocence indicates that the person will know the reason for his/her arrest immediately upon arrest. The Federal Highest Court confirmed this when it stated that the Judicial Police Officer shall ask the person after his/her arrest about the crime assigned to him/her.<sup>80</sup>

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<sup>78</sup> FLCP, art 47.

<sup>79</sup> The accused has the right to have a lawyer to prove his/her innocence in the investigation and trial stage only. See section 2.2.3: The right to have a lawyer, below.

<sup>80</sup> The Federal Highest Court, Sharia and Criminal 23 January 2007, Appeal No 495 for the 27<sup>th</sup> judicial year, para 4.

Article 99 explicitly requires that the Public Prosecutor inform the arrestee of the charge against him/her at the beginning of the investigation. Bringing the arrestee before the Public Prosecution within 48 hours of the time of the arrest means that the arrestee will be informed of the charge against him/her (within 48 hours).<sup>81</sup> Where arrest is longer as permitted by Article 104, the arrestee will be informed about the charge against him/her within 72 hours instead of 48 hours.<sup>82</sup>

Secondly, in the event that a person is arrested by the Public Prosecutor, under the previous Article the relevant member of the Public Prosecution must immediately [after the arrest] interrogate the arrested person. In this case the Public Prosecutor must inform the person about the charge against him/her at the beginning of the investigation,<sup>83</sup> which means immediately after the arrest. In the event that the Public Prosecutor cannot interrogate the arrestee at the time of arrest, s/he should be put in one of the specialised places of detention for a period of time not exceeding 24 hours, until his/her interrogation.<sup>84</sup> In this case, the arrestees will be informed within 24 hours of the charge against them.

To sum up: firstly, in the case of the arrest being by a Judicial Police Officer the reason for arrest will be delivered immediately after arrest and the charge against the arrested person will be delivered generally within 48 hours but sometimes within 72 hours. Secondly, in the event that a person is arrested by the Public Prosecutor, the charge against the arrestee will be delivered immediately after the arrest or within 24 hours.

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<sup>81</sup> FLCP, art 47.

<sup>82</sup> See Section 2.1.1.1.1: Period of arrest.

<sup>83</sup> FLCP, art 99.

<sup>84</sup> FLCP, art 104.

### 2.2.3 The right to have a lawyer

UAE law does not provide the right to a lawyer at the stage of arrest by a Judicial Police Officer,<sup>85</sup> (this is a stage of evidence gathering), doing so only while an investigation is being carried out by the Public Prosecutor and during a trial by the Judiciary. The right to have a lawyer at the investigation stage is optional for the accused. Here, ‘Optional’ means that the person can exercise his/her right to have a lawyer if s/he wishes and can afford a lawyer but if the accused cannot afford a lawyer there is no requirement for the government to pay at this stage. Therefore, if s/he has a lawyer, the lawyer must be allowed to attend the investigation along with the accused and must be given access to the investigation’s papers.<sup>86</sup> Also, since the extension of the period of provisional detention by the court (in the investigation stage) requires the presence of the accused before the judge who shall hear his/her statement before extending such period,<sup>87</sup> the lawyer must be allowed to attend with the accused.<sup>88</sup>

Secondly, the status of this right is different during the trial stage depending on the crime of which the person is accused. When the person is accused of a felony, punishable by the death penalty or life imprisonment, the presence of a lawyer is compulsory during the trial. When the accused is unwilling or unable to appoint an attorney, the court must appoint and pay for an attorney for the defence.<sup>89</sup> In the case of a felony sanctioned by imprisonment, the attendance of an attorney is not compulsory, but the accused can ask the court to appoint an attorney for his/her defence if s/he is unable to pay for one him/herself. In this case, the court must appoint and pay for an

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<sup>85</sup> This mean that a judicial police officer can reject the presence of the lawyer during the stage of evidence gathering.

<sup>86</sup> FLCP, art 100.

<sup>87</sup> FLCP, art 110.

<sup>88</sup> FLCP, art 100.

<sup>89</sup> FLCP, art 4.

attorney in a case in which it verifies his/her financial inability to appoint a lawyer.<sup>90</sup>

Furthermore, in the case of a misdemeanour or contravention, the law does not require the presence of counsel during the trial and there is no grant from the court to pay for a lawyer where the accused is unable to afford one.

In the case of a felony or a misdemeanour sanctioned by a penalty other than a fine, the accused must attend in person and the presence of a lawyer alone is not enough,<sup>91</sup> while, for other misdemeanours and contraventions, the attendance of a lawyer alone is adequate.<sup>92</sup> In all circumstances, the lawyer shall himself/herself defend the accused or delegate someone to represent him/her. The failure to do so will result in the lawyer being sentenced to pay a fine not exceeding one thousand Dirhams, and possibly facing a disciplinary trial, if applicable.<sup>93</sup>

#### 2.2.4 Review of detention

The FLCP provides a review of detention as an important procedural guarantee to protect persons from arbitrary arrest or detention. The duty to carry out this review lies with the Public Prosecutor. Article 320 states that members of the Public Prosecution are entitled to enter the buildings situated within the scope of the jurisdiction of the courts in which they operate for the purpose of verifying that there are no illegally detained persons within.<sup>94</sup> The Public Prosecutor must, for this purpose, peruse the registers of writs of arrest and detention; take copies thereof and contact all detained persons; and listen to any complaints they wish to make. Furthermore, every detained person is entitled to submit, at any time, a written or verbal complaint asking the person

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<sup>90</sup> Ibid.

<sup>91</sup> FLCP, art 160.

<sup>92</sup> Ibid.

<sup>93</sup> FLCP, art 194.

<sup>94</sup> These buildings could be the detention cells in a police station, in the Public Prosecution buildings, courts, central prison, etc.

in charge of the detention to notify the Public Prosecutor. The administrator has to accept this request and immediately inform the Public Prosecutor of the complaint.<sup>95</sup>

Although UAE law provides this procedural guarantee, it does not organise the application of this procedure. For example, it does not state how often the Public Prosecutor must carry out the review or during which stage of arrest or detention the review must be undertaken. Only, it does provide one particularly important procedure. Upon learning of an illegally detained person, a member of the Public Prosecutor must go immediately to the place where the person is detained; make relevant investigations; and order the release of the illegally detained person.<sup>96</sup>

#### 2.2.5 The right to have an interpreter

Although Article 70 only provides the right to have an interpreter at the investigation stage,<sup>97</sup> the Federal Highest Court has emphasised that this right is required throughout the criminal process including the stage of evidence gathering.<sup>98</sup> For example, in Appeals No. 294 and 709 for the 26<sup>th</sup> judicial year, the Highest Court found that the confession of the accused was unlawful as he was Iranian and did not understand Arabic. In this case, the accused had confessed in the front of a police officer (during the stage of evidence gathering) despite the absence of an interpreter.<sup>99</sup> Furthermore, the

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<sup>95</sup> FLCP, art 321.

<sup>96</sup> Ibid.

<sup>97</sup> In Appeal No. 289 and 358 for the 26<sup>th</sup> judicial year, the Federal Highest Court emphasised that the existence of an interpreter before the interrogation of the foreign accused [who does not understand Arabic] is a substantial procedure or the interrogation will be void in the case of absent such interpreter. The Federal Highest Court, Sharia and Criminal 06 March 2007, Appeal No. 289, 358 for the 26<sup>th</sup> judicial year, para 2; See also, The Federal Highest Court, Sharia and Criminal 19 December 2006, Appeal No. 294, 159 for the 27<sup>th</sup> judicial year, para 2.

<sup>98</sup> The Federal Highest Court, Sharia and Criminal 05 December 2006, Appeal No. 12 for the 24<sup>th</sup> judicial year and Appeal No. 88, 165 for the 27<sup>th</sup> judicial year, para 3.

<sup>99</sup> The Federal Highest Court, Sharia and Criminal 14 November 2006, Appeal No. 294, 709 for the 26<sup>th</sup> judicial year, para 4.

Highest Court has stated, in other cases, that the court must use an interpreter where the accused does not speak Arabic.<sup>100</sup>

#### 2.2.6 The right to contact with family members and relatives

The right to contact with family members and relatives is regulated under the UAE Federal Law for the Regulation of Punitive Facilities No. 43 (1992) for people kept in punitive facilities.<sup>101</sup> Article 17 provides that prisoners in category 'A' shall be entitled to the right to receive visits and communicate with any person by correspondence unless it is prohibited by the relevant confinement order; Article 18 mentions that foreign detainees shall have the right to communicate with their consuls or other authorities governing their interests; Article 22 states that prisoners of category 'B' may be treated as prisoners of category 'A' if the public prosecutor or the facility officers deem this to be appropriate; and Article 23 requires that the prisoners of category 'C' are entitled to communicate with family and friends by correspondence and receive visits from them within the limits decided by the implemented regulation.<sup>102</sup>

Although there is no time or other limit on the exercising of this right, it is not absolute.

The Public Prosecutor may prevent the detainee from having contact with any other person apart from his/her attorney. Article 109 FLCP states that 'Should the

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<sup>100</sup> The Federal Highest Court, Criminal 03 May 2004, Appeal No. 46 for the 24 of the judicial year, para 3.

<sup>101</sup> Article 16 of the Federal Law for the Regulation of Punitive Facilities provides the categories of people who may be kept in punitive facilities. It states that, in implementing the provisions of this law, the prisoners are classified into four categories:

Category A: comprises provisional detainees, prisoners imprisoned for a civil debt, Sharia alimony or for the payment of blood debt or in instances of physical duress, in addition to convicts sentenced to imprisonment for contraventions.

Category B: comprises the prisoners consigned for the execution of death, castigation and retaliation penalties.

Category C: comprises convicts sentenced to imprisonment, temporary or life imprisonment.

Category D: comprises juveniles sentenced to imprisonment.

<sup>102</sup> The Federal Law for the Regulation of Punitive Facilities does not provide this right for category D prisoners sentenced to imprisonment. In contrast, Article 51 provides that a juvenile may be licensed to leave the facility to visit his/her parents on official holidays, exceptional circumstances or any other occasion.

investigation procedures so necessitate, the public prosecution member shall issue an order forbidding any contact between the provisionally detained accused and the other detained and any visits by any person whatsoever, without prejudice to the right of the accused to permanently contact in private his attorney.’

#### 2.2.7 The right to have medical care

Article 29 of the Federal Law for the Regulation of Punitive Facilities requires every facility to have one or more physicians, one of whom should reside therein, entrusted with prisoners’ medical care as determined by the implemented regulation.

A physician is required to examine every prisoner who enters the facility, to enter his/her physical and mental condition in the General Register for every category of prisoner, and to determine the work s/he can perform based on his/her physical condition.

The physician must inspect the facility and the prisoners to assess any health issues and the facility officer is required to implement health measures as decided by the physician.<sup>103</sup>

#### 2.2.8 The right to silence

The right to silence is not explicitly available to accused persons under UAE law. Article 28 of the Constitution states that everyone is innocent until proven guilty in a legal and fair trial. In addition, the role of gathering evidence against the person belongs to the Judicial Police Officer (not the person himself/herself). Therefore the right to silence is available implicitly and the accused protected from being compelled to

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<sup>103</sup> The UAE Federal Law for the Regulation of Punitive Facilities (1992), art 30.



present evidence against himself/herself. For example, in Appeal No. 411 for the 32<sup>nd</sup> judicial year, the Highest Court stated that the court shall accept the confession of the accused when it is satisfied that it has come from the free will of the accused, and without coercion.<sup>104</sup>

#### 2.2.9 The right to be free from oppression

Article 2 FLCP mentions the right to be free from oppression. It states that there is a prohibition against harming the accused either physically or morally, and a prohibition against torture and degrading treatment. Therefore - as was mentioned previously - the Highest Court stated that the court may only accept the confession of the accused when it is satisfied that it has come from the free will of the accused,<sup>105</sup> and that if it comes after coercion it will not be accepted. For example, in Appeal No. 153 for the 25<sup>th</sup> judicial year, the Highest Court overturned the conviction for a drug trafficking charge because the confession came after the applicant was beaten by the Judicial Police Officers.<sup>106</sup>

### 3. The Law of England and Wales

#### 3.1 *Overview of the organisation of criminal justice*

England and Wales is a common law jurisdiction, which means that ‘The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified

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<sup>104</sup> The Federal Highest Court, State Security 18 April 2005, Appeal No. 411 for the 32<sup>nd</sup> judicial year, para 2.

<sup>105</sup> Ibid.

<sup>106</sup> The Federal Highest Court, Sharia and Criminal 25 December 2004, Appeal No. 153 for the 25<sup>th</sup> judicial year, para 2.

written laws.’<sup>107</sup> Unlike the UAE, the UK, of which England and Wales are part, has no ‘higher law’ written document called the Constitution. The rules on constitutional matters are instead found in several different sources (not all of which are founded in law); for example, Acts of Parliament, European Union (EU) law, common law (judicial precedents, including ones on prerogative powers of the Crown (central government)), constitutional conventions, and works by authoritative constitutional writers. Amidst all these sources, an Act of Parliament ranks as the highest (due to the concept of Parliamentary sovereignty) and cannot be invalidated by the courts, although one may be set aside if contrary to EU law. Similarly, the law on police powers is a mix of legislation (Acts of Parliament, subordinate legislation and ‘softer law’ – the PACE Codes of Practice) and judicial precedents.

The Human Rights Act 1998 (HRA) incorporates most of the Convention Rights under the ECHR into domestic law, and makes them enforceable by domestic courts, requiring ‘public authorities’ (including the courts) to respect these rights while they are making decision or implementing their activities.<sup>108</sup>

Parliamentary sovereignty enables Parliament to enact laws incompatible with Convention Rights. The courts must enforce such laws, although they have the duty to interpret statutory provisions, wherever possible, to make them compatible with the Convention. If a compatible interpretation cannot be found, they can only make a declaration of incompatibility, which does not affect the validity or enforceability of these laws.<sup>109</sup>

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<sup>107</sup> American Heritage, ‘Dictionary of the English Language’ (4<sup>th</sup> edn). <<http://www.wordnik.com/words/common%20law>> accessed 12 September 2012.

<sup>108</sup> Richard Stone, *Textbook on Civil Liberties and Human Rights* (9<sup>th</sup> edn, OUP 2012), 14.

<sup>109</sup> Ibid.

For challenging unlawful detention, ‘*Habeas Corpus* [court-ordered release] and the tort of false imprisonment [court-ordered compensation] are important constitutional safeguards of the liberty of the subject against the Executive’.<sup>110</sup>

In general, in England and Wales, the criminal justice system can be divided into two stages: firstly, gathering evidence of a crime and arresting the perpetrators; and secondly, the criminal case.

### 3.1.1 Gathering evidence of a crime and searching for the perpetrators

In England and Wales, the police have the role of gathering evidence of a crime and searching for the perpetrators. The procedures required for arrest and detention are mostly provided under the Police and Criminal Evidence Act 1984 (PACE).

This Act is supported by codes of practice. For example, Code G ‘deals with powers of arrest under section 24 PACE as amended by section 110 of the Serious Organised Crime and Police Act 2005.’<sup>111</sup> Similarly, Code C provides the requirements for the detention, treatment and questioning of non-terrorism suspects by police officers.<sup>112</sup>

Police officers, known as constables, enjoy a degree of independence and authority given by legislation. For example, police officers as ‘the gatekeepers of the criminal justice system’ can stop and arrest a suspect and bring him/her to a police station.<sup>113</sup>

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<sup>110</sup> *Regina v. Governor of Her Majesty’s Prison Brockhill, ex parte Evans* [2001]. 2 AC 19 (HL) at 43 (Lord Hobhouse of Woodborough).

<sup>111</sup> Home office, ‘Police and Criminal Evidence Act 1984 (PACE) and accompanying codes of practice’ <<http://www.homeoffice.gov.uk/police/powers/pace-codes/>> accessed 25 September 2012.

<sup>112</sup> *Ibid.*

<sup>113</sup> Robin C. White, ‘The structure and organization of criminal justice in England and Wales: an overview’ in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP 2002), 8.

### 3.1.1.1 Arrest without a warrant

Case-law provides several definitions of arrest. For example, in *Spicer v Holt*, arrest is defined as ‘an ordinary English word ... Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases.’<sup>114</sup> In *Holgate-Mohammed v Duke*, arrest is defined as ‘a continuing act; it starts with the arrester taking a person into his custody, (sc. by action or words restraining him from moving anywhere beyond the arrester’s control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.’<sup>115</sup> In contrast, in *Criminal Justice*, Andrew Sanders and others state that there is no need for a clear definition of arrest.<sup>116</sup> They refer to Lord Devlin who simply said, in *Shaaban bin Hussien and Others v Chong Fook Kam and Another*, that an arrest is implemented by using force to prevent a person from leaving.<sup>117</sup>

As in the UAE, most arrests are effected by Constables, this chapter focuses on arrest without a warrant by a Constable.

Section 24 (1)-(3) PACE provides the situations in which a constable is authorised to make an arrest without a warrant. Firstly, subsection (1) allows a Constable to arrest anyone who is about to commit an offence; anyone who is in the act of committing an offence; anyone whom s/he has reasonable grounds for suspecting to be about to commit an offence; and anyone whom s/he has reasonable grounds for suspecting to be committing an offence. Secondly, under subsection (2), if a constable suspects that a

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<sup>114</sup> *Spicer Respondent v Holt Appellant* [1977], AC 987 (HL) at 1000 (Viscount Simon).

<sup>115</sup> *Holgate-Mohammed Appellant v Duke Respondent* [1984], AC 437 (HL) at 441 (Lord Diplock).

<sup>116</sup> Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4<sup>th</sup> edn, OUP 2010), 130.

<sup>117</sup> *Shaaban bin Hussien and Others Appellants v Chong Fook Kam and Another Respondents* [1970], AC 942 (HL) at 947 (Lord Devlin).

crime has been committed, the constable can arrest a person whom s/he has reasonable grounds to suspect of being guilty. Finally, subsection (3) states that where an offence has been committed, a constable may arrest anyone who is guilty of the offence and anyone whom s/he has reasonable grounds for suspecting to be guilty.

#### 3.1.1.2 Detention without charge

The maximum period of detention without charge at a police station is 36 hours. Under section 41 (1) PACE, a suspect cannot normally be detained for more than 24 hours without being charged, but a Police Officer of the rank of superintendent or above can extend this 24 hour period, but only by 12 hours.<sup>118</sup>

Furthermore, the superintendent or higher-ranked officer can authorise an application to the Magistrates' Court for an extension beyond the 36 hours.<sup>119</sup> The Magistrate may issue a warrant for further detention if satisfied that there are reasonable grounds for believing that further detention is justified.<sup>120</sup> If the Police find need an extra extension, they must apply again to the Magistrates' Court who may exceed the period for an additional 36 hours.<sup>121</sup>

#### 3.1.2 The criminal case

##### 3.1.2.1 The indictment

The indictment is directed towards the person by the Crown Prosecution Service (CPS), which was established by the Prosecution of Offences Act 1985. The main reason for establishing the CPS was to create an institution which was independent from both the police and the government. However, unlike the UAE Public Prosecution the CPS is not

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<sup>118</sup> PACE, s 41 (2).

<sup>119</sup> PACE, s 42 (2), s 43 (1).

<sup>120</sup> PACE, s 43 (1).

<sup>121</sup> PACE, s 44.

in any way seen as part of the judiciary. This was considered to be necessary for the protection of suspects and defendants.<sup>122</sup> Furthermore, giving the police the authority to prosecute is incompatible with their role as investigators.<sup>123</sup>

### 3.1.2.2 The trial stage

The first instance courts for criminal cases can be divided into two. The seriousness of the offence involved will determine which court the accused is tried in. Firstly, the Magistrates' Court only hears offences which are 'summary or triable either way'.<sup>124</sup> Secondly, there is the Crown Court: this Court considers both 'triable only' and the 'triable either way' offences.<sup>125</sup> Furthermore, the defendant can go to the Court of Appeal to appeal against his/her first instance conviction. Then, s/he can appeal again to the highest court which is called the Supreme Court of the UK.

### 3.1.2.3 Arrest warrant

Arrest can be made, also, under a Magistrate's warrant. Under section 1 of the Magistrates' Courts Act 1980, a Justice of the Peace<sup>126</sup> may issue a warrant for the arrest of a person who is suspected of having committed an offence. An arrest warrant can only be issued for an indictable offence; for an offence punishable with

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<sup>122</sup> Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice*, (4<sup>th</sup> edn, OUP 2010). 427.

<sup>123</sup> Robin C. White (n 113), 11.

<sup>124</sup> Under heading 'construction of certain expressions relating to offences' of the Interpretation Act 1978, s 5, sch 1, the distinction between the different kinds of offence is made. It indicated that:

- (a) 'indictable offence' means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way;
- (b) 'summary offence' means an offence which, if committed by an adult, is triable only summarily;
- (c) 'offence triable either way' means an offence, other than an offence triable on indictment only by virtue of Part V of the Criminal Justice Act 1988 which, if committed by an adult, is triable either on indictment or summarily;

and the terms 'indictable', 'summary' and 'triable either way', in their application to offences, are to be construed accordingly.

<sup>125</sup> Robin C. White (n 113) 13.

<sup>126</sup> A Justice of the Peace is a lay person who hears criminal cases such as theft, assault, breach of the peace and road traffic offences in the local courts. The Scottish Government, 'Justice of the Peace' <[http://www.jpsscotland.org.uk/jabs/CCC\\_FirstPage.jsp](http://www.jpsscotland.org.uk/jabs/CCC_FirstPage.jsp)> accessed 12 September 2012.

imprisonment; or if the person's address is not sufficiently established for a summons to be served on him.<sup>127</sup> An arrest warrant should be carried out by the person directed to do so by either the Justice of the Peace or by a constable acting within his/her police area.<sup>128</sup>

#### 3.1.2.4 Detention after charge

Under Section 46 PACE, the period within which a detainee must be brought before a Magistrates' Court is different from situation to situation. Firstly, the detainee must be brought before a Magistrates' Court as soon as is practicable if the 'local justice' is located in the same area as the police station in which s/he was charged. In this situation, the detainee must be brought no later than the first sitting of the court after s/he is charged with the offence.<sup>129</sup>

Secondly, where the detainee is brought before a Magistrates' Court situated in a different local justice area to the police station, s/he must be transferred there and brought before the court as soon as is practicable and not later than the first sitting of a Magistrates' Court in that area after his arrival.<sup>130</sup>

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<sup>127</sup> The Magistrates' Courts Act 1980, s 1 (4) (a) (b).

<sup>128</sup> The Magistrates' Courts Act 1980, s 125 (2) (a) (b).

<sup>129</sup> PACE, s 46 (2).

<sup>130</sup> PACE, s 46 (4).

### 3.1.2.5 Period of pre-trial detention

#### 3.1.2.5.1 Custody time limits in Magistrates' Courts

Firstly, if the accused commits an offence triable either way the maximum period that s/he shall be kept in detention from the first appearance before the Magistrates' Court to the commencement of the summary trial is 56 days.<sup>131</sup>

Secondly, in the case of the accused being charged with an offence which is triable either way or with an offence exclusively triable on indictment, the maximum overall length of detention at a Magistrates' Court is 98 days in the county of the West Midlands or 70 days elsewhere.<sup>132</sup> This 98/70 day period begins with the first appearance in court and runs until the moment when the magistrates' court makes a decision on whether or not to commit the accused to the Crown Court for trial.

#### 3.1.2.5.2 Custody time limits in the Crown Court

The maximum period of detention in the Crown Court is 112 days.<sup>133</sup> However, this maximum period can be extended. This might be permitted due to, 'the illness or absence of the accused, a necessary witness, a judge or a magistrate; a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or some other good and sufficient cause.'<sup>134</sup>

It should be indicated here that although the law limits exceptions permitting the court to go beyond the maximum periods, it does not provide a maximum period for such exceptional extensions.

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<sup>131</sup> The Prosecution of Offences (Custody Time Limits) Regulations 1987, s 4 (3).

<sup>132</sup> The Prosecution of Offences (Custody Time Limits) Regulations 1987, s 4 (2) (a),(b), s 4 (4) (a),(b).

<sup>133</sup> The Prosecution of Offences (Custody Time Limits) Regulations 1987, s 5.

<sup>134</sup> The Prosecution of Offences Act 1985, s 22 (3) (a).



### 3.1.3 Arrest and provisional detention in terrorism cases

Section 1 of the Terrorism Act 2000 (TA 2000) defines terrorism, and the type of action (the use or threat) of which is considered to be terrorism. This action ‘involves serious violence against a person, involves serious damage to property, endangers a person’s life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system.’<sup>135</sup> Subsection (1) sets out the aims behind an action or threat which would lead it to be considered terrorism. These are: to impact the government or an intergovernmental organisation or to threaten the whole public or a part of the public; and to offer advancement for some cause one which is, ‘political, religious, racial or ideological’.<sup>136</sup> There is an exemption, which would lead to the consideration of an action or threat of action as terrorism despite it not being aimed to impact the government or an intergovernmental organisation or to threaten the whole public or a part of the public. This is in the case that the action (or threat) takes place by using firearms or explosives.<sup>137</sup> In addition, Section 1 (4) TA 2000 indicates the global reach of this definition of terrorism. It states that: firstly, an ‘action’ of terrorism includes action outside the United Kingdom. Secondly, the violence indicated includes violence against any person and the damage mentioned includes damage to property, wherever it is located. Thirdly, the reference to the public includes the public of any country other than the United Kingdom. Finally, the government mentioned in Section 1 includes any State government.

Unlike under UAE law, in England and Wales terrorism is not a criminal offence, while in the UAE it is a criminal offence.

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<sup>135</sup> TA 2000, s 1 (2).

<sup>136</sup> TA 2000, s 1 (1) (b), (c).

<sup>137</sup> TA 2000, s 1 (3).

### 3.1.3.1 Arrest

Section 41 TA 2000 states that a Constable can arrest any person without a warrant in the event that they reasonably suspect him/her to be a terrorist. Since Section 40 outlines two categories of people, who are defined as terrorists. This means that a Constable may arrest without warrant a person who has committed a crime which is mentioned in Sections 11, 12, 15 to 18, 54 or 56 to 63 TA 2000, and anyone who ‘has been concerned in the commission, preparation or instigation of acts of terrorism.’

Arrest in terrorism cases differs from the one in normal criminal procedures. It not requires the Constable to have a specific offence for which to arrest the suspected terrorist.

### 3.1.3.2 Detention without charge in a terrorist case

Under Section 41 (3) TA 2000, a terrorist suspect may be detained for an initial period of 48 hours. This initial period can be extended further by a judicial authority.<sup>138</sup> In England and Wales, a Crown Prosecutor is the one who applies to the judicial authority for the issue of a warrant of further detention.<sup>139</sup> The TA 2000 requires the existence of some grounds or evidence to enable the judicial authority to extend the period of pre-charge detention. These must include the existence of reasonable grounds to believe that the extension of the period of pre-charge detention is necessary and proof that the investigation into the detainee ‘is being conducted diligently and expeditiously.’<sup>140</sup>

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<sup>138</sup> In England and Wales the ‘judicial authority’ means ‘a District Judge (Magistrates’ Courts) who is designated for the purpose of this Part by the Lord Chief Justice of England and Wales’. TA 2000, sch 8, para 29 (4) (a).

<sup>139</sup> TA 2000, sch 8, para 29 (1) (a).

<sup>140</sup> TA 2000, sch 8, para 32 (1).

The process of the application for the first warrant of further detention on top of the initial period (48 hours) should be made within this period, or within 6 hours of the end of it.<sup>141</sup> There are some notices, which should be given to the detainee to whom the application relates, before the application of the warrant for further detention is heard by the judicial authority. These notices state that an application for a warrant of further detention has been made; when this application was made; the time that the application is to be heard; and the grounds on which further detention is required.<sup>142</sup> The same detainee can make oral or written representations to the judicial authority and is entitled to be legally represented at the hearing,<sup>143</sup> but the judicial authority may exclude the detained person or his/her representative from any part of the hearing.<sup>144</sup> Also, Paragraph 34 of Schedule 8 permits the judicial authority to prohibit the detainee or his/her representative from hearing specified information in the event of the existence of certain grounds. In addition, the opportunity of representation does not need to be physical; it could be by a live television link or other means.<sup>145</sup>

It could be worthwhile indicating here (despite the present thesis studying only criminal procedures) that the Special Immigration Appeals Commission Act 1997 (SIAC) has a different procedure than Schedule 8 of Terrorism Act 2000. SIAC provides a Special Advocate system which is ‘a specially appointed lawyer (typically a barrister) who is instructed to represent a person’s interests in relation to material which is kept secret from that person (and his ordinary lawyers) but analysed by a court or equivalent body at an adversarial hearing held in private.’<sup>146</sup> Section 6 (1) of the Special Immigration Appeals Commission Act 1997 stipulates that ‘The relevant law officer may appoint a

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<sup>141</sup> TA 2000, sch 8, para 30 (1).

<sup>142</sup> TA 2000, sch 8, para 31.

<sup>143</sup> TA 2000, sch 8, para 33 (1).

<sup>144</sup> TA 2000, sch 8, para 33 (3).

<sup>145</sup> TA 2000, sch 8, para 33 (4).

<sup>146</sup> The Constitutional Affairs Committee, *Seventh Report* (HC 2005), para 44.

person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.’

In the case that the judicial authority is satisfied that the grounds for extending the pre-charge detention are suitable, it may extend the period of pre-charge detention for a maximum of 7 days.<sup>147</sup> This period could later be further extended by the judicial authority for another 7 days. Therefore, the total period of pre-charge detention for terrorist suspects is 14 days.<sup>148</sup>

### *3.2 Rights following the deprivation of liberty*

#### *3.2.1 The right to be informed*

Under Section 28 PACE an arrest will not be considered to be lawful unless the arrestee receives certain information. Firstly, the arrestee must be informed that s/he is ‘under arrest’ as soon as is practicable after the arrest.<sup>149</sup> Secondly, the grounds for the arrest must be explained to the arrested person at the time of arrest, or as soon as is practicable after his/her arrest.<sup>150</sup> There is an exception in which the requirement to inform the arrestee is dropped: where the arrestee escapes before the information can be delivered.<sup>151</sup>

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<sup>147</sup> TA 2000, sch 8, para 29 (3).

<sup>148</sup> TA 2000, sch 8, para 36 (1A) and (1B), inserted by Terrorism Act 2006, s 23 (6).

<sup>149</sup> PACE, s 28 (1).

<sup>150</sup> PACE, s 28 (3).

<sup>151</sup> PACE, s 28 (5).

### 3.2.2 Review of detention

Section 40 of PACE provides an important safeguard; a periodical review of each person in police detention.<sup>152</sup> The reviews are to be carried out by the custody officer if the person has been charged.<sup>153</sup> Where the detainee has not yet been charged with an offence, the review must be carried out by an officer of at least the rank of inspector not directly involved in the investigation.<sup>154</sup>

To begin with, the first review must start not later than 6 hours after the detention was ordered.<sup>155</sup> The second review must take place not later than 9 hours after the first review.<sup>156</sup> Any subsequent reviews shall be carried out at intervals of no more than 9 hours.<sup>157</sup>

### 3.2.3 The right to have someone informed when arrested

The arrestee has the right ‘to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable.’<sup>158</sup>

A delay is permitted only if the person is detained in a police station for ‘an indictable offence’.<sup>159</sup> It must be authorised by an officer of at least the rank of inspector.<sup>160</sup> Furthermore, this delay is permitted in only two cases. Firstly, where the officer has reasonable grounds to believe that, ‘telling the named person of the arrest will lead to interference with or harm to evidence connected with an indictable offence or

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<sup>152</sup> PACE, s 40 (1).

<sup>153</sup> PACE, s 40 (1) (a).

<sup>154</sup> PACE, s 40 (1) (b).

<sup>155</sup> PACE, s 40 (3) (a).

<sup>156</sup> PACE, s 40 (3) (b).

<sup>157</sup> PACE, s 40 (3) (c).

<sup>158</sup> PACE, s 56 (1).

<sup>159</sup> PACE, s 56 (2) (a).

<sup>160</sup> PACE, s 56 (2) (b).

interference with or physical injury to other persons; or will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or will hinder the recovery of any property obtained as a result of such an offence.’<sup>161</sup> Secondly, this right can be suspended if the officer has reasonable grounds to believe that the detainee has gained an advantage from his ‘criminal conduct’, and that exercising his right to have someone informed might hinder ‘the recovery of the value of the property constituting the benefit.’<sup>162</sup> In any case, the detainee must be allowed to exercise this right no later than 36 hours from arrival at the police station.<sup>163</sup>

#### 3.2.4 The right to legal advice

Where a detainee makes a request for such legal advice, s/he must be allowed to consult a solicitor as soon as is practicable.<sup>164</sup>

As with the right to have someone informed, this right can be delayed. The conditions of such delay,<sup>165</sup> the two situations permitting delay,<sup>166</sup> and the maximum period of the delay (36 hours) are the same as with the right to have someone informed.<sup>167</sup>

#### 3.2.5 The right to silence

The Criminal Justice and Public Order Act 1994 (CJPOA)<sup>168</sup> provides for an accused person’s right to silence. Under this Act, the arrested person can choose to remain silent

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<sup>161</sup> PACE, s 56 (5) (a) - (c).

<sup>162</sup> PACE, s 56 (5A) (a), (b).

<sup>163</sup> PACE, s 56 (3).

<sup>164</sup> PACE, s 58 (4).

<sup>165</sup> The requirements under s 58 (6) (a), PACE are similar to those under s 56 (2) (a) PACE, but s 58 (6) (b) is different than s 56 (2) (b), PACE. This is because the former permits an officer of at least the rank of ‘superintendent’ to permit the delay, while the latter requires an officer of at least the rank of inspector.

<sup>166</sup> s 58 (8) (a) - (c), PACE similar to s 56 (5) (a) - (c), PACE and s 58 (8A) (a), (b), PACE similar to s 56 (5A) (a), (b), PACE.

<sup>167</sup> s 58 (5), PACE similar to s 56 (3), PACE.

<sup>168</sup> CJPOA, s 34 - 39.

and not to answer any of the questions which s/he is asked during police questioning or at the trial.

### 3.2.6 The right to be free from oppression

Oppression could be used by a constable during an investigation. Therefore, Section 11.5 of PACE Code C states that ‘no interviewer may try to obtain answers or elicit a statement by the use of oppression.’ Consequently, under section 76 (2) PACE, any confession obtained by oppression will not to be accepted by the courts, even if it could be true.

The term ‘oppression’ has a broad meaning and includes ‘torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).’<sup>169</sup>

### 3.3 *The key similarities and differences between the two systems*

Despite the differences between the UAE jurisdiction and English and Welsh jurisdiction, both systems have some similar procedures. Such procedures include arrest with or without a warrant, as well as the procedures for keeping a person in detention until trial and for protecting detainees’ rights following arrest.

In addition, there are several significant differences between the two systems of arrest and provisional detention.

Firstly, in the UAE system the Public Prosecutor has the authority to issue arrest warrants, while in England and Wales arrest warrants are issued by Justices of the Peace, who are independent judges. Also, UAE law sees the Public Prosecutor as part of the judiciary in a way that the UK does not.

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<sup>169</sup> PACE, s 76 (8).

Secondly, the UAE system provides three categories of people with the power to arrest without a warrant: Judicial Police Officers; public authority members; and normal persons. In England and Wales, however, there are only two such categories: Constables; and normal citizens.

Thirdly, the maximum period for keeping a person detained on police authority in the UAE system is 48 hours, while in England and Wales this is normally 24, or 36 hours if a Police Officer of the rank of superintendent or above extends it. Moreover, in the UAE, Judicial Police Officers can only gather evidence and arrest suspects, whereas police officers in England and Wales also have the power to investigate.<sup>170</sup>

Then, under UAE law the period of detention after arrest until trial is called ‘provisional detention’. In England and Wales, while the term ‘pre-charge detention’ is used for the stage after arrest but before charge, with the term ‘pre-trial detention’ used for the stage before trial. In the UAE system, a person could be kept in provisional detention during the investigation by the Public Prosecutor for a maximum period of 21 days. This period can then be extended by the court for a renewal period not exceeding 30 days. In the UAE there is no specific limit on the duration of provisional detention by the court. In the English and Welsh system the maximum overall period of pre-charge detention is 96 hours. The maximum period of pre-trial detention in a Magistrates’ Court varies between 56 and 98 days. This depends on the charge as well as on the location of the court. The maximum period of pre-trial detention in the Crown Court is 112 days. This period can be extended in some circumstances. Also, the English and Welsh system does not provide a maximum period for this extension.

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<sup>170</sup> The Criminal Procedure and Investigations Act 1996, s 22.



Finally, regarding arrest and provisional detention in terrorist cases, the main difference between UAE law and the law of England and Wales is that, in the UAE, terrorism is considered to be a criminal offence while in the latest law it is not. Also, in UAE law the procedures are the same as those for an ordinary crime except that the Public Prosecutor can keep the accused in provisional detention for a period of 6 months. However, in England and Wales, there are some differences from the position with respect to an ordinary crime. Firstly, arrest does not require that the Constable have a specific offence for which to arrest the suspected terrorist. Secondly, the total period of pre-charge detention for terrorist suspects is 14 days. Lastly, the judicial authority may exclude the detained person or his/her representative from any part of the hearing or from any specified information.

In addition, there are differences and similarities between the two systems with regard to a person's rights following the deprivation of their liberty.

Both systems provide the right to be informed, but there is a difference in the information which should be delivered at the time of arrest. Under UAE law the Judicial Police Officer should immediately inform the arrestee of the reason for their arrest and provide sufficient information regarding it, which might help the arrested person to prove his/her innocence. In England and Wales the arrestee should receive two kinds of information: these are that s/he is 'under arrest' and the grounds for the arrest.

Regarding the right to have a lawyer, the UAE system does not mention this right for a person in the stage of arrest, while it is optional in the investigation stage. During the trial stage, this right is different from person to person depending on the crime committed. If the offence is a felony punishable by the death sentence or life imprisonment, the presence of a lawyer is compulsory even if the person is unwilling to

have one. Conversely, if the offence is a lesser one than that previously mentioned, such as a felony sanctioned by imprisonment, a misdemeanour or a contravention, the attendance of an attorney is not compulsory. The UAE system does not offer payment for a lawyer except in the trial stage and if the crime is a felony punishable by the death sentence or imprisonment. In England and Wales the person deprived of his/her liberty has the right to have free legal advice from a solicitor at all stages of the detention and trial process.

In the UAE, on the one hand, there is no explicit availability of the right to silence. It is available implicitly, because of the general principle that everyone is innocent until proven guilty in a fair, legal trial, and the role of gathering the evidence against the person belongs to the Judicial Police Officer not to the person himself/herself. On the other hand, in England and Wales, this right is provided explicitly and the person can choose to remain silent and not to answer any of the questions which s/he is asked during police questioning or at the trial.

Regarding the right to be free from oppression, both systems provide such rights and both do not accept a confession which resulted from oppression.

#### **4. Conclusion**

This chapter looked at arrest and provisional detention, and the procedural guarantees protecting those deprived of liberty (in the context of both ordinary crime and counter-terrorism) in the UAE and in England and Wales. Following this, it provided the key similarities and differences between the two systems.

After exploring the national laws of UAE and of England and Wales, Chapter 2 moves on to consider the concept of the right to liberty under the ArCHR, whose provisions

will be interpreted drawing on the interpretation of the corresponding provisions of the ICCPR and the ECHR.

## **CHAPTER 2**

### **THE RIGHT TO LIBERTY**

#### **1. Introduction**

Chapter 1 provided an overview of the regulation of arrest and provisional detention in the UAE and in England and Wales. This is the first of three chapters which provide an interpretation of those provisions of the ArCHR which are relevant to this area of legal regulation. This chapter focuses on the core concepts of deprivation of liberty, and the circumstances in which it is permitted, while Chapter 3 considers the guarantees which arise when there has been a deprivation of liberty permitted by the ArCHR, and Chapter 4 explores deprivation of liberty in the face of security concerns and the principle of derogation.

Because there is no interpretation by the Arab Committee of Human Rights for the ArCHR's Articles, and limited assistance which can be drawn from the monitoring reports under the Arab Charter, and since the wording is similar, the interpretation of Article 9 ICCPR and Article 5 ECHR is used as a guide to the proper interpretation of Article 14.

This chapter concerns the concepts of liberty and security, and explores the circumstances in which a deprivation of liberty is permitted.

Article 14 (1) and (2) ArCHR provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.

2. No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.

The corresponding provisions of Article 9 ICCPR provide:

1. Everyone has the right to liberty and security of person. No one shall be subject 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.

The corresponding provisions of Article 5 ECHR are rather more detailed:

1. 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:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The concept of deprivation of liberty has given rise to some difficulties of interpretation at the margins, and there is a prohibition on arbitrary action. The most significant

practical conclusion, which can be drawn from an exploration of the meaning of Article 14 (1) and (2), is that there is a requirement that national law makes clear provision for those situations in which there may be a deprivation of liberty, and it is followed. If it is not, there will be a breach of Article 14.

## **2. The right to liberty and security of a person**

A person's right to liberty and security are provided for together within the first sentence of Article 14 (1) ArCHR. Also, the same things are provided under Article 9 (1) ICCPR and 5 (1) of ECHR.

Therefore, it is important to understand the meaning of both liberty and security provided under Article 14, and to ascertain whether the right to security of persons is independent of his/her right to liberty, or whether this Article only covers the arbitrary deprivation of liberty.

### *2.1 The concept of liberty*

The ECtHR indicated in *Hajduova v. Slovakia* that the right to 'liberty' which is provided under Article 5 ECHR takes the idea of individual liberty in its 'classic sense', which is the 'physical liberty of the person',<sup>1</sup> while Nowak states that the right to liberty, which is provided under Article 9 (1) ICCPR is the 'freedom of bodily movement'.<sup>2</sup>

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<sup>1</sup> *Hajduova v. Slovakia*, App no 2660/03 (ECHR, 30 November 2010), para 54; see also, *Engel and others v. the Netherlands*, App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (EHRR, 8 June 1976) Series A no 22, para 58; *Abdolkhani and Karimnia v. Turkey*, App no 30471/08 (ECHR, 22 September 2009), para 125; *Znaykin v. Ukraine*, App no 37538/05 (ECHR, 7 October 2010), para 58.

<sup>2</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publisher 1993), 160.

Although these two meanings of liberty appear to be the same, the statement of the ECtHR seems to be better. This is because the term ‘deprivation of liberty’ is different – as will be explained later – from a restriction on liberty.<sup>3</sup> For clarification, it could be a restriction on liberty that is opposed to the freedom of movement, but Articles 14 ArCHR, 9 ICCPR and 5 ECHR could not be raised as it does not reach the deprivation of liberty. Consequently, in this context, the meaning of liberty is ‘physical liberty’, not freedom of movement.

## 2.2 *The concept of security*

The first sentences of Articles 14 (1) ArCHR, 9 (1) ICCPR and 5 (1) ECHR state that ‘Everyone has the right to liberty and security of person’. Since the first sentence of these Articles provides for the right to liberty and the security of an individual together in the same sentence, it is important to find the answer of the question raised previously, that is whether an individual’s ‘right to security of person’ is independent of their right to liberty, or whether it only covers the arbitrary deprivation of liberty.

To begin with, on the one hand, the HRC, with regard to Article 9 ICCPR, have argued that the question of the right to security could not arise solely in the context of the deprivation of liberty by arrest and detention, but must be wider than that to include ‘...threats to the personal security of non-detained persons’.<sup>4</sup> This is because, in the Committee’s view, ‘an interpretation of Article 9 which would allow a State party to

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<sup>3</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006), 220.

<sup>4</sup> *Carlos Dias v. Angola*, Communication No. 711/1996, U.N. Doc. CCPR/C/68/D/711/1996 (2000), para 8.3. In the same view, the Inter-American Commission of Human Rights interpreted the term ‘security’ as referring to detained and non-detained persons when it stated that ‘the right to ‘security’ appears to mean the right to be free from arbitrary arrest and danger or risk of personal harm or injury’. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para 122.

ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant.’<sup>5</sup>

On the other hand, in *East African Asians v. the United Kingdom*, the European Commission of Human Rights emphasised that the ‘security’ provided under Article 5 must not to be interpreted beyond the context of Article 5, meaning that it can only be read with regard to the right to ‘liberty’.<sup>6</sup> Lord Bingham of Cornhill supported the view that the right to security presented under Article 5 must not go beyond Article 5 (the right to liberty) to cover other rights under the European Convention.<sup>7</sup> Also, regarding Article 5 ECHR, Jim Murdoch states that the right to ‘liberty’ and the right to ‘security’ of a person must always be read together.<sup>8</sup> The justification for this can be concluded from the decision of the European Commission of Human Rights in *Agee v. the United Kingdom*. Here, the Commission stated that a person’s right to ‘security’ ensures that there is no arbitrary action on the part of a public authority against an individual’s liberty and that, according to the Commission, requires that any procedure laid down under Article 5 ECHR must be legal under domestic law.<sup>9</sup> In other words, the same Commission stated that the right to security is a guarantee against arbitrary arrest and

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<sup>5</sup> Ibid.

<sup>6</sup> *East African Asians v. the United Kingdom*, App no 4403/70; 4404/70; 4405/70; 4406/70; 4407/70; 4408/70; 4409/70; 4410/70; 4411/70; 4412/70; 4413/70; 4414/70; 4415/70; 4416/70; 4417/70; 4418/70; 4419/70; 4422/70; 4423/70; 4434/70; 4443/70; 4476/70; 4477/70; 4478/70; 4486/70; 4501/70; 4526/70; 4527/70; 4528/70; 4529/70; 4530/70 (Commission Decision, 14 December 1973), para 217-224. See also, *X v. the United Kingdom*, App no 5877/72 (Commission Decision, 12 October 1973) the law, para 2; *A and others v. Federal Republic of Germany*, App no 5573/72 (Commission Decision, 16 July 1976) the law, para 28; *Mentes and others v. Turkey*, App no 23186/94 (EHRR, 28 November 1997) 1997-VIII, para 79; *Selçuk and Asker v. Turkey*, App no 23184/94; 23185/94 (EHRR, 24 April 1998), 1998-II, para 82.

<sup>7</sup> *The Queen on the Application of Mrs Dianne Pretty (Appellant) v. Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)*, Opinions of the Lords of Appeal for Judgment in the Cause (29 November 2001) [2001] UKHL 61, para 23.

<sup>8</sup> Jim Murdoch, *Article 5 of the European Convention on Human Rights* (Council of Europe, Files No.12, 2002), 16.

<sup>9</sup> *Agee v. the United Kingdom*, App no 7729/76 (Commission Decision, 17 December 1976), p. 173, para 12.



detention.<sup>10</sup> For example, in *Bozano v. France* the applicant argued that his detention was unlawful in accordance with French law. The ECtHR started the investigation by stating: ‘What is at stake here is not only the “right to liberty” but also the “right to security of a person”’, since the right to security of a person requires that the procedure applied be legal. The Court concluded that there had been a breach of Article 5 ECHR, and that the deprivation of liberty was incompatible with the right to security of a person.<sup>11</sup> Moreover, the European Commission of Human Rights, in *Stocke v. the Federal Republic of Germany*, stated that any deprivation of liberty must be in accordance with the domestic law of the State which carries out the procedure. Thus, if an authority of the State processes the arrest of a person in the territory of another State, without prior permission from that State, this is not merely an infringement of the State, but is also an infringement of the right to security of the person concerned.<sup>12</sup>

To sum up, there is a difference between the interpretations of the Human Rights Committee and those of the European Commission and Court of Human Rights. On the one hand, the latter refer to the principle of positive obligations (under Article 1 ECHR), which requires the national authorities of each State to take ‘...reasonable and suitable measures to protect the rights of the individual’.<sup>13</sup> This leads to a limitation of the right to security to the right to liberty, but only insofar as the other rights are already protected. On the other hand, the HRC seems to ignore the same principle which is

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<sup>10</sup> *Dyer v. the United Kingdom*, App no 10475/83 (Commission Decision, 09 October 1984), 246.

<sup>11</sup> *Bozano v. France*, App no 9990/82 (EHRR, 18 December 1986), Series A, no 111, paras 54, 60.

<sup>12</sup> *Stocke v. the Federal Republic of Germany*, App no 11755/85 (Commission Decision, 12 October 1989), para 167.

<sup>13</sup> Jean-François Akandji-Kombe, *Positive Obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, No 7, Council of Europe 2007), 7. For clarification, in *López Ostra v. Spain*, the applicant claimed a violation of Article 8 of the ECHR, because the lives of her family members became unbearable due to noise and odours emitted from a factory near her home. The court stated that, regarding the principle of ‘positive obligations’, the role of the public authorities of the State is to ‘...take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 8’. The court concluded that there had been a violation of Article 8 in that the State did not provide appropriate measure(s) to safeguard the right to the protection of private and family life. *López Ostra v. Spain*, App no 16798/90 (EHRR, 09 December 1994), series A 303-C, paras 44-58.

provided under Article 2 (1) ICCPR, so it considers that the right to security should go beyond the right to liberty.

It can be argued that, despite the fact that Articles 14 (1) ArCHR, 9 (1) ICCPR and 5 (1) ECHR protect a person's right to liberty by providing the right to security in the same Article, it does not appear necessary for them to specifically provide the right to 'security' for the following reason. Article 3 (1) ArCHR, Article 2 (1) ICCPR and Article 1 of the ECHR regulate the principle of positive obligations. Since this principle requires the national authorities of each State to take measures to protect the rights of the individual, all of an individual's rights are already protected, including the right to liberty.

In addition, because the phrase 'right to security' can indicate that the right to security is independent, and can therefore cover all rights, or can alternatively refer to dependent rights which must only be read together with the right to liberty, it might be better to replace these terms with 'the right of prohibition of the arbitrary deprivation of liberty', as this provides the same protection as the current terms (the right to security).<sup>14</sup>

### **3. Deprivation of liberty**

#### *3.1 The notion of deprivation of liberty*

The deprivation of liberty is regulated under Article 14 (2) ArCHR and other similar Articles (Article 9 (1) ICCPR and Article 5 (1) ECHR). Despite the fact that the ICCPR and the ECHR provide such regulations along with case-law, neither give a precise or comprehensive definition of the deprivation of liberty - however, some idea of the concept is certainly provided.

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<sup>14</sup> Article 50 ArCHR states that 'Any State party may submit written proposals, through the Secretary-General, for the amendment of the present Charter.....'

Regarding Article 5 ECHR, Stefan Trechsel defines the meaning of the deprivation of liberty as: ‘...a measure taken by a public authority by which a person is kept against his or her will for a certain amount of time within a limited space and hindered by force, or a threat of the use of force, from leaving that space’.<sup>15</sup> Although this thesis concentrates only on ‘arrest’ and ‘provisional detention’ as criminal procedures normally undertaken by a public authority, it is important to highlight here that, while Trechsel has tried to find a comprehensive definition of the deprivation of liberty, he confines the definition to an action carried out by a public authority, and does not consider acts carried out by private persons, such as kidnapping.<sup>16</sup> In addition, regarding Article 9 of the ICCPR, Nowak explains two cases of deprivation of liberty in terms of arrest and detention. He states that the term ‘arrest’ indicates the act of the deprivation of personal liberty and, in general, includes the period up to the time when the person is brought before the competent authority, while ‘detention’ signifies the situation of the deprivation of liberty, irrespective of what happens after the period of legal deprivation of liberty, for example arrest (custody, pre-trial detention) or conviction (imprisonment), or what follows an illegal deprivation, such as kidnapping or some other action.<sup>17</sup>

In their classic form ‘arrest’ and ‘detention’ at the police station plainly constitute deprivations of liberty. These two procedures cover any deprivation of liberty in general and not only those related to criminal procedures. Since keeping persons of unsound mind in a psychiatric hospital is a deprivation of liberty, these terms (‘arrest’ and ‘detention’) must therefore cover the holding and keeping of individuals in a psychiatric

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<sup>15</sup> Stefan Trechsel, with the assistance of Sarah J. Summers, *Human Rights in Criminal Proceedings* (OUP 2005), 412.

<sup>16</sup> The Inter-American Court of Human Rights in the *Velasquez Rodriguez* case confirmed this when it stated that ‘...the kidnapping of a person is an arbitrary deprivation of liberty’. *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 155.

<sup>17</sup> Manfred Nowak (n 2) 169.

hospital.<sup>18</sup> Furthermore, although the deprivation of liberty is similar to a restriction on the liberty of movement in terms of its nature and principles, the two restrictions are different in degree and intensity.<sup>19</sup> The ECtHR, in *Austin and others v. the United Kingdom*, emphasised that, in order to find out whether or not a measure has involved a deprivation of liberty, it is important to investigate ‘...a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’<sup>20</sup> Moreover, the ECtHR stated that ‘Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.’<sup>21</sup> For instance, in *N.C. v. Italy* the ECtHR decided that the house arrest in that case was a deprivation of liberty,<sup>22</sup> while in *Raimondo v. Italy*, the same court found that house arrest is not considered to be a deprivation of liberty.<sup>23</sup>

To sum up, on the one hand, in case of the deprivation of liberty, Articles 14 ArCHR, 9 ICCPR or 5 ECHR should be raised as they provide the right to liberty. On the other hand, if it is merely a restriction on liberty, Articles 26 ArCHR, 12 ICCPR or 2 ECHR should be raised because these provide the right to freedom of movement.

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<sup>18</sup> For clarification, Article 5 (1) (e) ECHR refers to ‘detention’ in terms of the place of keeping ‘...of persons of unsound mind’. Also, in *Morsink v. the Netherlands*, where the European Court of Human Rights investigated the issue of mentally ill individuals, it emphasised that ‘...there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, and that, in principle, the ‘detention’ of a person as a mental health patient will only be ‘lawful’ for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution’. *Morsink v. the Netherlands*, App no 48865/99 (ECHR, 11 May 2004), para 65. See also *Ashingdane v. the United Kingdom*, App no 8225/78 (EHRR, 28 May 1985), Series A no 93, para 45; *Aerts v. Belgium*, App no 61/1997/845/1051 (EHRR, 30 July 1998) 1998-V, para 46; *Hutchison Reid v. the United Kingdom*, App no 50272/99 (ECHR, 20 February 2003), paras 47,48; *Brand v. the Netherlands*, App no 49902/99 (ECHR, 11 May 2004), para 62.

<sup>19</sup> *Guzzardi v. Italy*, App no 7367/76 (EHRR, 6 November 1980), Series A no 39, paras 92, 93; *Celepli v. Sweden*, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994), paras 4.5, 6.1.

<sup>20</sup> *Austin and others v. the United Kingdom* App no 39692/09, 40713/09 and 41008/09 (ECHR, 15 March 2012), para 57.

<sup>21</sup> *Guzzardi v. Italy* (n 19), para 93.

<sup>22</sup> *N.C. v. Italy*, App no 24952/94 (ECHR, 11 January 2001), para 33.

<sup>23</sup> *Raimondo v. Italy* App no 12954/87 (EHRR, 22 February 1994), Series A no 281-A, paras 9, 39.

There are two elements which make the deprivation of liberty different from a restriction on the liberty of movement. The first element of deprivation is the space in which the person is kept. For criminal procedures, confinement in a cell is the most common image of the deprivation of liberty.<sup>24</sup> Referring to case-law, there are other possible images of the deprivation of liberty relating to the place in which an individual might be kept; for example, house arrest;<sup>25</sup> placing a person in a hospital;<sup>26</sup> or hotel<sup>27</sup> under surveillance or a restriction in terms of their liberty of movement are deprivations of liberty, as is keeping the person in a detention centre established in a school or church.<sup>28</sup>

Indeed, it can be argued that the element of space, as it relates to the deprivation of liberty, is difficult to define and is unclear. Hence, keeping a person under house arrest, as mentioned above, is sometimes considered to be a deprivation of liberty and sometimes a restriction on it. Also, commonly occurring restrictions on movement in some places cannot be considered as deprivation of liberty and in some others it can be considered as such.<sup>29</sup> For example the ECtHR stated that ‘It cannot be excluded that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of Article 5 (1).’<sup>30</sup>

It is true that keeping a person in a confined space under supervision may be considered a deprivation of the individual liberty protected under Article 14 ArCHR, Article 9 ICCPR and Article 5 ECHR. However, there are some situations which do not fall

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<sup>24</sup> Stefan Trechsel (n 15) 413.

<sup>25</sup> *N.C. v. Italy* (n 22), para 33; *Mancini v. Italy*, App no 44955/98 (ECHR, 12 December 2001), para 17. See also *Monja Jaona v. Madagascar*, Communication No. 132/1982, U.N. Doc. CCPR/ C/OP/2 at 161 (1990).

<sup>26</sup> *Lavents v. Latvia*, App no 58442/00 (ECHR, 28 November 2002), para 63.

<sup>27</sup> *Riera Blume and others v. Spain*, App no 37680/97 (ECHR, 14 October 1999), para 30.

<sup>28</sup> *Cyprus v. Turkey*, App no 9780/74; 6950/75 (Commission Decision, 10 July 1976), para 285.

<sup>29</sup> *Austin and others v. the United Kingdom* (n 20), paras 59, 60.

<sup>30</sup> *Ibid* para 60.

within the scope of these Articles. The best example of this is the case of people performing military service; it is natural that soldiers are restricted in their liberty – for example, to a camp which they are not allowed to leave.<sup>31</sup>

Both the ECtHR (regarding Article 5 ECHR) in *Engel and others v. the Netherlands*,<sup>32</sup> and the HRC (regarding Article 9 ICCPR) in *Vuolanne v. Finland*<sup>33</sup> explained this situation and arrived at the same conclusion. They stated that a disciplinary penalty or action which could be considered a deprivation of liberty for a civilian could not be automatically deemed to be the same if they were applied to a person in the armed services. However, if the situation was to exceed a limit in terms of the requirements for ordinary armed service and/or if it was to diverge from the armed forces' conditions, then the situation would be eligible for protection under the Articles 14 ArCHR, 9 ICCPR or 5 ECHR, whichever was applicable, as will be shown in the following section.

The second element, in the deprivation of liberty, is the absence of consent. A person must be forced to stay in the place associated with the deprivation of liberty.<sup>34</sup> Therefore, if a person stays in a particular place through his/her own free will and can leave whenever s/he wants, the situation cannot be considered to be a deprivation of liberty.<sup>35</sup> In contrast, if a person entered a space of his/her own free will and, thereafter,

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<sup>31</sup> *Engel and others v. The Netherlands* (n 1), para 59; *Antti Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989), para 9.4.

<sup>32</sup> *Engel and others v. The Netherlands* (n 1), para 59.

<sup>33</sup> *Antti Vuolanne v. Finland* (n 31), para 9.4.

<sup>34</sup> *Storck v. Germany*, App no 61603/00 (ECHR, 16 June 2005), para 74. For example, in *H.M. v. Switzerland* the applicant argued that she had been deprived of her liberty as she had been kept in a nursing home without her consent. The Court, after investigating the claim, found that '...after moving to the nursing home, the applicant agreed to stay there', and so it decided that there had been no deprivation of liberty. *H.M. v. Switzerland*, App no 39187/98 (ECHR, 26 February 2002), paras 40- 48.

<sup>35</sup> For example in *S.S., A.M. and Y.S.M. v. Austria*, the applicants arrived at Vienna airport of their own free will and asked for asylum. The Austrian government prevented them from entering the State as asylum seekers and they stayed for seven days in the transit area. The European Commission on Human Rights found that their situation did not constitute a deprivation of liberty as they had arrived of their own free will and were free to leave the Austrian airport at any time during the period of their stay. *S.S., A.M.*

became unable to leave that place then s/he would be deemed as having been deprived of their liberty.<sup>36</sup> David Harris and others agree with this view and state that ‘...of course, even if consent is given, it can be withdrawn.’<sup>37</sup>

Coercion to stay in one place, which is regarded as a deprivation of liberty, has two forms. Firstly, it can be material coercion using objects such as handcuffs and locked doors. In *Berkday v. Turkey*, for example, the ECtHR found that the applicant was deprived of his liberty as he had been handcuffed in his house by six police officers while they were searching his house.<sup>38</sup> By contrast, in *X. v. Germany*, the applicant was kept in an unlocked room in a police station for two hours. The European Commission found that this measure did not constitute a deprivation of liberty.<sup>39</sup>

Secondly, the coercion to stay in one place, which is regarded as a deprivation of liberty, can be a moral one which uses the threat of the use of force instead of handcuffs and locked doors; ‘house arrest does not necessarily mean that the door is locked.’<sup>40</sup>

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and *Y.S.M. v. Austria*, App no 19066/91 (Commission Decision, 05 April 1993), para 2. In contrast, in *Amuur v. France*, the European Court of Human Rights decided that retaining the applicants – who had been prevented from entering France as asylum seekers – in the transit area of Paris-Orly Airport for 20 days was a deprivation of liberty under Article 5. This decision was contrary to the previous case because the Court found that the applicants had been kept under strict and constant police observation in the airport’s transit area ‘...and its extension, the floor of the Hotel Arcade adapted for the purpose’, which was like the detention of aliens pending deportation. In other words, the police in the airport restricted their rights in terms of liberty of movement without their consent, although they were free to leave France. *Amuur v. France*, App no 19776/92 (EHRR, 25 June 1996) 1996-III, paras 43-49.

<sup>36</sup> For example, in *Storck v. Germany*, the applicant came to the psychiatric clinic herself, but when she was kept inside and prohibited from leaving it the Court found that there had been a deprivation of liberty. *Storck v. Germany* (n 34), paras 75, 78.

<sup>37</sup> David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP, 2009), 127.

<sup>38</sup> *Berkday v. Turkey*, App no 22493/93 (ECHR, 01 March 2001).

<sup>39</sup> *X. v. Germany*, App no 8819/79 (Commission Decision, 19 March 1981), 161.

<sup>40</sup> Stefan Trechsel (n 15) 415. For example, the European Commission on Human Rights in *Engel and others v. The Netherlands* emphasised that ‘aggravated arrests’, in the form of keeping a group of soldiers in a particular locality as a punishment and not allowing them to leave that locality, were a deprivation of liberty. It explained that this was the case despite the fact that there was no material coercion such as locked doors or handcuffs but just an order from the company commander. *Engel and others v. The Netherlands*, App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (Commission Decision, 19 July 1974), para 72.

A question can be raised here: if a person is detained with his/her consent, is his/her arrest or detention a deprivation of liberty with regard to which the State must respect the requirements set out in Article 14 ArCHR, Article 9 ICCPR and Article 5 ECHR? Or, if his/her arrest or detention is not a deprivation of liberty, is there no violation if the government of the State fails to fulfil its obligations under the same Articles?

The ECtHR's view is that such detention is a deprivation of liberty and the government concerned must fulfil the requirements of the ECHR. This is clear from its statement in the *De Wilde, Ooms and Versyp* case. In this case it stated that a '...detention might violate Article 5, even though the person concerned might have agreed to it.'<sup>41</sup> Stefan Trechsel disagrees with this statement and says: '...this sentence, in my view, is misleading and contradictory in that the very notion of detention implies the absence of consent. The passage reveals its meaning, however, when read in its context: detention cannot be justified by relying on the fact that the person concerned initially agreed to enter and stay in a particular institution if he or she later wishes to leave.'<sup>42</sup>

Although Trechsel argues that the statement by the ECtHR is misleading, it could be said that the sentence is clear and satisfactory. For clarification, with regard to any person kept in detention by a public authority, whether or not they have given consent, the government concerned must respect the requirements of international human rights instruments, such as the conditions and grounds for detention, and make procedural guarantees following a deprivation of liberty. For instance, if a person agrees to be arrested or detained, the government must first check the circumstances under which arrest or detention is allowed, such as whether the individual has committed a crime. If these circumstances are not pursuant the government cannot arrest or detain the person

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<sup>41</sup> *De Wilde, Ooms and Versyp (Vagrancy) v. Belgium (Merits)*, App no 2832/66; 2835/66; 2899/66 (EHRR, 18 June 1971), series A 12, para 65.

<sup>42</sup> Stefan Trechsel (n 15) 414.



despite their agreement to be arrested or detained. In other words, even if a person agrees to be arrested or detained the government will be in violation of the relevant Article that provides the right to liberty if it does not fulfil any of the Article's requirements.

This is exactly what the ECtHR said: '...detention might violate Article 5 even though the person concerned may have agreed to it.' Moreover, in the same case, it explained its understanding clearly when it stated: '...such a "voluntary reporting" can scarcely amount to being "deprived of liberty" within the meaning of Article 5. From this it concluded that the Court ought to rule out forthwith any idea of a failure to comply with the requirements of the Convention, as regards both "the detention itself" and "the conditions of detention"'.<sup>43</sup>

In addition, consent in the issue of deprivation of liberty must be based on full information and must come from a person of sound mind.<sup>44</sup> Consequently, limiting the liberty of children in a school or any educational or recreational institution cannot be considered a deprivation of liberty, even though the child is coerced.<sup>45</sup>

The existence of the previously mentioned elements is enough to constitute a deprivation of liberty, even in situations where a relatively short period of time involved.<sup>46</sup> For example, in *Rantsev v. Cyprus and Russia* the ECtHR concluded that the

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<sup>43</sup> *De Wilde, Ooms and Versyp (Vagrancy) v. Belgium* (n 41), para65.

<sup>44</sup> Stefan Trechsel (n 15) 415. For instance, in *Storck v. Germany*, the European Court of Human Rights found that the applicant was deprived of her liberty as she was kept in a psychiatric institution without her consent, but at the will of her father. The European Court reached this conclusion because the applicant had reached the age of majority and was legally capable of expressing her views. *Storck v. Germany* (n 34), paras 69-78.

<sup>45</sup> The European Commission of Human Rights in *M.; R.T.; F. v. Austria* indicated the reason for this, which is that the care and upbringing of children naturally and essentially needs to involve different limitations with regard to their liberty. *M.; R.T.; F. v. Austria*, App no 14013/88 (Commission Decision, 14 December 1989), para 1.

<sup>46</sup> *Rantsev v. Cyprus and Russia*, App no 25965/04 (ECHR, 7 January 2010), para 317; *Iskandarov v. Russia*, App no 17185/05 (ECHR, 23 September 2010), para 140.

applicant was deprived of her liberty, although the detention lasted no more than 2 hours.<sup>47</sup>

Does stopping and searching a person constitute a deprivation of liberty? What this issue emphasises is that of the three human rights instruments discussed here, only the ArCHR provides the term ‘search’ within the procedures protecting against arbitrary deprivation of liberty. This is clear from the second sentence of Article 14 (1) which states that ‘No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.

The best answer can be found in *Gillan and Quinton v. The United Kingdom*. In this case, the ECtHR noted that there was arguably or possibly a deprivation of liberty because the applicants were stopped and searched for a period of time that did not exceed 30 minutes.<sup>48</sup> This was because the applicants were forced to remain where they were, and even in the event of a period of short duration, an element of coercion may be indicative of a deprivation of liberty.<sup>49</sup> In terms of the same principle, the same court, in *Shimovolos v. Russia*, observed that there had been a deprivation of liberty with regard the applicant who was forced to remain in a police station for less than one hour.<sup>50</sup>

What is noted here is that in the two previous cases the court did not explicitly recognise that there had been a violation of Article 5 ECHR, despite the notification that there had been a deprivation of liberty. In contrast, in *Brega and Others v. Moldova* the ECtHR expressly concluded that there had been a violation of Article 5. This was because, when the police stopped the applicant for a very limited period of time (8

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<sup>47</sup> *Rantsev v. Cyprus and Russia* (n 46) para 317.

<sup>48</sup> *Gillan and Quinton v. The United Kingdom*, App no 4158/05 (ECHR, 12 January 2010), para 57.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Shimovolos v. Russia*, App no 30194/09 (ECHR, 21 June 2011), para 50.

minutes) without satisfactory reason, the deprivation of liberty was deemed to be unlawful.<sup>51</sup>

Ashworth provides criticism on *Gillan and Quinton v. The United Kingdom* with regard to the element of coercion in the stops and searches, which was indicative of a 'deprivation of liberty'. He stated that, in *Gillan* case, the court based its opinion on *Foka* judgment, without making a clear relationship between the two cases.<sup>52</sup> This is because in the latest case, the court found that there was an element of coercion when the police forced the applicant to get into the car as she refused to go to the police station for a search,<sup>53</sup> which means that there was actual force, while in the initial case there was a potential use of coercive powers.<sup>54</sup> Moreover, the Chamber's suggestion in *Gillan* case was doubted by a more recent case of *Austin and others v. the United Kingdom*.<sup>55</sup> For clarification, in *Gillan* there was possibly a deprivation of liberty because the applicants were stopped and searched for a period of time that did not exceed 30 minutes.<sup>56</sup> In contrast, in *Austin*, although the applicant was forced to remain in a location for 7 hours in a police cordon or 'kettle', which is containment of a group of people in a public place by the police, there was no deprivation of liberty.<sup>57</sup>

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<sup>51</sup> *Brega and Others v. Moldova*, App no 61485/08 (24 January 2012), para 43.

<sup>52</sup> Andrew J. Ashworth, '*Gillan and Quinton v United Kingdom*: human rights - article 5 - stop and search as deprivation of liberty' (2010) *Crim. L.R.* 415, 417.

<sup>53</sup> *Foka v. Turkey*, App no 28940/95 (24 June 2008), para 78.

<sup>54</sup> Andrew J. Ashworth (n 52) 417.

<sup>55</sup> David Bonner, 'Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience' (2013) 19 *European Public Law* 97, 103.

<sup>56</sup> *Gillan and Quinton v. The United Kingdom* (n 48) para 57.

<sup>57</sup> *Austin and others v. the United Kingdom* (n 20), para 67.

### 3.2 *The requirements of the deprivation of liberty*

#### 3.2.1 Prohibition of arbitrariness

##### 3.2.1.1 The notion of arbitrariness of liberty

Prohibition of arbitrariness is available under Article 14 (1) ArCHR, which states: ‘No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.’ It appears that this Article forbids arbitrariness in all kinds of deprivation of liberty such as arrest, search or detention. Also, it raises questions as to whether the words ‘without a legal warrant’ apply to arrest, search and detention, or just to detention. Before providing the answer, it is important to indicate that 14 (1) ArCHR should be read differently from its all translations.<sup>58</sup> It should be read as meaning that no one shall be subjected to arrest, search or detention which is arbitrary or without a legal warrant. This because in the authentic and authoritative Arabic text, Article 14 (1) states ‘لا يجوز’ *la yajuz*. Therefore, ‘without a legal warrant’ applies to all kinds of deprivation of liberty. In addition, however, these translations of Article 14 (1) ArCHR include the words ‘without a legal warrant’; it can be argued that the phrase ‘without a legal basis’ is a better translation for the following reasons:<sup>59</sup> the words ‘legal warrant for arrest’, as an example, can mean a warrant issued by a competent authority. This meaning cannot be accepted because each State – as was mentioned in the previous chapter – allows arrest without a warrant in some situations. Also, since the second sentence of Article 14 (1) ArCHR concerns the arbitrary deprivation of liberty, the best terms to be used to indicate the existence of arbitrary deprivation are ‘without a legal basis’. This is because the absence of a legal basis was conflated in other places with the

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<sup>58</sup> For example, the translation by United Nations (High Commissioner for Human Rights), available at <[http://www.arableagueonline.org/lasimages/picture\\_gallery/Arab%20HR%20Charter5-2004en.pdf](http://www.arableagueonline.org/lasimages/picture_gallery/Arab%20HR%20Charter5-2004en.pdf)> accessed 03 November 2008; also, by Dr. Mohammed Amin Al-Midani and Mathilde Cabanettes, available at <[http://www.acihl.org/res/Arab\\_Charter\\_on\\_Human\\_Rights\\_2004.pdf](http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf)> accessed 18 December 2009.

<sup>59</sup> The correct translation for the words ‘سند قانوني’ that are included in Article 14 (1) is ‘legal basis’.

arbitrary deprivation of liberty. The best example can be found in the Working Group on Arbitrary Detention statement.<sup>60</sup> It emphasises that the absence of ‘any legal basis justifying the deprivation of liberty’ is deemed to be an arbitrary deprivation of liberty.<sup>61</sup> Furthermore, in *Al-Jedda v. the United Kingdom*, the ECtHR stated that ‘Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty’ and when it found that there had been no legal basis for keeping the applicant in detention, it concluded that there had been a violation of Article 5.<sup>62</sup>

Although Article 14 (1) provides ‘without a legal warrant’, it seems unnecessary to do so. This is because this is merely one example of arbitrary deprivation and prohibition of arbitrary deprivation in general covers this kind and the other.

Only the ArCHR (under Article 14 (1)) and the ICCPR (under Article 9 (1)) require that nobody be subjected to an arbitrary deprivation of liberty. Although the ECHR does not provide such a requirement, the European Court and Commission of Human Rights – as mentioned previously – agreed that the right to ‘security’ that is provided under Article 5 of the ECHR protects a person from any arbitrary deprivation of liberty. For clarification, the European Commission of Human Rights in *Dyer v. the United Kingdom* stated that the right to security is a guarantee against the arbitrary deprivation of liberty,<sup>63</sup> and the ECtHR also stated in *Saadi v. the United Kingdom* that ‘...any

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<sup>60</sup> ‘The Working Group was established by the UN Commission on Human Rights and not under a treaty. Therefore, it does not have any treaty (international legal) powers to compel a government to take action or to stop violating human rights. What it aims to do is help victims and the relatives of persons who have been arbitrarily detained by raising individual cases with the government concerned.’ Frontline defenders website, ‘The Working Group on Arbitrary Detention’.

<[http://www.frontlinedefenders.org/manual/en/wgad\\_m.htm](http://www.frontlinedefenders.org/manual/en/wgad_m.htm)> accessed 03 May 2012.

<sup>61</sup> OHCHR, *The Working Group on Arbitrary Detention: No one shall be subjected to arbitrary arrest, detention or exile*, (Universal Declaration of Human Rights, Article 9, Fact Sheet No. 26, 2000), B. When does deprivation of liberty become arbitrary?

<sup>62</sup> *Al-Jedda v. the United Kingdom*, App no 27021/08 (ECHR, 07 July 2011), paras 99, 107, 108, 110.

<sup>63</sup> *Dyer v. the United Kingdom* (n 10), p. 246.

deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness.’<sup>64</sup>

What increases the importance of the prohibition on arbitrary deprivation of liberty that are provided under Article 14 (1) ArCHR and Article 9 (1) ICCPR is that both do not provide a list of the grounds for deprivation of liberty, unlike Article 5 ECHR, which does provide such a list.

The Working Group on Arbitrary Detention stated that there is no specific definition of the arbitrary deprivation of liberty under international law, but it could be said with regard to the general definition of the arbitrary deprivation of liberty that it is one ‘...which is contrary to the human rights provisions of the major international human rights instruments’.<sup>65</sup>

Regarding Article 9 (1) ICCPR, the HRC stated that the *travaux préparatoires* to this right indicate that the term ‘arbitrariness’ contains the meaning of ‘...incompatibility with the principles of justice or with the dignity of the human person’.<sup>66</sup> Therefore, the Committee explained, the term ‘...“arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.’<sup>67</sup>

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<sup>64</sup> *Saadi v. the United Kingdom* App no 13229/03 (ECHR, 29 January 2008), para 67; see also in the same meaning *X v. the United Kingdom* App no 7215/75 (EHRR, 5 November 1981), Series A no 46, para 43; *Benham v. the United Kingdom* App no 19380/92 (EHRR, 10 June 1996), 1996-III, para 40; *Steel and Others v. the United Kingdom* App no 24838/94 (EHRR, 23 September 1998), 1998-VII, para 54.

<sup>65</sup> OHCHR, (n 61) What is arbitrary detention?

<sup>66</sup> *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), para 7.6.

<sup>67</sup> *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para 5.8; the same meaning could be found in *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para 9.8; *A v. Australia* (n 66), para 7.6.

Furthermore, the ECtHR emphasised that, to avoid any arbitrariness in the deprivation of liberty, the procedures prescribed by law require that the domestic law of the State must provide sufficient lawful protection and have fair and appropriate procedures,<sup>68</sup> and there must be a relation between the grounds for the deprivation of liberty and the space and conditions of such deprivation of liberty.<sup>69</sup>

Fiona de Londras confirms the value of this: ‘...the first step to preventing arbitrariness is to require that there would be a justifiable reason for someone’s arrest and detention.’<sup>70</sup> For the purpose of clarifying this issue it is useful to provide examples of non-criminal detention because of the lack of such examples in cases of criminal detention. On the one hand, in *A v. Australia*, the applicant arrived in Australia by boat and applied for refuge. The Australian Government rejected his application but he appealed the decision. The applicant was in detention from the moment he arrived in Australia until his wife’s application for refugee status had been accepted. He remained in detention for 4 years, and he alleged that this detention was an arbitrary one within the meaning of Article 9 (1) ICCPR because the period was unreasonable. The Australian Government argued that there had been no arbitrary detention but that it had been instead a legal one. It explained that the first period of detention had been because the applicant had entered the State without permission. Secondly, he had remained in detention pending the decision of his application for refugee status. The last period of detention was pending the decision of the appeal against refusal. Finally, the Australian Government justified the detention by stating that the applicant’s detention had been important in order to prevent him from escaping into Australian society. The HRC

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<sup>68</sup> *H.L. v. the United Kingdom*, App no 45508/99 (ECHR, 05 October 2004), para 115.

<sup>69</sup> *Ashingdane v. the United Kingdom* (n 18), para 44. For example, a person who is of unsound mind will not be arbitrarily deprived of liberty if he is compulsorily hospitalised. *Winterwerp v. the Netherlands*, App no 6301/73 (EHRR, 24 October 1979), series A no 33, para 39.

<sup>70</sup> De Londras, ‘The right to challenge the lawfulness of detention: an international perspective on US detention of suspected terrorists’ (2007) 12 J.C. & S.L. 223, 243.

found that the period of the detention was unreasonable even though his entry was unlawful. This was because, in order for the Australian Government to justify the period of detention, it must prove ‘...the likelihood of absconding and lack of cooperation’ and concluded that there had been arbitrary detention.<sup>71</sup>

On the other hand, in *Chahal v. the United Kingdom*, the applicant alleged that he had arbitrarily been made to undergo an unreasonable detention. This was because he had been detained ‘...with a view to deportation’ for about 4 years, which meant that the detention period was excessive. The UK Government argued that this period was reasonable because it had taken time to study the different proceedings brought by the applicant, such as his application for refugee status, the appeal against the decision to refuse the application for refugee status and the new decision refusing asylum. The UK Government added that ‘...in view of the threat to national security represented by him, he could not safely be released.’ This was because the applicant was a political activist and had been detained twice: once ‘...on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom’ and again because ‘...he was charged with assault and affray following disturbances at the East Ham gurdwara in London’. After investigating all the factors of the case, the ECtHR concluded that there had been no arbitrary detention as the period was reasonable and the detention was justified.<sup>72</sup>

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<sup>71</sup> *A v. Australia* (n 66), paras 7.5, 9.4. See also *Mr. C. v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002), para 8.2; *Mr. Omar Sharif Baban v. Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003), para 7.2.

<sup>72</sup> *Chahal v. the United Kingdom*, App no 22414/93 (EHRR, 15 November 1996) 1996-V, paras 109 - 123. Although this thesis concentrates on arrest and provisional detention with regard to criminal procedure, it could be useful to indicate that the European Court of Human Rights has different views regarding the detention ‘with a view to deportation’ than those that are provided under Article 5 (1) (f) of the ECHR. In *Saadi v. the United Kingdom* the European Court emphasised that ‘any deprivation of liberty under Article 5 (1) (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible ...’ So, as an example, in *Chaha*, keeping a person for the purpose of waiting for the decision of the appeal



In order to ensure that no arbitrary deprivation of liberty occurs, the ECtHR stated that any deprivation of liberty must be recorded accurately in terms of the time of arrest, place of detention, the grounds for the detention and the names of the officers performing it. All of these are important for the deprivation of liberty to ‘...be compatible with the requirements of lawfulness for the purposes of Article 5 (1).’<sup>73</sup>

Furthermore, the ECtHR added that the function of the Human Rights Courts is to review the decisions taken and the procedures carried out by the State under consideration, to ensure there are no arbitrary elements in its actions.<sup>74</sup> This means that the decisions and the procedures of the States have to be reasonable and appropriate.

### 3.2.1.2 Two situations of arbitrary deprivation of liberty

There are two situations which can be considered to be arbitrary deprivation of liberty. Firstly, a situation of arbitrary deprivation of liberty can be found in the application of the relevant domestic law. Consequently, any unlawful deprivation of liberty with reference to domestic law must be considered to be arbitrary deprivation.<sup>75</sup> Secondly, if the deprivation of liberty is compatible with domestic law but the latter is incompatible with the purposes of the international human rights instruments, then domestic law itself contains arbitrariness.<sup>76</sup>

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against the refusal of the application for refugee status will not more be justified than keeping a person with a view to deportation. For more details, see *Saadi v. the United Kingdom* (n 64), paras 67-74.

<sup>73</sup> *Çakici v. Turkey*, App no 23657/94 (ECHR, 08 July 1999), para 105; *Bazorkina v. Russia*, App no 69481/01 (ECHR, 27 July 2006), para 147. The Inter-American Commission of Human Rights stated that to ensure that there is no arbitrary deprivation of liberty, all the procedures of the deprivation must be fair. This fairness in terms of procedures depends on the different situations of each case, including, for instance, ‘...the capabilities of the detainee, detention review proceedings must at a minimum comply with the rules of procedural fairness.’ *Rafael Ferrer Mazorra et al. v. United States*, Case 9903, Report No. 51/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 1188 (2000), para 213.

<sup>74</sup> *Handyside v. the United Kingdom*, App no 5493/72 (EHRR, 07 December 1976), Series A no 24, para 50.

<sup>75</sup> *Winterwerp v. the Netherlands* (n 69), para 39.

<sup>76</sup> *Ilaşcu and others v. Moldova and Russia*, App no 48787/99 (ECHR, 08 July 2004), para 461.

Regarding the first situation of the arbitrary deprivation of liberty, the HRC in *Jorge Landinelli Silva et al. v. Uruguay* decided that there had been an arbitrary deprivation of liberty with regard to Article 9 ICCPR because the applicant had been kept in detention for 6 weeks after the judge ordered his release.<sup>77</sup>

In addition, in *Witold Litwa v. Poland*, the applicant had been intoxicated, with the result that the police took him to a ‘sobering-up centre’ and detained him there for 6 hours and 30 minutes. His deprivation of liberty had a legal basis as he was intoxicated and, under Section 40 of the Polish law of 26 October 1982, an intoxicated person may be taken to a sobering-up centre. Despite this legal basis, the ECtHR decided that the detention was unlawful. The reason was because Section 40 permits detention in a sobering-up centre for ‘...intoxicated persons who behave offensively in a public place or a place of employment’, but ‘the court entertains serious doubts as to whether it can be said that the applicant behaved, under the influence of alcohol, in such a way that he posed a threat to the public or himself, or that his own health, well-being or personal safety were endangered. The Court’s doubts are reinforced by the rather trivial factual basis for the detention and the fact that the applicant is almost blind.’ In other words, the ECtHR decided that the deprivation of liberty was unlawful because of an error in the application of the relevant domestic law.<sup>78</sup>

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<sup>77</sup> *Jorge Landinelli Silva et al. v. Uruguay*, Communication No. 4/1977, U.N. Doc. CCPR/C/OP/1 at 49 (1984), para 18; see also, *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984), para 10; *Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 at 45 (1984), para 16; *Carmen Améndola and Graciela Baritussio v. Uruguay*, Communication No. 25/1978, U.N. Doc. CCPR/C/OP/1 at 136 (1985), para 13; *Esther Soriano de Bouton v. Uruguay*, Communication No. 37/1978, U.N. Doc. CCPR/C/OP/1 at 72 (1984), para 13.

<sup>78</sup> *Witold Litwa v. Poland*, App no 26629/95 (ECHR, 04 April 2000), paras 77-80. Also, the Inter-American Court of Human Rights found an arbitrary deprivation of liberty when the arrest of the applicant by the National Police of Peru was incompatible with the grounds and conditions for arrest recognised by the Constitution of Peru; this was because any deprivation of liberty must be ‘...by order in writing and reasoned judicial authority’, which was absent in the presented case. *Castillo Paez v. Peru*, Decision of 3 November 1997 (Series C) No. 34, Inter-Am.Ct.HR, para 56.

Referring to the second circumstance deemed to be an arbitrary deprivation of liberty, the ECtHR stated that any deprivation of liberty must be compatible with the purposes of the convention, and must save persons from arbitrariness.<sup>79</sup> Additionally, in *Wassink v. The Netherlands*, the Court emphasised that any deprivation of liberty must be compatible with the objectives of the European Convention on Human Rights,<sup>80</sup> and it added in another case that the deprivation of liberty must be in accordance ‘...with the purpose of the restrictions permissible’ under the European Convention.<sup>81</sup>

Regarding Article 9 ICCPR, there is an example of a situation in which the deprivation of liberty might be for political reasons and not for the person to be charged and brought before a judge. This can be found in *Andre Alphonse Mpaka-Nsusu v. Zaire*, where the HRC agreed that there had been an arbitrary deprivation of liberty because the applicant was kept for about 1 year and 9 months in pre-trial detention for political reasons as ‘...he presented his candidacy for the presidency of Zaire in conformity with existing Zairian law’.<sup>82</sup> In this situation, the deprivation of liberty was arbitrary, despite it being lawful under domestic law.

In addition, an instance of deprivation of liberty could be compatible with domestic law and international human rights instruments and still be considered an arbitrary deprivation of liberty. This occurs in cases of deprivation of liberty that ‘lead to a

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<sup>79</sup> *Amuur v. France* (n 35) para 50.

<sup>80</sup> *Wassink v. the Netherlands*, App no 12535/86 (EHRR, 27 September 1990), series A no 185-A, para 24.

<sup>81</sup> *Bouamar v. Belgium*, App no 9106/80 (EHRR, 29 February 1988), series A no 129, para 50.

<sup>82</sup> *Andre Alphonse Mpaka-Nsusu v. Zaire*, Communication No. 157/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 142 (1986), paras 8.2, 10; see also *Ramon B. Martinez Portorreal v. Dominican Republic*, Communication No. 188/1984, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988), para 11; *Monja Jaona v. Madagascar* (n 25) para 14; *Isidore Kanana Tshiongo a Minanga v. Zaire*, Communication No 366/1989, U.N. Doc. CCPR/C/49/D/366/1989 (1993), para 6.

violation of another human's rights or are the result of a violation of another human right, such as the right to a fair trial.'<sup>83</sup>

The requirement that an instance of deprivation of liberty must be lawful extends throughout the whole period of the deprivation – from arrest to release.<sup>84</sup> Accordingly, an arrest could be lawful but the period of detention could be unlawful.<sup>85</sup> For instance, in *Aage Spakmo v. Norway*, while the applicant was carrying out repairs to a building, one of the residents in the building called the police. He claimed that the applicant's work was '...disturbing the peace in the neighbourhood.' When the police arrived, they ordered him to stop work but he refused and argued that his work was lawful as he had been commissioned by the landlord of the building to start the maintenance and he had obtained permission from the municipal inspector to do so. The police arrested the applicant twice for the same purpose, to prevent him from carrying out the repairs, and because he refused a police order. On the first occasion they released him after 1 hour, and on the second after 8 hours. The HRC found that the arrest had been legal because it was reasonable and necessary, but that there had been no need to detain the applicant for 8 hours. As a result, it concluded that there had been a breach of Article 9 (1) ICCPR.<sup>86</sup> Furthermore, in *Quinn v. France* the applicant had been arrested and detained lawfully but the ECtHR found that he had been kept in detention for 11 hours after the decision had been made to release him immediately and that he had not been notified of

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<sup>83</sup> Sangeeta Shah, 'Administration of Justice' in Daniel Moeckli and others (eds): *International Human Rights Law* (OUP 2010), 309.

<sup>84</sup> Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (Human Rights Handbooks, No 5, Council of Europe 2002), 10.

<sup>85</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2<sup>nd</sup> edn, OUP 2004) 310.

<sup>86</sup> *Aage Spakmo (initially represented by Mr. Gustav Hogtun) v. Norway*, Communication No. 631/1995, U.N. Doc. CCPR/C/67/D/631/1995 (11 November 1999), para 6.3.

the decision. In addition, the French Government did not engage in any action to implement the resolution; therefore, there was a violation of Article 5 (1).<sup>87</sup>

To avoid any arbitrariness during the period of detention, the HRC regarding Article 9 ICCPR emphasised ‘...that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.’<sup>88</sup>

The ECtHR required that the relevant domestic court should undertake a review of whether it found the detention was lawful,<sup>89</sup> or unlawful.<sup>90</sup>

Since the original view is that a person has the right to liberty, any deprivation of liberty should be the exception,<sup>91</sup> and detention should be the last resort.<sup>92</sup> As will be discussed further in Chapter 3, a detainee charged with an offence must immediately be released pending trial, except when there are ‘relevant and sufficient’ reasons to justify keeping them in detention.<sup>93</sup> The ECtHR confirmed this when it stated that ‘...continued detention can be justified in a given case only if there are specific indications of a

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<sup>87</sup> *Quinn v. France*, App no 18580/91 (EHRR, 22 March 1995), series A no 311, paras 42, 43. The European Court of Human Rights decided the same in *Labita v. Italy* when the applicant was kept 12 hours after his acquittal because of the absence of the registration officer. *Labita v. Italy*, App no 26772/95 (ECHR, 06 April 2000), paras 166-174.

<sup>88</sup> *A v. Australia* (n 66), para 4.7. In fact, this review is one of the procedural guarantees following the deprivation of liberty which is provided in Articles 14 (6) ArCHR, 9(4) ICCPR and 5(4) ECHR. These procedural aspects will be discussed in Chapter 3, section 7: The right to have the lawfulness of the detention decided speedily and without delay by a court.

<sup>89</sup> *Douiye v. the Netherlands*, App no 31464/96 (ECHR, 4 August 1999), para 57.

<sup>90</sup> *Bouamar v. Belgium* (n 81), para 55. The Inter-American Court of Human Rights stated that this review is considered important in order to protect and respect an individual’s life and physical integrity. See *Suárez Rosero v. Ecuador*, Judgment of November 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No 35 (1997), para 63; *Castillo Paez v. Peru* (n 78), paras 82, 83.

<sup>91</sup> *Rafael Ferrer Mazorra et al. v. United States* (n 73), para 219.

<sup>92</sup> For clarification, in *Enhorn v. Sweden* the applicant was detained in compulsory isolation as he was infected with the HIV virus. The Government of Sweden argued that there had been a lawful basis for the detention, as it was compatible with Article 5 (1) (e) which permits the ‘...detention of persons for the prevention of the spreading of infectious diseases’. Despite this, the European Court of Human Rights found that the circumstances of the case indicated that the compulsory detention was not a last resort, and there were less severe measures that would have been sufficient to avoid spreading the HIV virus. The Court therefore concluded that there had been a breach of Article 5 (1) of the Convention. *Enhorn v. Sweden* App no 56529/00 (ECHR, 25 January 2005), paras 46-56.

<sup>93</sup> *Castravet v. Moldova*, App no 23393/05 (ECHR, 13 March 2007), para 32; *Polonskiy v. Russia*, App no 30033/05 (ECHR, 19 March 2009), para 139.

genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention'.<sup>94</sup>

In summary, there are three essential requirements for any deprivation of liberty. Firstly, it '...must be based on the grounds and procedures set forth in law; secondly, it may not be arbitrary; and thirdly, supervisory judicial control must be available without delay'.<sup>95</sup>

3.2.2 The deprivation of liberty must be in accordance with such procedure as is established by law

Articles 14 (2) ArCHR, 9 (1) ICCPR and 5 (1) ECHR require that any deprivation of liberty must be in accordance with the procedure prescribed by domestic law. The requirement for the deprivation of liberty to be in accordance with the procedure prescribed by law is associated with the implementation of the international human rights instruments' principle of legality,<sup>96</sup> and it is very important as it provides protection for individuals against any arbitrariness that may occur on the part of their Governments.<sup>97</sup>

Regarding this condition, it is necessary to test any deprivation of liberty to find out whether or not a government has fulfilled the requirements that are provided for under

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<sup>94</sup> *Kudla v. Poland*, App no 30210/96 (ECHR, 26 October 2000), para 110.

<sup>95</sup> IACHR, Report on the Situation of the Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (28 February 2000), para 137.

<sup>96</sup> Steven Greer (n 3) 249.

<sup>97</sup> Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009), 14.

domestic law,<sup>98</sup> and the State must provide a legitimate reason for the deprivation of liberty.<sup>99</sup>

The ECtHR stated that ‘...the procedures prescribed by law’ require that the domestic law of the State must provide sufficient lawful protection and have fair and appropriate procedures.<sup>100</sup> This means that there must be a link between the grounds for the deprivation of liberty and the space and conditions of the deprivation of liberty.<sup>101</sup> Miroslav Baros states that ‘...any deprivation of liberty must be prescribed by law, while the latter [domestic law] relates to proportionality of the measure to restrict liberty.’<sup>102</sup> Furthermore, Lord Atkin emphasised that ‘one of the pillars of liberty’ is that any detention must be lawful. He added that, as an example, ‘...in English law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act’.<sup>103</sup>

### 3.2.2.1 The notion of ‘procedure’

The word ‘procedure’, as used by the above-mentioned Articles, covers three categories of procedures prescribed by law. Firstly, procedures prescribed by law that control arrest and detention, such as the grounds for a detention. Secondly, procedures required during arrest or detention, such as the possession of a warrant for arrest. Finally,

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<sup>98</sup> Monica Macovei (n 84) 9.

<sup>99</sup> Steve Foster, *Human Rights and Civil Liberties* (2<sup>nd</sup> edn Pearson Education Limited 2008), 223.

<sup>100</sup> *H.L. v. the United Kingdom* (n 68), para 115.

<sup>101</sup> *Ashingdane v. the United Kingdom* (n 18), para 44. The Inter-American Court of Human Rights confirmed this view. It emphasised that Article 7 (3) ‘...addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality’. *Gangaram Panday Case*, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 16 (1994), para 47.

<sup>102</sup> Miroslav Baros, ‘A developing gap in the application of Articles 5 and 8 of the European Convention on Human Rights in the immigration context - the shifting nature of humanity’ (2009), 23 (3) J.I.A.N.L. 264, 267.

<sup>103</sup> *Liversidge v Anderson* [1942] AC 206 (HL) at 245 (Lord Atkin).

procedural guarantees following the deprivation of liberty, such as the right to be promptly brought before a judge or other judicial officer.

An example of the first procedure, prescribed by law, arose in *Denizci and others v. Cyprus*. In this case, the ECtHR found that the Government of Cyprus had breached Article 5 (1) because the applicants were arrested and detained without any reason or on any lawful basis.<sup>104</sup> Also, in *Van Der Leer v. the Netherlands*, the same Court found that there had been a breach of Article 5 (1) because the judge had violated one of the procedures prescribed by law, in that he did not hear the application before ordering the detention.<sup>105</sup>

The second situation appears in *Mr. Dmitry L. Gridin v. Russian Federation*, where the HRC found a violation of procedure as prescribed by domestic law, as required under Article 9 (1) ICCPR, because the Government of the Russian Federation had issued a warrant of arrest more than 3 days after the arrest of the applicant, whereas it must do this within 72 hours of arrest.<sup>106</sup>

The third circumstance can be found in *Villagran-Morales et al. v. Guatemala*,<sup>107</sup> when the Guatemalan Government did not fulfil the requirements of Article 6 of the Guatemalan Constitution, which requires that the detainee must be brought before the competent judicial authority within 6 hours of arrest.<sup>108</sup>

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<sup>104</sup> *Denizci and others v. Cyprus*, App no 25316-25321/94 and 27207/95 (ECHR, 23 May 2001), paras 390- 393. Also, see *Clifford McLawrence v. Jamaica*, Communication No. 702/1996 (26 April 1996), CCPR/C/60/D/702/1996, para 5.5.

<sup>105</sup> *Van Der Leer v. The Netherlands*, App no 11509/85 (EHRR, 21 February 1990) Series A no 170-A, para 23.

<sup>106</sup> *Mr. Dmitry L. Gridin v. Russian Federation*, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000), para 8.1.

<sup>107</sup> It could be useful to use an example from the Inter-American Court of Human Rights in regard to Article 7 ACHR, which provides the right to liberty.

<sup>108</sup> *Villagran-Morales et al. v. Guatemala*, 'The Street Children', Inter-American Court of Human Rights (IACrHR), 19 November 1999, paras 133, 136.



### 3.2.2.2 The notion of ‘law’

Regarding the domestic ‘law’ with which the deprivation of liberty must be in accordance with, Nowak states that ‘...the term law is to be understood here in the strict sense of a general-abstract, parliamentary statute or an equivalent, unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction’.<sup>109</sup> For example, the HRC in *Floresmilo Bolaños v. Ecuador* found a breach of Article 9 (1) ICCPR, as the deprivation of liberty of the applicant had been contrary to Ecuador’s domestic law of Ecuador.<sup>110</sup> An example of an unwritten norm of common law which is considered to be a law, and with which the deprivation of liberty must therefore be in accordance with in terms of its procedure - as stated under Article 5 ECHR - was raised in *Drozd and Janousek v. France and Spain*. In this case, the applicants alleged that the French Government had detained them unlawfully. This was because the applicants had committed an armed robbery in Andorra la Vella, and were sentenced to imprisonment for 14 years by a court of the Principality of Andorra, despite the fact that their sentences were enforced in a prison in France instead of in the Principality of Andorra. They claimed that there was no legal basis for this because there was ‘...no French statutory provision, nor any international treaty’ that allowed France to enforce their criminal conviction, decided on by the courts of the Principality of Andorra, on French territory. The Government agreed that the applicants had presented a lack of elements, but argued that in spite of this the detention had a legal basis in both International Custom and the domestic laws of both France and Andorra, which implemented that custom. The ECtHR agreed with the response of the Government and stated: ‘The Franco-Andorran custom ... dating back several centuries, has sufficient stability and

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<sup>109</sup> Manfred Nowak (n 2) 171.

<sup>110</sup> *Floresmilo Bolaños v. Ecuador*, Communication No. 238/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 246 (1989), para 9.

legal force to serve as a basis for the detention in issue.’ It concluded that detention was in accordance with the procedures prescribed by French law.<sup>111</sup>

In contrast, any deprivation of liberty in accordance with the provisions of an administrative act is not accepted within the meaning of the ‘law’ as mentioned in Articles 14 (2) ArCHR, 9 (1) ICCPR and 5 ECHR. The only exception to this is if the domestic law clearly permits such an intervention.<sup>112</sup>

### 3.2.2.3 Grounds and circumstances for deprivation of liberty

Despite the fact that the right to liberty is a valuable one, it is not absolute.<sup>113</sup> In the words of Monica Macovei, there is a presumption that each person is supposed to enjoy liberty and that they can only be deprived of that liberty in limited situations.<sup>114</sup> The exceptions on the right to liberty include detention on suspicion of having committed an offence; detention of a minor; detention of persons of unsound mind; detention of vagrants; etc.

Article 14 (2) ArCHR states: ‘...No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law.’ However, it does not mention the grounds and circumstances for the deprivation of liberty, instead referring to the domestic laws of each State. This is exactly the same as Article 9 ICCPR, which also does not specify grounds. Only, Article 5 (1) (a)–(f) ECHR, which does.

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<sup>111</sup> *Drozd and Janousek v. France and Spain*, App no 12747/87 (EHRR, 26 June 1992) Series A no 240, paras 105-107.

<sup>112</sup> Manfred Nowak (n 2) 171.

<sup>113</sup> David Harris and others (n 37) 137.

<sup>114</sup> Monica Macovei (n 84) 8.

In contrast, Article 14 ArCHR and Article 9 ICCPR provide the prohibition on arbitrary deprivation of liberty, while nothing similar is explicit in Article 5 ECHR but that Article has been interpreted as ruling out arbitrary detention.

This indicates that, under Article 5 (1) (a)-(f), only the particular circumstances listed are lawful, and any other grounds will be conceded as being an arbitrary deprivation of liberty. Thus, in *A. and others v. the United Kingdom*, the ECtHR stated that Sub-paragraphs (a)-(f) of Article 5 (1) ECHR ‘contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds’.<sup>115</sup> In addition, in *Ashingdane v. the United Kingdom*, the same court emphasised that under Article 5 (1) ECHR ‘no detention that is arbitrary can ever be regarded as “lawful”’,<sup>116</sup> which means that any detention which does not fit any of those categories, is arbitrary and consequently, unlawful.

With regard the criminal proceedings, the grounds for the deprivation of liberty are set out in Article 5 (1) (c), which states that they are ‘...the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’. The ECtHR confirmed that a right reading of this Article indicates that it allows the deprivation of liberty only in relation to criminal proceedings.<sup>117</sup>

The purpose of arrest and detention under Article 5(1) (c) is to bring an arrested or detained person before the competent legal authority. In *Murray v. the United Kingdom*,

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<sup>115</sup> *A. and others v. the United Kingdom*, App no 3455/05 (ECHR, 19 February 2009), para 163.

<sup>116</sup> *Ashingdane v. the United Kingdom* (n 18), para 44

<sup>117</sup> *Ciulla v. Italy*, App no 11152/84 (EHRR, 22 February 1989), Series A no 148, para 38.

Mrs Murray alleged that she was deprived of her liberty for the purpose of gathering general intelligence and not for bringing her before the competent legal authority. After investigation, the ECtHR decided that Mrs Murray's arrest was compatible with Article 5 (1) (c) because its purpose was to bring her before the competent legal authority.<sup>118</sup> Furthermore, if a person is released before bringing him/her before the competent legal authority, it does not mean that the arrest and detention was not in accordance with Article 5 (1) (c), since that sub-paragraph does not presume that the police have enough evidence to charge a person.<sup>119</sup>

A textual reading of sub-paragraph (c) shows that there are only three acceptable grounds which allow the deprivation of liberty in criminal proceedings. For example, in *Lynas v. Switzerland*, the applicant was detained pending extradition. However, the European Commission of Human Rights decided that Article 5 (1) (c) did not apply to detention pending extradition.<sup>120</sup>

The ECtHR in *Lawless v. Ireland* noted that it was incorrect to accept that '...anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention.'<sup>121</sup> This was because, in this situation, arrestees and detainees have the right to be brought before a judge or other judicial officer promptly, and the right to trial within a reasonable time, or to be released pending trial. In this regard, sub-paragraph (c) should be read in conjunction with Article 5 (3), which states that 'Everyone arrested or detained in

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<sup>118</sup> *Murray v. the United Kingdom*, App no 14310/88 (EHRR, 28 October 1994), Series A no 300-A, paras 64-69.

<sup>119</sup> *Brogan and Others v. the United Kingdom*, App no 11209/84; 11234/84; 11266/84; 11386/85 (EHRR, 29 November 1988), Series A145-B, para 53.

<sup>120</sup> *Lynas v. Switzerland*, App no 7317/75 (Commission Decision, 06 October 1976), p. 167.

<sup>121</sup> *Lawless v. Ireland* (no 3) App no 332/57 (EHRR, 1 July 1961) Series A no 3, the law, para 14.

accordance with the provisions of paragraph (1) (c) of this Article shall be brought promptly before a judge or other officer'.<sup>122</sup>

As discussed above, any detention based on the grounds mentioned in Article 5(1) must adhere to domestic law,<sup>123</sup> and the government involved is required to comply with its substantive and procedural rules.<sup>124</sup> In *Pantea v. Romania*, the Public Prosecutor ordered the arrest and detention of the accused in order to '...prevent his fleeing after having committed an offence'. The Romanian Oradea Court of Appeal decided that the arrest and detention were unlawful and contrary to Romania's Code of Criminal Procedure as he '...had not evaded criminal proceedings but had attended all the appointments to which he had been summoned by the prosecution service'. The ECtHR decided that, since the arrest and detention were incompatible with 'procedure prescribed by law', which the Romanian Courts were aware of, there had been a breach of Article 5(1) (c).<sup>125</sup>

Stefan Trechsel raised an important point when he stated that Article 5 (1) (c) does not list the risk of tampering with evidence with respect to the grounds for arrest and detention. He concluded that the European Convention is restricted to the committing of an offence, without mentioning any other dangers. He strengthened his view by saying that '...it would not be compatible with elementary rules of interpretation to interpret the treaty contrary to its text, even if it would lead to the restriction of the scope of an exception.'<sup>126</sup> Oppositely, the ECtHR has a different view. It mentioned in *Lawless v. Ireland* that '...paragraph 1 (c) of Article 5 can be construed only if read in conjunction

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<sup>122</sup> Ibid.

<sup>123</sup> J. G. Merrills and A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn, Juris Publishing, Manchester University Press 2001) 63.

<sup>124</sup> *Assenov and Others v. Bulgaria* App no 90/1997/874/1086 (EHRR, 28 October 1998) Reports 1998-VIII, para 139.

<sup>125</sup> *Pantea v. Romania* App no 33343/96 (ECHR, 03/09/2003), paras 216-223.

<sup>126</sup> Stefan Trechsel (n 15) 425.

with paragraph 3 of the same Article.’<sup>127</sup> Also, it stated in *Rusiecki v. Poland* that keeping the detainee in detention on remand on the grounds of the risk of tampering with evidence is justified under Article 5 (3).<sup>128</sup>

The two views show that the ECtHR and Stefan Trechsel both depend on a different textual reading of Article 5 (1). However, Trechsel referred only to Article 5 (1) (c) without mentioning Article 5 (3), although it states explicitly that ‘...everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly...’. This is because Trechsel agreed that under Article 5 (3), keeping a detainee in pre-trial detention is justified if there is a risk of his tampering with evidence.<sup>129</sup> Therefore, if he had referred to Article 5 (3), he would have been forced to agree that the European Convention accepts this ground as justification for the deprivation of liberty. Moreover, if this ground is justified under Article 5 (3), there is no need to repeat it in another Article.

As mentioned above, Article 9 ICCPR does not mention the grounds which allow a government to deprive individuals of their liberty. However, the HRC stated in its General Comment No. 8 that Article 9 (1) ‘...is applicable to all deprivations of liberty, whether in criminal cases or in other cases.’<sup>130</sup> Moreover, when the HRC interpreted the term ‘arbitrariness’, which is found in Article 9 (1), in *Hugo van Alphen v. the Netherlands*, it provided some examples of grounds for provisional detention. In its statement it said that any arrest or detention must not only be legal, but must also be

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<sup>127</sup> *Lawless v. Ireland* (no 3) (n 121), para 14.

<sup>128</sup> *Rusiecki v. Poland* App no 36246/97 (ECHR, 21 April 2009), para 37.

<sup>129</sup> Stefan Trechsel (n 15) 525.

<sup>130</sup> Human Right Committee, ‘General Comment 8: Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (U.N. Doc. HRI/GEN/1/Rev.1 at 8, 1994), para 1.

reasonable, for example to prevent fleeing, tampering with evidence or the recurrence of crime.<sup>131</sup>

In conclusion, under Article 14 ArCHR the national law must make clear provision for those situations in which there may be a deprivation of liberty. This is because the concept of a deprivation of liberty has given rise to some difficulties of interpretation at the margins, and there is a prohibition on arbitrary action.

#### **4. Conclusion**

The right to liberty provided by Articles 14 ArCHR contains the idea of the physical liberty of the person and is different from the freedom of bodily movement.

The first sentence of Articles 14 (1) ArCHR provides the right both to liberty and to security of person. The meaning of ‘security’ is vague, so there are different interpretations of it.

However, the deprivation of liberty is similar to the restriction on liberty of movement in terms of nature and principles, but they are different in degree and intensity. In order to find out whether a measure taken results in a deprivation of liberty or not, it is important to investigate all the circumstances of the case, such as the space where the person is kept and the consent of the person.

Any deprivation of liberty must be in accordance with such procedure as is established by domestic law and the government of the State must ensure that there is no arbitrary deprivation of liberty. There are two situations in which a deprivation of liberty would be deemed to be arbitrary: if the detention is unlawful under domestic law; and/or if the

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<sup>131</sup> *Hugo van Alphen v. The Netherlands* (n 67), para 5.8.

domestic law is incompatible with the purposes of the relevant international conventions on human rights.

Article 14 ArCHR does not mention the grounds and circumstances for the deprivation of liberty but, instead, refers to the domestic laws of each State. In contrast, the ECHR provides, under Article 5, the grounds and circumstances for deprivation of liberty. Article 5 (1) (c) of the ECHR provides the acceptable grounds for arrest and detention in relation to criminal proceedings. These grounds are: bringing a person before the competent legal authority; on the reasonable suspicion of them having committed an offence; preventing a person from committing a crime, when it is reasonably considered to be necessary; and preventing a person from fleeing after committing a crime.

Articles 14 (1) and (2) ArCHR set out the conditions for a permissible deprivation of liberty in broad terms. Articles 14 (3)-(7) spell out in considerable detail the procedural and substantive guarantees applicable to those deprived of their liberty. The interpretation of Articles 14 (3)-(7) is the subject matter of the following chapter.



## **CHAPTER 3**

### **GUARANTEES FOLLOWING THE DEPRIVATION OF LIBERTY**

#### **1. Introduction**

This chapter explores a person's rights following the deprivation of their liberty, referring to the certain guarantees under Article 14 ArCHR and the very similar Articles 9 ICCPR and 5 ECHR. These Articles, after setting out the right to liberty, provide certain guarantees following the deprivation of liberty.

These rights are of great importance in order to ensure that no arbitrary deprivation of liberty takes place. The guarantees also outline the different stages of detention, from the arrest of the suspect to their appearance before the court, and prescribe a reasonable length of time for each procedural stage. This helps to determine the time which a person must spend in detention.

The procedural guarantees set down are: the right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself; the right to be promptly brought before a judge or other judicial officer; the right to a trial within a reasonable time or the right to release pending trial; the right to have the lawfulness of the detention decided quickly and without any court delays; and the right to compensation in the event of any unlawful deprivation of liberty. Articles 14 ArCHR, 9 ICCPR and 5 of ECHR provide these procedures mentioned, but Article 14 provides two more procedures, for which there are no parallels under the other Articles. These procedures are the right to contact with family members and relatives and the right to have a medical examination.

Articles 14 (3)-(7) ArCHR provide:

3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.
6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

The corresponding provisions of Article 9 ICCPR provide:

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The corresponding provisions of Article 5 ECHR state:

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## **2. The right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself**

### *2.1 The relevance of the right*

The right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself is a requirement of international human rights standards.<sup>1</sup> Therefore, Article 14 (3) ArCHR, Article 9 (2) ICCPR and Article 5 (2) ECHR provide this right.

The HRC explained the relevance of this right with regards to the notification of arrest and detention when it indicated that Article 9 (2) ICCPR applies to all types of deprivation of liberty,<sup>2</sup> such as house arrest<sup>3</sup> and administrative detention.<sup>4</sup>

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<sup>1</sup> Amnesty International, *Swaziland: Suppression of Terrorism Act undermines human rights in Swaziland* (Amnesty International Publications and International Bar Association, 8 January 2009), 23.

<sup>2</sup> Human Right Committee, 'General Comment 8: Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (U.N. Doc. HRI/GEN/1/Rev.1 at 8, 1994), para 1.

The ECtHR also clarified the relevance of Article 5 (2) ECHR to arrest and detention. For example, in *Fox, Campbell and Hartley v. the United Kingdom* it stated that Paragraph 2 of Article 5 affords a procedural guarantee for a person who is deprived of his/her liberty that s/he should know why s/he is being deprived of their liberty.<sup>5</sup> In another case the same court stated that there is no reason to exempt a person from the right of notification because there is no difference between one who is deprived of his/her liberty by arrest, and one who is deprived of it by detention.<sup>6</sup>

## 2.2 *The rationale of the right*

Article 14 ArCHR, Article 9 ICCPR and Article 5 ECHR protect a person's liberty because no one should be deprived of his/her liberty without legal reason. Therefore, the reason for notification is to make clear whether or not there are any legal reasons for the deprivation of a person's liberty. This is because this right allows a person who is deprived of his liberty to judge the lawfulness of the arrest and take the necessary steps to question it if they deem it inappropriate.<sup>7</sup> Accordingly, they may take advantage of Articles 14 (6) ArCHR, 9 (4) ICCPR or 5 (4) ECHR which, as will be discussed in Section 7, contain the right to have the lawfulness of the detention decided speedily. Furthermore, persons who would like to make a prompt decision on the lawfulness of their deprivation of liberty cannot utilise this right unless rapidly and adequately informed of the reasons why they have been deprived of their liberty.<sup>8</sup> This means that

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<sup>3</sup> *Monja Jaona v. Madagascar*, Communication No. 132/1982, U.N. Doc. Supp. no 40 (A/40/40) at 179 (1985), para 14.

<sup>4</sup> Monica Hakimit, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide' (2008), Law 33 Yale J. Int'l L. 369, 387.

<sup>5</sup> *Fox, Campbell and Hartley v. the United Kingdom*, App no 12244/86; 12245/86; 12383/86 (EHRR, 30 August 1990), Series A no 182, para 40.

<sup>6</sup> *Shamayev and Others v. Georgia and Russia*, App no 36378/02 (ECHR, 12 April 2005), para 414.

<sup>7</sup> *Fox, Campbell and Hartley v. the United Kingdom* (n 5), para 40.

<sup>8</sup> *X v. the United Kingdom*, App no 7215/75 (EHRR, 05 November 1981), Series A no 46, para 66. See also Claire Macken, 'Preventive Detention and the Right of Personal Liberty and Security Under the International Covenant on Civil and Political Rights, 1966' (2005), 26 Adel. L. Rev. 1, 19.

there is a relationship between the paragraphs which contain the right to be informed of the reason for arrest and the paragraphs which contain the right to have the lawfulness of the arrest or detention decided speedily. This relationship is based on the assumption that the arrestee or detainee cannot take advantage of his/her right to have the lawfulness of the arrest or detention decided speedily unless they are also able to take advantage of the right to notification.<sup>9</sup> The HRC ensured the purpose of the notification when it stated that the principle of the notification prescribed under Article 9 (2) of the ICCPR is to permit an arrestee to ‘take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded.’<sup>10</sup> If they are informed completely and immediately, the arrested or detained person can prepare a defence and request for a release if the reasons given do not sustain the detention.<sup>11</sup>

Stefan Trechsel states that the purpose of the notification seems to be a humanitarian one.<sup>12</sup> He adds that ‘The essence of the duty to give reasons for the arrest is, in my view, to prevent the person concerned from having simply to guess but to get a clear answer to the question “why have I been arrested?”’<sup>13</sup> Additionally, he states that, as the arrest usually comes as a surprise, it could affect the daily life of the person arrested and this suffering might be increased if s/he does not know what is going on.<sup>14</sup>

In general, it could be said that giving the person deprived of his/her liberty an opportunity to know the reasons for arrest and any charges against themselves, which

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<sup>9</sup> Jim Murdoch, *The Treatment of Prisoners: European Standards* (Council of Europe 2006), 88.

<sup>10</sup> *Adolfo Drescher Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. Supp. No. 40 (A/38/40) at 192 (1983), para 13.2.

<sup>11</sup> UN, *Human rights and pre-trial detention: A Handbook of International Standards Relating to Pre-Trial Detention*, (Professional Training Series No. 3, Centre for Human Rights Crime Prevention and Criminal Justice Branch 1994), 11; Jordan J. Paust ‘Gerhard Von Glahn and Gonter Woratsch: Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza’ (1990-1991), 14, *Hastings Int’l. & Comp. L. Rev.* 1, 37.

<sup>12</sup> Stefan Trechsel, with the assistance of Sarah J. Summers, *Human Rights in Criminal Proceedings* (OUP 2005) 456.

<sup>13</sup> *Ibid* 461.

<sup>14</sup> *Ibid* 456.

helps them to take advantage of the right to have the lawfulness of the arrest or detention decided, leads to increased protection against arbitrary deprivation of liberty. Therefore, the information which is required to be delivered, as will be mentioned later in an analysis of the nature of the information to be conveyed, must be sufficient for the detainees.

### 2.2.1 The notions of ‘at the time of arrest’ and ‘promptly’

Articles 14 (3) ArCHR, 9 (2) ICCPR and 5 (2) ECHR prescribe two kinds of information which should be delivered. These are the reasons for the arrest and the charge against the arrested person.

Article 14 (3) ArCHR and Article 9 (2) ICCPR differentiate between these two types of information, while Article 5 (2) ECHR does not. On the one hand, under the first two Articles, the reason for arrest shall be conveyed ‘at the time of arrest’ while the charge against the arrested person is delivered ‘promptly’. On the other hand, Article 5 (2) ECHR uses the term ‘promptly’ regarding both pieces of information.

As regards Article 9 (2) ICCPR, the HRC stated that ‘The reasons for the arrest must be given when it occurs, and that subsequently, the specific legal reasons must be provided.’<sup>15</sup>

The ECtHR has given clarification with regards to the term ‘promptly’ which is used in Article 5 (2) ECHR. It states that, although the arrested person must be informed ‘promptly’, this does not mean that it has to be related in its totality by the arresting

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<sup>15</sup> *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995), para 3.3. See also Derek P. Jinks ‘The Legalization of World Politics and the Future of U.S. Human Rights Policy’ (2002), 46 St. Louis U. L. J. 357, 369; Sherrie L. Russell-Brown ‘Poisoned chalice?: The rights of criminal defendants under International Law during the pre-trial phase’ (2003), 8 UCLA J. Intl L. & Foreign Aff. 127, 148.

officer at the time of the arrest; the prompt transfer of information should be enough to be assessed in each case in relation to the particular features.<sup>16</sup>

In fact, it appears that the reason for the arrest should be given at the time of arrest, similar to the requirements of the ArCHR and the ICCPR, for a number of reasons. Firstly, the right to liberty is one of the person's rights. Therefore, as with the other rights, this right should not be denied, even for an hour or less, without informing the owner of the right (the arrested or detained person) at the time of arrest of the reason for such a denial. For example, if somebody has money, this money is one of his/her personal rights; no one can legally take this money from him/her without informing him/her of the reason for taking the money. Secondly, it cannot be agreed that the person who carried out the arrest is not aware of the reasons for the arrest.<sup>17</sup> In contrast, the charge against the arrestee or detainee can be agreed to be given promptly because it may not be clear at the time of the arrest.

Nevertheless, it is very important for the arrestee or detainee to be informed 'promptly', although there is no specific standard for the time of notification and it therefore differs from case to case. For example, on the one hand, in *Saadi v. the United Kingdom* it appears that a delay of 76 hours to inform a detainee was too long and not compatible and harmonious with the requirements of Article 5 (2).<sup>18</sup> On the other hand, in *Fox, Campbell and Hartley v. the United Kingdom* the applicants were informed of the reason for their arrest not more than 7 hours after the deprivation of their liberty and the court did not object to this delay.<sup>19</sup> In accordance with there being no specific standards for the time of notification, the Committee on Legal Affairs and Human Rights of the

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<sup>16</sup> *Fox, Campbell and Hartley v. the United Kingdom* (n 5), para 40.

<sup>17</sup> Stefan Trechsel (n 12) 460.

<sup>18</sup> *Saadi v. the United Kingdom*, App no 13229/03 (ECHR, 29 January 2008), para 84.

<sup>19</sup> *Fox, Campbell and Hartley v. United Kingdom* (n 5), para 42.

Council of Europe suggest a threshold in terms of an acceptable delay in accordance with Article 5 (2) ECHR, stating that it must be between 7 and 76 hours.<sup>20</sup>

However, although the information must be given immediately,<sup>21</sup> there are some situations which could prevent this from happening. For example, if at the time the arrestees resisted the arrest or were not in a fit state to understand the charge through being drunk, injured or mentally disadvantaged.<sup>22</sup>

### 2.2.2 The language of the notification

The legal reasons for the arrest, along with the basic facts relevant to the legality of the decision, must be given in ‘simple, non-technical language’ which a lay person can understand.<sup>23</sup> For instance, in *Ladent v. Poland* the applicant was a French speaker, but the information about the reasons for the arrest was given in Polish, so the ECtHR agreed that the arrestee was not informed of the reason for the arrest because he did not understand Polish.<sup>24</sup> Furthermore, it can be presumed, in the case of a speaker of a different language, which the information delivered to the arrestee is insufficient information due to the absence of an interpreter who can translate into an understood language.<sup>25</sup> Consequently, the arrested person has the right to have a free interpreter.<sup>26</sup>

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<sup>20</sup> Committee on Legal Affairs and Human Rights, ‘Proposed 42-day pre-charge detention in the United Kingdom’ Council of Europe (Doc. 11725, 30 September 2008), para 39.

<sup>21</sup> *Bordovskiy v. Russia*, App no 49491/99 (ECHR, 8 February 2005), para 53.

<sup>22</sup> Edwin Shortt and Claire de Than, *Civil Liberties: Legal principles of individual freedom*, (Sweet & Maxwell, 1998), 469.

<sup>23</sup> *Fox, Campbell and Hartley v. United Kingdom* (n 5), para 40.

<sup>24</sup> *Ladent v. Poland* App no 11036/03 (ECHR, 18 March 2008), para 64.

<sup>25</sup> *Shamayev and Others v. Georgia and Russia* (n 6), paras 421, 422.

<sup>26</sup> Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that ‘A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly, in a language which he understands, the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest’. UN General Assembly, ‘Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (Resolution 43/173, 9 December 1988).



Article 14 (3) ArCHR is similar to Article 5 (2) ECHR: both require the notification to be delivered in a language which the person understands, while Article 9 (2) ICCPR does not provide this. On the one hand, Trechsel comments on this point which it is superfluous to mention that the information should be given in a language that the arrested person understands, because it is already implied from the term ‘information’. Moreover, he states that there is no requirement to provide the information in a particular language, for example a minority language, because it is the purpose of the conventions to provide effective protection for the individuals directly concerned and not to solve linguistic disputes.<sup>27</sup> On the other hand, Merrills and Robertson believe that mentioning the term ‘language’ in the conventions’ Articles could lead to an obligation to ensure that the person deprived of his/her liberty receives understandable information.<sup>28</sup>

It can be said that the second view, of Merrills and Robertson, is better than Trechsel’s as it offers an important point, which is that the international conventions on human rights must prescribe in their Articles that the arrestee must be informed in a language that s/he understands. Firstly, if it is a requirement in the conventions and is mentioned in the Articles, it will be one of the arrested person’s rights; it could not be interpreted otherwise, and if a State did not inform a person in a language that s/he could understand it would be a violation of his/her right to be informed. Secondly, if it is prescribed in the Articles, it means that all languages, contrary to Trechsel’s view,<sup>29</sup> are

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<sup>27</sup> Stefan Trechsel (n 12) 460.

<sup>28</sup> J. G. Merrills and A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Right* (4<sup>th</sup> edn Juris Publishing, Manchester University Press 2001), 73.

<sup>29</sup> This is, as mentioned in the previous paragraphs, that he states: ‘there is no requirement to provide the information in a particular language, for example a minority language, because it is the purpose of the conventions to provide effective protection for the people and not to solve linguistic disputes’. Stefan Trechsel (n 12) 460.

able to be interpreted so there would not be some languages that deserve to be interpreted and others that do not deserve interpretation.

Since this right requires the information to be promptly delivered in a language that the person understands, even in the case of a lack of a multilingual police authority, one suggestion may help to fulfil this requirement. This is to have some system in, for example, police stations, for calling in interpreters to communicate with those who do not understand one of the languages customarily used in day to day communications. This could ensure that the notification would be delivered promptly and in a language which the person understood.

### 2.2.3 The nature of the information to be conveyed

Article 14 (3) ArCHR, Article 9 (2) ICCPR and Article 5 (2) ECHR only provide the type of information to be conveyed - the reason for the arrest and the charge against the detainee - without reflecting on the nature of this information. Consequently, case-law and scholars have explained the nature of this information in detail.

The information required must be sufficient for the person.<sup>30</sup> Therefore, for this information to be sufficient and fulfil the requirements, it should be clear and adequate with regard to the particular issue and the legal authority that has the power to deprive the person of their liberty.<sup>31</sup> This is because the information could help to prevent the arrested person from being left to deduce the reason during the investigation,<sup>32</sup> which could be different from the actual reason for arrest or the charge against him/her. In addition, it would be sufficient information if the person received general information

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<sup>30</sup> UN (n 11) 11; *Murray v. the United Kingdom*, App no 14310/88 (EHRR, 28 October 1994), Series A no 300-A, para 75.

<sup>31</sup> *X v. the United Kingdom* (n 8), para 66.

<sup>32</sup> *Fox, Campbell and Hartley v. United Kingdom* (n 5), para 38.

relating to the reason for arrest and the charge against him/her.<sup>33</sup> There must be a general standard of sufficient information in order that the arrestee can understand the reason for his/her arrest<sup>34</sup> and can distinguish the substance of the charge against him/her.<sup>35</sup>

The notification provided does not need to be exact, except that information which is too general is not acceptable.<sup>36</sup> Therefore, the ECtHR indicated that if the arrested person was informed merely of the legal basis of the arrest, this would not be sufficient and the information should be more than that in order to be commensurate with the requirements of the convention.<sup>37</sup> The information provided should be a 'clear explanation of the legal and factual basis for the arrest.'<sup>38</sup> For example, if the authorities merely inform the arrested person that the arrest was because of emergency legislation,<sup>39</sup> that the arrest was made pursuant to the suspicion of the arrestee being a terrorist,<sup>40</sup> that the arrest was due to a breach of State security,<sup>41</sup> or merely give a mention of the Act;<sup>42</sup> all of these are deemed to be insufficient information. It should also be noted that it is not permissible to give abridged information, even if the person is considered unable or unsuitable to be given the notification. In this situation the facts

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<sup>33</sup> Lawyers Committee for Human Rights 'What is a fair trial?' A Basic Guide to Legal Standards and Practice' (March 2000), 5; *Michael Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000), para 7.5.

<sup>34</sup> Human Rights and Equal Opportunity Commission, 'Submission of the Human Rights and Equal Opportunity Commission to the Clarke Inquiry on the case of Dr. Mohamad Haneef' (May 2008), para 16.

<sup>35</sup> Claire Macken (n 8) 18.

<sup>36</sup> Edwin Shorts and Claire de Than (n 22) 469.

<sup>37</sup> *H.B. v. Switzerland*, App no 26899/95 (ECHR, 5 April 2001), para 46; *Fox, Campbell and Hartley v. United Kingdom* (n 5), para 41.

<sup>38</sup> Jennifer G Riddell LL.B, 'Addressing Crimes Against International Law: Rwanda's Gacaca in Practice' (LL.M thesis, University of Aberdeen 2005), 73.

<sup>39</sup> *Ireland v. the United Kingdom*, App no 5310/71 (EHRR, 18 January 1978), Series A no 25, para 198; *Adolfo Drescher Caldas v. Uruguay* (n 10), para 13.2; Human Rights and Equal Opportunity Commission (n 34), para 16.

<sup>40</sup> *Fox, Campbell and Hartley v. the United Kingdom* (n 5), para 41.

<sup>41</sup> *Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of the Congo*, Communication No. 1177/2003, U.N. Doc. CCPR/C/86/D/1177/2003 (2006), para 6. 2. For the same information provided, see *Adolfo Drescher Caldas v. Uruguay* (n 10), para 13. 2.

<sup>42</sup> *Murray v. the United Kingdom* (n 30), para 76.

should be delivered to a representative, such as a lawyer or a guardian.<sup>43</sup> Furthermore, the information given on the charge at this stage does not mean that this charge is exactly that with which the person may eventually be exactly charged, but it refers to the possibility that takes this into account.<sup>44</sup> Hence, the information with regard to the charge might be compared to the information of the charge that is required for the right to a fair trial.<sup>45</sup> The information on a charge for the person is more specific and more detailed in the trial stage regarding its purpose, which is to protect the right to a fair trial, while the information required at the time of arrest needs to be less detailed, as its purpose is to protect the right of the individual to liberty and security. Furthermore, the information given at the trial stage should be detailed enough to allow the detainee to prepare his/her defence while, at the time of arrest, the person requires simple information as to the reasons for the arrest and the charge against the them, to allow the him/her to judge the lawfulness of the arrest.<sup>46</sup> It can also be said that it is normal to find that the information is more detailed during the case in court than the information available at the first step when the person has just been deprived of his/her liberty. This is because the case is transmitted to the court after the investigation, which includes the collection of the evidence and other procedures which allow the case to contain more information than at the time of arrest.

#### 2.2.4 The method of informing the detainee

Articles 14 (3) ArCHR, 9 (2) of ICCPR and 5 (2) ECHR do not specify a particular method of informing the detainee and there is no requirement for it to be written or

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<sup>43</sup> Jim Murdoch (n 9) 88.

<sup>44</sup> *Van Der Leer v. The Netherlands*, App no 11509/85 (EHRR, 21 February 1990) Series A no 170-A, para 27.

<sup>45</sup> The right to be notified of the charges in the trial stage is provided in Article 16 (1) ArCHR, Article 14 (3) (a) ICCPR and Article 6 (3) (a) ECHR.

<sup>46</sup> Stefan Trechsel (n 12) 459; Francis G. Jacobs, Robin C. A. White and Clare Ovey, *The European Convention on Human Rights* (5<sup>th</sup> edn, OUP 2010), 214.

mentioned in the resolution of detention. Despite this, the information should be delivered ‘in an adequate manner’,<sup>47</sup> which may be orally or in writing.<sup>48</sup> For example, in *Keus v. The Netherlands* the ECtHR stated that there had been no violation of Article 5 (2) when the applicant, who was eventually convicted of murder was informed of the extension of his detention by telephone while he was in hospital.<sup>49</sup> In another case, the arrestee was given a copy of the arrest warrant, which included the reason for his arrest and the charges against him, and that was found to be enough.<sup>50</sup> There is however no requirement to provide the person with the written arrest warrant<sup>51</sup> and the case file. Nevertheless, the notification should be sufficient and adequate.<sup>52</sup>

Additionally, there is no particular person who should inform the arrestee or detainee, and no specific place where the information should be given, provided that the authorities do not exceed the requirements of ‘at time of arrest’ or ‘promptly’. Therefore, the notification could be at the place of arrest or search, as in *Bülbül v. Turkey*, where the applicant signed the search and arrest report at the place of arrest (office) and the ECtHR concluded that the person was fully aware of the reason for the arrest before he had been taken into detention.<sup>53</sup> The notification can also be given in the police station and by a police officer or it could be during the interrogation. In this case, if the arrested or detained person confesses and signs the record of the investigation it is enough to ensure that s/he has been given access to the information.<sup>54</sup> All these types of notifications are acceptable because this right concentrates on informing the person of the reason for his/her arrest and the charge against him/her.

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<sup>47</sup> *Nowak v. Ukraine*, App no 60846/10 (ECHR, 31 March 2011), para 63.

<sup>48</sup> *Lamy v. Belgium*, App no 10444/83 (EHRR, 30 March 1989), Series A no 151, para 31.

<sup>49</sup> *Keus v. The Netherlands*, App no 12228/86 (EHRR, 25 October 1990), Series A no 185, para 22.

<sup>50</sup> *Lamy v. Belgium* (n 48), para 32.

<sup>51</sup> Lawyers Committee for Human Rights (n 33) 5.

<sup>52</sup> *Shamayev and Others v. Georgia and Russia* (n 6) para 427.

<sup>53</sup> *Bülbül v. Turkey* App no 47297/99 (ECHR, 22 May 2007), para 30.

<sup>54</sup> *Lamy v. Belgium* (n 48), para 31.

Consequently, the notification will fulfil the requirements of the relevant Article if it is given at the time of arrest or promptly delivered, sufficient and adequate, without taking into account other things, such as the place of notification and the person providing the information. For instance, there are some situations that would not fulfil the requirement to give the person deprived of his/her liberty sufficient information, even though they had been visited by the investigator. In *Shamayev and Others v. Georgia and Russia* the prosecutor visited and met the applicant, but it was not enough because he did not give him sufficient information<sup>55</sup> and, in the same case, the detainees were notified through rumours, which constituted insufficient information.<sup>56</sup>

Furthermore, some circumstances of the arrest may speak for themselves and there may be no need for further notification.<sup>57</sup> For example, in *Dikme v. Turkey* the police arrested the person because he submitted forged identification during an identity check.<sup>58</sup> In *Stephens v. Jamaica* the arrestee gave himself up to the police<sup>59</sup> and in *Wilfred Pennant v. Jamaica* the detainee confessed that he had committed the crime.<sup>60</sup> In all these cases the arrestees were aware of the reasons for the arrest and there was no need for more information to be given.

In this respect, it is important to state that, as is required in the international human rights instruments, the arrestee should always be informed of the reason for the arrest and the charge against him. Previous cases indicate that, although a person could be supposed to know the reason for their arrest, the authorities were still required to inform the arrested person of the charge against him/her because s/he probably did not know

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<sup>55</sup> *Shamayev and Others v. Georgia and Russia* (n 6), para 426.

<sup>56</sup> *Ibid* para 416.

<sup>57</sup> Francis G. Jacobs, Robin C. A. White and Clare Ovey (n 46), 215.

<sup>58</sup> *Dikme v. Turkey*, App no 20869/92 (ECHR, 11 July 2000), para 54.

<sup>59</sup> *Stephens v. Jamaica* (n 15), para 9.5. See also *Trevor Bennett v. Jamaica*, Communication No. 590/1994, U.N. Doc. CCPR/C/65/D/590/1994 (10 May 1999), para 10.3.

<sup>60</sup> *Wilfred Pennant v. Jamaica*, Communication No. 647/1995, U.N. Doc. CCPR/C/64/D/647/1995 (3 December 1998), para 8.1.

exactly what this was. For instance, if a person turned him/herself in after stabbing someone, the appropriate charge here could be attempted murder, causing grievous bodily harm with intent or another charge.

In summary, Article 14 (3) ArCHR applies to all types of deprivation of liberty. The reason for arrest shall be delivered conveyed at the time of arrest while the charge against the arrestee can be conveyed promptly. The notification must be in a simple language that a person understands and it must be sufficient. There is no particular method of informing, which may be orally or in writing.

### **3. The right to contact with family members and relatives**

As was mentioned previously, the arrest usually comes as a surprise and it could affect the daily life of the person arrested, so Article 14 (3) ArCHR (after providing the right to be informed at the time of arrest of the reasons for the arrest and promptly informed of any charges against oneself) provides an important right, which is the granting of the arrestee or detainee the right to contact his/her family members and relatives.

There is no explicit statement of such a right in either Article 9 ICCPR or Article 5 ECHR. However, case- law under Article 17 ICCPR and Article 8 ECHR reads such a right into respect for family life. With regard to Article 17 ICCPR, the HRC stated that ‘prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits.’<sup>61</sup> With regard the ECHR, in *Mcveigh and others v. The United Kingdom*, the European Commission of Human Rights confirmed that, under Article 8

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<sup>61</sup> *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990), para 9.2.

(1), anyone deprived of his/her deprivation should be able contact rapidly with his/her family.<sup>62</sup>

In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) provides a similar right, but to a convicted prisoner serving a sentence of imprisonment following trial. It emphasises that ‘It is also very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends.’<sup>63</sup> Also, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders stated that ‘Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals.’<sup>64</sup>

Since there is no counterpart to this right in either Article 9 ICCPR or Article 5 ECHR, the right in the ArCHR must be interpreted entirely on its own terms. For example, the term ‘contact’ that is provided under Article 14 (3) needs to be interpreted, as it could indicate both physical contact and correspondence. The literal or textual reading of Article 14 (3) could indicate that all kinds of contact should be permitted because the Article merely uses the general term ‘contact’, which leads to the possibility of all types of contact.

Furthermore, Article 14 (3) does not mention the time or frequency in which it is required to entitle the arrestee or detainee to the right to contact with his/her family

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<sup>62</sup> *Bernard Leo McVeigh, Oliver Anthony O'Neill and Arthur Walter Evans v. The United Kingdom* App no 8022/77, 8025/77 and 8027/77 (Commission Decision, 18 March, 1981), para 237.

<sup>63</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991’ (Ref.: CPT/Inf (92) 3 [EN], 13 April 1992), para 51.

<sup>64</sup> The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ‘Standard Minimum Rules for the Treatment of Prisoners, Aug. 30, 1955’ (U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988,1977), para 37.



members and relatives. It could be argued that it is fair to allow the arrestee or detainee to exercise this right promptly after the deprivation of liberty, as this could decrease the detainee's suffering because the deprivation of liberty usually comes unexpectedly, which influences the daily life of the detained person.

#### **4. The right to have a medical examination**

Article 14 (4) ArCHR stipulates that 'Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.' Similar to the right to contact with family members and relatives, there is no counterpart to this right in either Article 9 ICCPR or Article 5 ECHR.

It would be better if the ArCHR provided more requirements regarding this service, such as stating that there must be a medical point in each institution that contains a detainee. This would help to provide a medical examination as soon as it necessary and at all times. Also, this might help to save time and money which would be spent on transferring the detainee to a hospital for the normal medical examination.

Furthermore, granting the arrestee or detainee the right to request a medical examination could help prevent the serious ill-treatment and torture that the arrestee or detainee might face during an investigation. This is because the medical examination could detect whether the arrestee or detainee had undergone these unsatisfactory treatments, as they usually leave marks or other traces. Therefore, it must be absolute in the sense that if requested it must be granted promptly. The exemption could be a delay if there is no obvious medical problem and it would interfere with the investigation.

It appears from Article 14 ArCHR that it considers this right the most valuable one. This is indicated by the fact that while Article 14 does not usually require the arrestee or

detainee to be informed about his/her rights, this right is an exception. Under Article 14 (4) ArCHR there is an emphasis that the arrested or detained person ‘must be informed of that right’.

## **5. The right to be promptly brought before a judge or other judicial officer**

### *5.1 The relevance of the right*

The right to be promptly brought before a judge or other judicial officer is one of the most important procedural guarantees because it puts the arrest and detention under judicial supervision at a very early stage.<sup>65</sup> Therefore, it attracts the interest of the international human rights instruments, in particular Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR.

It appears from Article 14 (5) that the ArCHR determines the beneficiary of the right to have been promptly brought before a judge or other judicial officer if a person is arrested or detained regarding a criminal charge, which is similar to Article 9 (3) ICCPR. However, Article 5 (3) ECHR gives the right also to the person deprived of his/her liberty under Article 5 (1) (c), which includes lawful arrest and detention.<sup>66</sup>

Indeed, it might be argued that referring to the right of a person who is under lawful arrest or detention, as Article 5 (3) ECHR does, is better than referring to anyone

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<sup>65</sup> Stanislaw Frankowski and Dinah Shelton, *Preventive Detention: A Comparative and International Law Perspective* (Martinus Nijhoff Publishers 1992), 15. See also A.R. Mowbray LLb, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publisher 2004), 76; John Quigley, ‘Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights’ (1993), 6 Harv. Hum. Rts. J. 59, 85.

<sup>66</sup> In *Lawless v. Ireland* the Irish Government argued that Article 5 (3) involves the case of ‘when it is reasonably considered necessary to prevent his committing an offence’ that is provided under Article 5 (1) (c) because, in Common Law countries, a person cannot be put on trial for having intended to commit an offence. The European Court of Human Rights did not agree with the Irish Government’s analysis of Article 5 (3) and it stated that the purpose of the deprivation of liberty is to bring the arrestee or the detainee to the judicial authority so that they can examine the question of deprivation of liberty and/or decide on its merits. Therefore, the guarantee in Article 5 (3) stands for all categories of deprivation of liberty under Article 5 (1) (c). *Lawless v. Ireland* (no 3), App no 332/57 (EHRR, 1 July 1961), Series A, no, 3, the law, paras 10, 14.

arrested or detained on a criminal charge, for two reasons. Firstly, as the purpose of a judicial review is to monitor the lawfulness of a detention at a very early stage, and the arrested person might not be charged at the time of the arrest,<sup>67</sup> therefore, applying this right to the detainee only when they are on a criminal charge would prevent the detainee from being promptly brought before a judge and taking the advantage of this right. Secondly, preventing the person from appearing before the judge because there is no criminal charge could lead to arbitrary detention if the period of detention extends beyond the permitted length of time for a person detained without criminal charge.<sup>68</sup> For instance, in *Daniel Monguya Mbenge v. Zaire* some members of the applicant's family were detained by the Government of Zaire without criminal charge (due to the accused person's absence) for various durations, which in one case amounted to about a year. This was regarded as an arbitrary detention because they had not been brought before a judge due to the lack of a criminal charge against them.<sup>69</sup>

Despite the fact that Article 9 (3) ICCPR determines the beneficiary of this right to be a person who is arrested or detained regarding a criminal charge, the HRC suggested that any person deprived of his/her liberty has the right to be brought promptly before a judge, not only those who have been arrested or detained on a criminal charge.<sup>70</sup> Since the right to be promptly brought before a judge or other judicial officer is applicable for detention on remand, this is not required for a person who is provisionally released.<sup>71</sup>

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<sup>67</sup> Stefan Trechsel (n 12) 502.

<sup>68</sup> Claire Macken (n 8) 22.

<sup>69</sup> *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. Supp. No. 40 (A/38/40) at 134 (25 March 1983).

<sup>70</sup> Human Rights Committee, 'Comments on Peru' (U.N. Doc. CCPR/C/79/Add.67, 1996), para 24.

<sup>71</sup> *X v. the United Kingdom* (n 8), para 58. See also Edwin Shorts and Claire de Than (n 22) 469.

## 5.2 *The rationale of the right*

The purpose of bringing the arrestee or detainee promptly before a judge or other judicial officer, as previously mentioned, is to ensure the lawfulness of the arrest or detention. Thus, if the deprivation of liberty is subject to legal control, this means that there is protection for the individual against arbitrary decisions about his/her right to liberty.<sup>72</sup> To illustrate this, in *Kurt v. Turkey* the ECtHR stated that the fundamental purpose of this guarantee is to protect the individual's rights, in a democracy, to live in security from any arbitrary detention by the State's authorities. This protection is achieved by allowing the act of deprivation of liberty to be subject to review by an independent judiciary and by ensuring the accountability of the authorities for that act.<sup>73</sup>

In addition, the requirement to bring a person who has been deprived of his/her liberty promptly before a judicial authority is very important when it comes to detecting and preventing the serious ill-treatment of that person.<sup>74</sup> For example, nowadays there are many ways to inflict harsh pain or suffering without leaving marks or other traces. However, there might still be a relatively good chance of detecting any ill-treatment if the person is brought before the judiciary within 1 or 2 days.<sup>75</sup> Moreover, the right to be promptly brought before a judge or other judicial officer is important in order to reduce the risk of disappearance, where the State could keep the detainee in an unknown place. Therefore, after the deprivation of the individual's liberty, the authority is obliged to indicate the person's whereabouts to ensure that the person who has been taken into custody is capable of being seen again.<sup>76</sup> To protect the detainee from the risk of

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<sup>72</sup> *Bozano v. France*, App no 9120/80 (EHRR, 18 December 1986), series A111, para 54.

<sup>73</sup> *Kurt v. Turkey*, App no 24276/94 (EHRR, 25 May 1998), 1998-III, paras 122, 123.

<sup>74</sup> *Aksoy v. Turkey*, App no 21987/93 (EHRR, 18 December 1996), 1996-VI, para 76.

<sup>75</sup> Stefan Trechsel (n 12) 505.

<sup>76</sup> *Kurt v. Turkey* (n 73), para 124.

disappearance s/he must be detained in an officially recognised detention centre.<sup>77</sup> Accordingly, to ensure that there is no arbitrariness in a case of deprivation of liberty, the absence of the main information in the holding data recording, that is ‘the date, time and location of the detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting’<sup>78</sup> must be seen as incompatible with the requirement of the guarantee to be promptly brought before a judge or other judicial officer.

This right cannot be waived; this prescription is to prevent the arrestee or detainee from being compelled to make a waiver so as to not disclose ill-treatment and/or arbitrary detention.<sup>79</sup> Furthermore, this right does not depend on individual application. It must automatically be attributed to the arrested or detained person by the judicial authorities.<sup>80</sup>

The automatic review is also important because it gives an opportunity for people who cannot apply for the review, such as those who are detained in hospital, to take advantage of the right to appear before a judge.

### 5.3 *The scope of the right*

#### 5.3.1 The notion of ‘officers’ authorised by law to exercise judicial power

Any person deprived of his/her liberty must be brought before a judge or other officer authorised by law to exercise judicial power. However, what is the difference between an officer and a judge? Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR mention them both in the same phrase. Regarding Article 5 (3) ECHR, the ECtHR stated that

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<sup>77</sup> *Camilo Alarcon Espinoza et al. v. Peru*, Cases 10.941, 10.942, 10.044, 10.945, Report No. 40/97, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 780 (1997), para 92.

<sup>78</sup> *Kurt v. Turkey* (n 73), para 125.

<sup>79</sup> Stefan Trechsel (n 12) 506.

<sup>80</sup> *Aquilina v. Malta*, App no 25642/94 (ECHR, 29 April 1999), 1999-III, para 45.

mentioning the officer and the judge in the same phrase could indicate that these authorities perform similar duties.<sup>81</sup> Consequently, both the judge and the officer could be called ‘the competent legal authority’.<sup>82</sup> In fact, the term ‘judge’ is self-explanatory and does not need further explanation at this stage; however the term ‘other officer’ requires further explanation.<sup>83</sup> It would be legitimate to refer back to existing case-law because that would clarify the meaning of an officer who is authorised by law to exercise judicial power. The ECtHR states that for an officer to exercise judicial power, s/he must satisfy certain conditions; these conditions provide a surety to the person being held against any arbitrary or unjustified deprivation of liberty.<sup>84</sup> In other words, the officer who exercises judicial power does not need to be a judge, but s/he must have some features of the judiciary in order to protect the rights of detainees.<sup>85</sup> The first condition is that the officer is required to be independent from both the executive and the parties involved in the case.<sup>86</sup> This condition exists to ensure that the officer is independent, objective and impartial with the cases that s/he deals with,<sup>87</sup> and to prevent the relevant government from allowing arbitrary detention.<sup>88</sup> For instance, regarding Article 9 ICCPR, in *Vladimir Kulomin v. Hungary* the HRC stated that it ‘considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with..... the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an “officer

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<sup>81</sup> *Schiesser v. Switzerland*, App no 7710/76 (EHRR, 4 December 1979), series A34, para 27.

<sup>82</sup> *Ireland v. the United Kingdom* (n 39), para 199.

<sup>83</sup> Stefan Trechsel (n 12) 507.

<sup>84</sup> *Assenov and Others v. Bulgaria*, App no 90/1997/874/1086 (EHRR, 28 October 1998), 1998-VIII, para 146.

<sup>85</sup> Francis G. Jacobs, Robin C. A. White and Clare Ovey (n 46), 220.

<sup>86</sup> *Neumeister v. Austria*, App no 1936/63 (EHRR, 27 June 1968), series A8, para 24.

<sup>87</sup> *Vladimir Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992 (1996), para 11.3.

<sup>88</sup> Amnesty International, ‘In Re: request presented by the government of Uruguay for an advisory opinion interpreting Article 27 (2) of the American Convention on Human Rights’ (16 June 1987).

authorised to exercise judicial power” within the meaning of article 9(3).’<sup>89</sup> In addition, the possibility cannot be ruled out that the officer who ordered the detention fulfils other duties<sup>90</sup> and, if it appears at the time of ordering the detention that the officer might afterwards interfere in the subsequent criminal proceedings as a part of the prosecuting authority, his/her independence and impartiality would be open to doubt.<sup>91</sup> For example, in *Huber v. Switzerland* a District Attorney ordered the applicant’s detention on remand as he was an investigating officer. Some 14 months later the same officer acted as the prosecuting authority and presented the indictment. The Swiss Government stated that the matter of impartiality had to be considered exclusively at the time of ordering the detention without thinking that the individual could subsequently play a role as prosecuting authority. The Strasbourg Court did not accept this and said, ‘Clearly the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties’ and found a violation of the convention requirement.<sup>92</sup>

What is really remarkable is that the decision of the ECtHR in the *Huber* case indicates an important principle, which is that the features of the judiciary are obligatory for the officer during the case (from the beginning to the end) and not just at the time of ordering the detention. This is because these features are important in order to ensure objectiveness and impartiality throughout the case. Therefore, there is no chance that one of the parties or a member of the executive can become an officer who determines the legality of the detention.

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<sup>89</sup> *Vladimir Kulomin v. Hungary* (n 87), para 11.3.

<sup>90</sup> *Huber v. Switzerland*, App no 12794/87 (EHRR, 23 October 1990), series A188, para 43.

<sup>91</sup> *H.B. v. Switzerland* (n 37), para 55; *Pauwels v. Belgium*, App no 10208/82 (EHRR, 26 May 1988), series A135, para 38.

<sup>92</sup> *Huber v. Switzerland* (n 90), paras 37-43.

The second condition is a procedural requirement. This requirement obliges the officer to hear the detainee or arrestee who is brought before him/her before making any decision.<sup>93</sup> In some circumstances, the judge or the officer might go to the place where the detainee is held, such as a hospital. For example, in *Egmez v. Cyprus* the ECtHR stated that a visit by the judge to the detainee who was in the hospital was in compliance with the right to be brought before a judge.<sup>94</sup>

The last condition is the substantive requirement which obliges the officer: to review the situation that is brought before him/her; to make a decision for the deprivation of liberty or against it; to make his/her decision by reference to legal standards if there are reasons to justify the deprivation; and to order the release of the person in the absence of such grounds.<sup>95</sup> In other words, this condition gives the officer the power to review the various circumstances which could militate for or against the deprivation of liberty, and to decide to release the person of his/her own volition, without a request for release.<sup>96</sup> For example, in *Assenov and Others v. Bulgaria* the person who investigated the detainees after having them brought before him and ordering their detention on remand did not have the power to order their detention or release. As a result that decision was capable of being rejected by the prosecutor because the investigator was not an ‘officer authorised by law to exercise judicial power’ because s/he did not fulfil the conditions required by the conventions.<sup>97</sup>

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<sup>93</sup> *Schiesser v. Switzerland* (n 81), para 31; *Assenov and Others v. Bulgaria* (n 84), para 146; *Aquilina v. Malta* (n 80), para 50.

<sup>94</sup> *Egmez v. Cyprus*, App no 30873/96 (ECHR, 21 December 2000), para 90.

<sup>95</sup> *Ireland v. the United Kingdom* (n 39), para 199; *Schiesser v. Switzerland* (n 81), para 31.

<sup>96</sup> *Aquilina v. Malta* (n 80), para 52.

<sup>97</sup> *Assenov and Others v. Bulgaria* (n 84), para 148.



### 5.3.2 The notion of ‘promptly’

The ArCHR, the ICCPR and the ECHR require that the arrestee or detainee must be brought promptly before a judge or other officer authorised by law to exercise judicial power. It appears from the first sentences of Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR that there is a focus on the period that the arrestee must spend in custody before they appear before a judicial authority. Accordingly, this period begins at the time when the person is deprived of his/her liberty<sup>98</sup> and it ends when s/he appears before the judicial power.<sup>99</sup>

The HRC states that, regarding the word ‘promptly’, the first sentence of Article 9 (3) requires that a detainee must be brought immediately upon the deprivation of liberty to a judicial authority.<sup>100</sup> Moreover, although the Committee in *L. Stephens v. Jamaica* indicated that the significance of the word ‘promptly’ should be decided on a case-by-case basis,<sup>101</sup> its General Comment on Article 9 stipulates that any ‘delays must not exceed a few days’.<sup>102</sup> Accordingly, any delays, in the absence of a rationalisation, could be a violation of the Article 9 (3) requirement; for example the delay of 4 days before bringing the arrestee to a judicial authority in *Michael Freemantle v. Jamaica*,<sup>103</sup> and the delay of 1 week in *Clifford McLawrence v. Jamaica*.<sup>104</sup> Therefore, the length of time between the arrest and bringing the arrestee before a judicial authority differs from one country to another. In some countries, for example, the custody period is limited to

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<sup>98</sup> *Jėčius v. Lithuania*, App no 34578/97 (EHRR, 31 July 2000), 2000-IX, para 84.

<sup>99</sup> Stefan Trechsel (n 12) 511.

<sup>100</sup> *Vladimir Kulomin v. Hungary* (n 87) para 11.2.

<sup>101</sup> *Stephens v. Jamaica* (n 15), para 9.6.

<sup>102</sup> Human Rights Committee, General Comment 8 (n 2), para 2.

<sup>103</sup> *Michael Freemantle v. Jamaica* (n 33), para 7.4.

<sup>104</sup> *Clifford McLawrence v. Jamaica*, Communication No. 702/1996, U.N. Doc.CCPR/C/60/D/702/1996 (1996), para 5.6.

48 hours and in others to 24 hours.<sup>105</sup> Committee members discussed whether or not a 48 hours detention before a judicial review was inappropriately long and they asked countries to reconsider this period and decrease it.<sup>106</sup>

The ECtHR explains that the term ‘promptly’ does not mean immediately, as in the French text’s use of the word ‘aussitôt’, but is flexible<sup>107</sup> and depends on the facts of each case.<sup>108</sup> Although the term ‘promptly’ is evidence of some degree of flexibility, this flexibility is not absolute, but is limited according to the circumstances of the case.<sup>109</sup> For example, in *Brogan and Others v. the United Kingdom* the court stated that 4 days is the maximum period which could be compatible with the first sentence of Article 5 (3).<sup>110</sup> Therefore, as a result of limited flexibility, in the same case, the court found that spending 4 days and 6 hours in police custody was a violation of Article 5 (3). They argued that the need to protect the community from a serious crime, such as terrorism, is not on its own enough to meet the requirements of Article 5 (3).<sup>111</sup> However, although the time in which to bring an arrestee or detainee before a judge is limited, there are some exceptions that could extend the time beyond 4 days,<sup>112</sup> such as when it is impossible to promptly present the arrestee before a judicial authority. For example, in *Rigopoulos v. Spain*, even though the applicant spent 16 days in custody before being brought before a judicial authority, the ECtHR found that there had been no breach of the requirement to be prompt given in Article 5 (3) and said that ‘The applicant’s detention lasted for sixteen days because the vessel under his command was

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<sup>105</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publisher, 1993), 176.

<sup>106</sup> UN, (n 11), 12.

<sup>107</sup> *Brogan and Others v. the United Kingdom*, App no 11209/84; 11234/84; 11266/84; 11386/85 (EHRR, 29 November 1988), Series A145-B, para 59.

<sup>108</sup> *Wemhoff v. Germany*, App no 2122/64 (EHRR, 27 June 1968), series A7, the law, para 10.

<sup>109</sup> *Brogan and Others v. the United Kingdom* (n 107), para 59.

<sup>110</sup> *Ibid* para 60.

<sup>111</sup> *Ibid* para 62. See also, *İpek and Others v. Turkey* App no 17019/02 and 30070/02 (ECHR, 3 February 2009), para 35; *Medvedyex and Others v. France* App no 3394/03 (ECHR, 29 March 2010) para 121.

<sup>112</sup> *Taş v. Turkey*, App no 24396/94 (ECHR, 14 November 2000), para 86.

boarded on the high seas of the Atlantic Ocean at a considerable distance – more than 5,500 km – from Spanish territory and ...no less than sixteen days were necessary to reach the port of Las Palmas.’<sup>113</sup>

The previous passages show that there are two different periods in which the arrested or detained person should be brought before the judge. The HRC states that it must be as short as possible and limited to 48 hours without an extension, however the ECtHR has decided that the period is flexible and depends on the facts of each case, but must not to exceed 4 days.

It seems clear that the period provided by the HRC is better than that provided by the ECHR because allowing the detainee to review the lawfulness of his/her detention within a maximum of 48 hours is important in order to prevent him from spending a long time in detention without any legal reason.<sup>114</sup>

In summary, under Article 14 (5) ArCHR the right to be promptly brought before a judge or other judicial officer is determined for a person who is arrested or detained regarding a criminal charge. The officer authorised by law to exercise judicial power should satisfy three conditions. Firstly, s/he must be independent from both the executive and the parties involved in the case. Secondly, the officer must hear the person deprived of his/her liberty. Finally, s/he must review the case brought before him/her before making a decision. The term ‘promptly’ does not mean immediately but instead depends on the facts of different cases.

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<sup>113</sup> *Rigopoulos v. Spain*, App no 37388/97 (ECHR, 12 January 1999), 1999-II, the law.

<sup>114</sup> The Inter-American Commission on Human Rights states that the person who is in detention should be brought before a judge within a reasonable amount of time and any period beyond such a reasonable time is against the presumption of innocence requirement. *Desmond McKenzie and Others v. Jamaica*, Report No. 41/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 918 (1999), para 247.

## **6. The right to trial within a reasonable period of time, or to release pending a trial**

Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR require two rights for the arrestee or detainee. The first right, as previously mentioned, is the right to be promptly brought before a judge or other judicial officer and the second right is the right to trial within a reasonable time or to be released pending trial. Therefore, for the second right, the same Articles prescribe that the arrestee or detainee shall be entitled to trial within a reasonable time or must be released. Therefore, a period in custody without any grounds will be deemed unreasonable<sup>115</sup> and against the presumption of innocence.<sup>116</sup>

The purpose of the right to trial within a reasonable time or to release pending trial is to place a limit on the length of time that the person may be kept in pre-trial detention by forbidding the authorities from ordering unreasonable detention.<sup>117</sup> This is because a long period in detention is like a punishment while, in fact, no sentence may be executed on a person - even if found guilty of an offence - before a previous sentence by a regularly constituted court.<sup>118</sup> In addition, the need to ‘prevent the accused from remaining a long time under accusation and ensuring that the accusation is decided on promptly’ could be the reason for a trial within a reasonable time.<sup>119</sup> It can be said that the time limitation is required in the interests of the suspect and not in the interests of

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<sup>115</sup> IACHR, ‘Report on the Situation of Human Rights in Ecuador’ (OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 1997).

<sup>116</sup> *Jorge A. Giménez v. Argentina*, Case 11.245, Report no 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996), para 80.

<sup>117</sup> Jim Murdoch, *Article 5 of the European Convention on Human Rights* (Council of Europe, Files No12 2002), 75.

<sup>118</sup> In *Jorge A. Giménez v. Argentina* the Inter-American Commission of Human Rights supported this when it said, ‘no person should be punished without a prior trial’ and it found a violation of the right to trial within a reasonable time because the detainee spent 49 months in pre-trial detention before the sentence was issued. *Jorge A. Giménez v. Argentina* (n 116), paras 35, 76, 108; see also ‘Declaration of Minimum Humanitarian Standards’, ‘reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4 (U.N. Doc. E/CN.4/1995/116, 1995) (Declaration of Turku).

<sup>119</sup> *Waldemar Gerónimo Pinheiro and José Victor Dos Santos v. Paraguay*, Case 11.506, Report No. 76/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 803 (2002), para 68.

justice<sup>120</sup> because, if the period of detention on remand goes beyond the reasonable period, it will only affect the suspect and not the court.

The Arab Charter on Human Rights and the other human rights instruments do not determine the time that the accused may spend in pre-trial detention. The HRC<sup>121</sup> and the ECtHR<sup>122</sup> agree that ‘reasonable time’ depends on the circumstances of each case,<sup>123</sup> while they have reached different decisions about the exact time limits. On the one hand, the HRC mentioned that the length of any pre-trial detention must not exceed 12 months.<sup>124</sup> On the other hand, the ECtHR indicated the term ‘reasonable time’ could not be interpreted in terms of a fixed period, such as a numbers of days, weeks, months or years, because it depends on the distinct features of each case.<sup>125</sup>

It appears inappropriate to try to reach a definite time limit for pre-trial detention, as the HRC has done, but it could be accepted that this period should be controlled by ordering certain conditions, as will be mentioned in the following paragraphs, to guarantee control over the pre-trial detention period. This is because the conventions mention the term ‘reasonable time’, which indicates that the period of pre-trial detention must be compatible with the conditions of the case and the reasons which require that the detainee be kept in pre-trial detention.

Although neither the HRC nor the ECtHR say this, it could be useful to suggest that the period of pre-trial detention should not go beyond the period of the sentence if the

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<sup>120</sup> *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Report No. 35/96, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 (1997), para 70.

<sup>121</sup> *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 at 96 (1991), para 6.5

<sup>122</sup> *Kubicz v. Poland*, App no 16535/02 (ECHR, 28 March 2006), para 38.

<sup>123</sup> Also, in *Luis Lizardo Cabrera v. Dominican Republic*, the Inter-American Commission on Human Rights stated the same thing. *Luis Lizardo Cabrera v. Dominican Republic* (n 120), para 72.

<sup>124</sup> Human Right Committee, ‘Concluding Observations of the Human Rights Committee, Poland’ (U.N. Doc. CCPR/C/79/Add.110, 1999), para 18.

<sup>125</sup> *Stögmüller v. Austria*, App no 1602/62 (EHRR 10 November 1969), series A9, the law, para 4.

accused was to be convicted and sentenced.<sup>126</sup> This because this would be an injustice, as the person would have been deprived of his/her liberty for longer than the length of time served as a penalty for the crime he is charged with.

Since the ‘reasonable time’ stipulated depends on the circumstances of each case, and these circumstances can be extremely different, there could be large differences in the understanding of ‘reasonable time’.<sup>127</sup> Accordingly, to prevent exceeding the reasonable time, the national judicial authorities must examine the different circumstances of a case in order to ensure that a period of detention is intended to achieve public interest, while not neglecting the principle of innocence.<sup>128</sup>

The fact that Article 14 (5) ArCHR prescribes that the arrestee or detainee shall be entitled to a trial within a reasonable time, or to release, does not mean that the judicial authorities have a choice between bringing the detainee to trial within a reasonable time and releasing him on bail. This is because the last sentences of the same Article, similar to Article 9 (3) ICCPR, provide that ‘pre-trial detention shall in no case be the general rule’. Therefore, the HRC states that the general rule in Article 9 (3) ICCPR requires release from custody pending trial; detention in custody pending trial should be regarded as an exception to this general rule.<sup>129</sup> Although the European Convention on Human Rights does not include this general principle, it agrees that the release of the detainee pending trial should be the general rule and that keeping him/her in pre-trial detention is the exception. This is because ‘until conviction, he must be presumed

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<sup>126</sup> The Inter-American Commission on Human Rights stated that that the duration of the detention must not exceed the period of a prison sentence in the case of conviction. IACHR, ‘Report on the Situation of Human Rights in Panama’ (OEA/Ser.L/V/II.44 doc. 38, rev. 1, 22 June 1978).

<sup>127</sup> *Wemhoff v. Germany* (n 108), the law, para 10.

<sup>128</sup> *Assenov and Others v. Bulgaria* (n 84), para 154.

<sup>129</sup> Human Right Committee, General Comment 8, (n 2) para 3; *Jorge A. Giménez v. Argentina* (n 116), para 84.

innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.’<sup>130</sup>

It should also be emphasised that if there is no capability under domestic law to release the detainee in certain circumstances, such as when s/he has committed a serious crime, the officer or the judge therefore has no ability to release him, even on bail. This means that the relevant domestic law is incompatible with the requirement of the right to trial within a reasonable period of time, or to release pending a trial. For clarification, in *Caballero v. the United Kingdom* the ECtHR found a violation of Article 5 (3) because the domestic law does not permit the officer or the judge involved to release detainees who have committed a serious crime.<sup>131</sup>

Article 14 (5) ArCHR and the similar Articles 9 (3) ICCPR and 5 (3) ECHR include the same sentence, which is that the arrestee or detainee released may be subject to guarantees to appear for trial. Therefore, the detainee who was charged with an offence must immediately be released pending trial except when there are ‘relevant and sufficient’ reasons to justify keeping him/her in detention.<sup>132</sup> The relevant and sufficient reasons are the conditions that could allow the pre-trial detention period to exceed the reasonable period. These conditions can be divided into two types. One is related to the relevant reasons and the other to the sufficient reasons; each reason must contain both conditions. For clarification, the relevant reasons could be, for example, the risk of absconding, the risk of tampering with evidence and/or suborning or bringing pressure to bear on the witnesses, the protection of public order and the protection of the

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<sup>130</sup> *Neumeister v. Austria* (n 86), the law, para 4.

<sup>131</sup> *Caballero v. the United Kingdom*, App no 32819/96 (ECHR, 8 February 2000), para 21.

<sup>132</sup> *Castravet v. Moldova* App no 23393/05 (ECHR, 13 March 2007), para 32; *Polonskiy v. Russia*, App no 30033/05 (ECHR, 19 March 2009), para 139.

suspect.<sup>133</sup> In addition, the sufficient reasons require that the length of the pre-trial detention should depend on the time necessary for the reasons which allow for keeping the detainee in detention. For example, if the risk of absconding is applicable for only one month, the pre-trial detention must be for no longer than one month. In *Kubicz v. Poland* the accused spent about 2 years in pre-trial detention. The Polish Government maintained that the period of the detention was not excessive because there were some relevant reasons, such as the gravity of the charges and the severe penalty, the risk of the applicant tampering with the evidence or attempting to influence witnesses. The ECtHR rejected this view when it stated, ‘The courts did not indicate any circumstance capable of showing that the risk relied on actually persisted during the entire relevant period.’<sup>134</sup>

## 6.1 *The relevant reasons for detention on remand*

### 6.1.1 The risk of absconding

Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR require that the release of the detainee is conditioned by guarantees to appear for trial. Regarding this, the HRC states that ‘such detention [under Article 9 (3) ICCPR] is essential to protect legitimate interests, such as the appearance of the accused at the trial’.<sup>135</sup> Furthermore, the ECtHR states that the ‘only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial’.<sup>136</sup> As a result of this, and the argument that a trial in the absence of the accused would be an unacceptable alternative to a fair trial,<sup>137</sup> keeping the suspect in pre-trial detention in the

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<sup>133</sup> Stefan Trechsel (n 12) 523-527.

<sup>134</sup> *Kubicz v. Poland* (n 122), paras 33-46.

<sup>135</sup> Human Rights Committee, ‘Concluding Observations of the Human Rights Committee, Italy’ (U.N. Doc. CCPR/C/79/Add.94, 1998), para 15.

<sup>136</sup> *Wemhoff v. Germany* (n 108), the law, para 15.

<sup>137</sup> Stefan Trechsel (n 12) 524.



light of the risk of absconding can be justified if there are enough factors to indicate that the accused might abscond. One of these factors is the severity of the sentence risked in relation to the offence, such as those for murder or the illegal possession of weapons. In fact, this factor cannot be accepted unless there are other factors involved which confirm the risk of absconding.<sup>138</sup> The HRC recommends that the relationship between the offence that a detainee has been charged with and the length of detention should be stopped.<sup>139</sup> Instead, ‘the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts’<sup>140</sup> must be looked at. For example, pre-trial detention will be justified in the case of a suspect who has absconded from criminal proceedings<sup>141</sup> or if the suspect is bankrupt or in a bad financial situation and is required to pay huge amounts of money.<sup>142</sup>

#### 6.1.2 The risk of tampering with evidence and/or suborning or causing pressure to be brought to bear on witnesses

The risk of tampering with evidence and/or suborning or causing pressure to be brought to bear on witnesses is one of the reasons that allow for a suspect to be kept in detention. An example of this situation is if the suspect is a member of an organised criminal gang; he/she could bring pressure to bear on witnesses, hamper the proceedings or tamper with the evidence.<sup>143</sup> For example, in *W.B.E. v. The Netherlands* the HRC

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<sup>138</sup> *Letellier v. France*, App no 12369/86 (EHRR, 26 June 1991), Series A no 207, para 43; *Kauczor v. Poland*, App no 45219/06 (ECHR, 3 February 2009), para 46; *Grishin v. Russia* App no 14807/08 (ECHR, 24 July 2012), para 142.

<sup>139</sup> Human Rights Committee, ‘Concluding Observations of the Human Rights Committee, Italy’ (n 135), para 15.

<sup>140</sup> *W. v. Switzerland*, App no 14379/88 (EHRR, 26 January 1993), Series A no 254-A, para 33.

<sup>141</sup> *Punzelt v. The Czech Republic*, App no 31315/96 (EHRR, 25 April 2000), para 76.

<sup>142</sup> Stefan Trechsel (n 12) 524.

<sup>143</sup> *Gładczak v. Poland*, App no 14255/02 (ECHR, 31 May 2007), para 55.

found that keeping the applicant in pre-trial detention was justified because ‘there was a serious risk that, if released, he might interfere with the evidence against him.’<sup>144</sup>

For suborning or causing pressure to be brought to bear on witnesses to be taken into account in this situation, the detainee must have the ability to impact upon the witnesses to make them change their testimony;<sup>145</sup> if not, the detention will be unreasonable. Moreover, the risk of collusion between the co-accused is one form of tampering with evidence.<sup>146</sup> For instance, in *Rusiecki v. Poland* the suspect was kept in pre-trial detention because he was a leader of a criminal gang and the other members of the gang had not yet been arrested, so he could have colluded with the other gang members and tampered with the evidence.<sup>147</sup>

#### 6.1.3 Protection of public order

There are some crimes that might lead to public disquiet and action. Therefore, these kinds of crimes have justified reasons for keeping the suspect in detention pending trial.<sup>148</sup> The best example of this kind of crime is in *Tomasi v. France*, where the suspect had participated in an attack against a Foreign Legion rest centre which had resulted in the death of one man and very serious injuries to another.<sup>149</sup>

#### 6.1.4 Protection of the suspect

In some cases, ‘the nature of the offences concerned, the conditions in which they were committed and the context in which they took place’ indicate that the suspect is

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<sup>144</sup> *W.B.E. v. The Netherlands*, Communication No. 432/1990, U.N. Doc. CCPR/C/46/D/432/1990 (1992), para 6.3.

<sup>145</sup> *Letellier v. France* (n 138), para 37.

<sup>146</sup> Stefan Trechsel (n 12) 526.

<sup>147</sup> *Rusiecki v. Poland*, App no 36246/97 (ECHR, 21 April 2009), para 6.

<sup>148</sup> *Tomasi v. France*, App no 12850/87 (EHRR, 27 August 1992), series A no 241-A, para 91.

<sup>149</sup> *Ibid.*

potentially in danger and his/her safety requires keeping him/her in pre-trial detention.<sup>150</sup> This danger could, for example, comprise of revenge attacks by the victim's family, reprisals or other fears expressed by the suspect.<sup>151</sup>

In summary, under Articles 14 (5) ArCHR the words 'reasonable time' depends on the circumstances of each case. Keeping a person in pre-trial detention is an exception and the general rule is to release him/her pending trial. This exception is applied when there are 'relevant and sufficient' reasons to justify keeping him/her in detention.

## **7. The right to have the lawfulness of the arrest or detention decided without delay by a court**

The right to have the lawfulness of the detention decided without delay by a court is one of the rights that are mentioned in the international human rights instruments, including Articles 14 (6) ArCHR, 9 (4) ICCPR and 5 (4) ECHR. These Articles give the person who is deprived of his/her liberty the right to challenge the lawfulness of the arrest or detention before a court, which can then order the person's release in the case of an unlawful deprivation of liberty. This right also gives the court the authority to order the release without recourse to any other procedure.<sup>152</sup>

### *7.1 The relevance of the right*

The first sentence of Articles 14 (6) ArCHR, 9 (4) ICCPR and 5 (4) ECHR indicates that anyone deprived of his/her liberty has the right to review the lawfulness of an arrest or detention. Therefore, all persons deprived of their liberty are qualified to take the advantage of this right, with no distinction between who is or is not in lawful

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<sup>150</sup> *OF I.A. v. France*, App no 28213/95 (EHRR, 23 September 1998), 1998-VII, para 108.

<sup>151</sup> *Ibid.*

<sup>152</sup> Stanislaw Frankowski and Dinah Shelton (n 65), 25.

detention.<sup>153</sup> Furthermore, no difference is made between criminal cases and others, such as those involving mental illness; vagrancy; drug addiction; educational purposes; or immigration control.<sup>154</sup> Consequently, in general, the court should focus the review on whether it finds the detention lawful<sup>155</sup> or unlawful.<sup>156</sup>

Since this right is very important, only Article 4 (2) ArCHR lists this right within the non-derogable rights. This means that it is applicable in all circumstances without distinction between ordinary or extraordinary situations. Looked at superficially Articles 9 (4) ICCPR and 5 (4) ECHR appear to be derogable. However, the purpose of the provisions as confirmed in the interpretation by the HRC and the ECtHR requires that this right should be treated as non-derogable rights, as will be shown in more detail in the following chapter.<sup>157</sup> In other words, the wording of the ArCHR reflects the interpretation that Articles 9 (4) ICCPR and 5(4) ECHR have been given. For example, with regard to Article 9 (4) ICCPR, the Commission on Human Rights emphasised that the right, to have the lawfulness of the arrest and detention decided speedily or without delay, must be applied at all times and in all cases, including a state of emergency.<sup>158</sup> With regard to Article 5 (4) ECHR, the same principle could be understood from the cases of the ECtHR. For example, in *Aksoy v. Turkey*, although the Court concluded that there was a public emergency, as envisioned by Article 15 ECHR, it emphasised that the Turkish Government did not provide adequate safeguards against abuse. It expressly stated that ‘the absence of any realistic possibility of being brought before a court to test

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<sup>153</sup> *De Wilde, Ooms and Versyp ('Vagrancy') v. Belgium (Merits)*, App no 2832/66; 2835/66; 2899/66 (EHRR, 18 June 1971), series A12, para 73.

<sup>154</sup> Human Rights Committee, General Comment 8 (n 2), para 1; *Suárez Rosero v. Ecuador*, Judgment of November 12, 1997, Inter-Am. Ct. H.R. (Ser. C) no 35 (1997), para 63.

<sup>155</sup> *Douiyeb v. the Netherlands*, App no 31464/96 (ECHR, 4 August 1999), para 57.

<sup>156</sup> *Bouamar v. Belgium* App no 9106/80 (EHRR, 29 February 1988), series A no 129, para 55.

<sup>157</sup> See Chapter 4, section 3.1.2.4.1: Non-derogable rights.

<sup>158</sup> UN Commission on Human Rights, Habeas corpus, 28 February 1992, E/CN.4/RES/1992/35, <<http://www.unhcr.org/refworld/docid/3b00f01d4.html>> accessed 22 March 2013.

the legality of the detention meant that he [the detainee] was left completely at the mercy of those holding him.’<sup>159</sup>

It is true that this right is applicable to all kinds of deprivations of liberty and to many different circumstances, but there are some situations that do not fall within the scope of the guarantee of a judicial review. The best example of this is in the case of people performing military service; it is natural that soldiers are restricted in their liberty in a camp, for example, and are not allowed to leave it.<sup>160</sup> In addition, there is another situation in which the right of judicial review does not apply; this is in a case where the detainee chooses to waive his/her right. In *Brogan and Others v. the United Kingdom* the court found that there was no violation of the right to challenge the lawfulness of detention because the detainees had decided not to avail themselves of this right.<sup>161</sup>

It appears that this right is different from the right to be promptly brought before a judge or other judicial officer, as the former can be given up while the latter cannot. It could be said that the reason for this is that the arrestee or detainee, after the first review by a judge or other judicial officer, could be convinced that his/her deprivation of liberty is lawful, and therefore s/he may choose to waive the right to have the lawfulness of the arrest or detention decided without delay by a court.

## 7.2 *The rationale of the right*

This right is very important for the detainee because, as is obvious from its name, it gives the detainee the opportunity to test the legality of the detention;<sup>162</sup> ‘the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose

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<sup>159</sup> *Aksoy v. Turkey* (n 74), para 83.

<sup>160</sup> *Antti Vuolanne v. Finland*, Communication no 265/1987, U.N. Doc. Supp. no 40 (A/44/40) at 311 (1989), para 9.4.

<sup>161</sup> *Brogan and Others v. the United Kingdom* (n 107), paras 64, 65.

<sup>162</sup> *E. v. Norway*, App no 11701/85 (EHRR, 29 August 1990), series A no 181-A, para 49.

pursued by the arrest and the ensuing detention.’<sup>163</sup> This is to ensure that there is no possibility of arbitrariness against the detainee.<sup>164</sup> This right is also necessary to protect and respect an individual’s life and physical integrity because it prevents disappearance or secret detention and protects the arrestee or detainee from any torture or inhumane and/or degrading treatment.<sup>165</sup> Therefore States, as is evident in this review, can control any instance of the deprivation of liberty and ensure that it fulfils the conventions’ requirements.

### 7.3 *The nature of the ‘court’ undertaking the review*

It is clear, from the previous Articles mentioned, that the review of the legality of deprivation of liberty should be undertaken by a court, not by another authority. Therefore, if there is an institution authorised to exercise a judicial power which does not have the essential features of a court, it cannot undertake the review.<sup>166</sup> This is because the authority that undertakes the review must have the features of a court, similar to the other officer authorised by law to exercise judicial power that is mentioned in Articles 14 (5) ArCHR, 9 (3) ICCPR and 5 (3) ECHR, such as having a judicial nature, being independent from both the executive and the case parties<sup>167</sup> and being impartial,<sup>168</sup> in order to ensure a high degree of objectivity and independence.<sup>169</sup>

In addition, Articles 14 (6) ArCHR, 9 (4) ICCPR and 5 (4) ECHR require all courts to have the power to release a person deprived of his/her liberty in the case of unlawful deprivation of liberty. This is a fundamental procedure because a detainee could not

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<sup>163</sup> *Brogan and Others v. the United Kingdom* (n 107), para 65.

<sup>164</sup> *Keus v. the Netherlands* (n 49), para 24.

<sup>165</sup> *Castillo Paez v. Peru*, Decision of 3 November 1997 (Series C) no 34, Inter-Am.Ct.HR, paras 82, 83; *Suárez Rosero v. Ecuador*, (n 154), para 63.

<sup>166</sup> *Stanislaw Frankowski and Dinah Shelton* (n 65), 27.

<sup>167</sup> *Neumeister v. Austria* (n 86) the law, para 24.

<sup>168</sup> *Ilijkov v. Bulgaria*, App no 33977/96 (ECHR, 26 July 2001), para 97.

<sup>169</sup> *Mario Inés Torres v. Finland*, Communication No. 291/1988, UN Doc. CCPR/C/38/D/291/1988 (1990), para 7.2.

take advantage of this right if the court, after deciding that the detention was unlawful, could not order their release.<sup>170</sup> For example, in *Chahal v. the United Kingdom* the ECtHR found that the Advisory Panel cannot be considered to be a ‘court’ that is capable of making a review of a case of deprivation under Article 5 (4). This is because it cannot make a decision binding on the executive, but can only give an advisory opinion.<sup>171</sup>

Furthermore, in *Antti Vuolanne v. Finland* the HRC confirmed that the review must be taken before a court, whether this is civilian or military. In the same case it rejected the review that had been performed by a superior military officer regarding the law on Military Disciplinary Procedure.<sup>172</sup> In addition, the ‘court’ that is required by international conventions does not need to be one of the standard law courts of the judicial machinery of a State. It can be an authority which has the essential features of a court - those mentioned previously, including a judicial nature and independence from both the executive and the involved parties. Also, it must be able to deal with the judicial procedure that is required for the type of deprivation of liberty which is presented for review.<sup>173</sup> For instance, in *De Wilde, Ooms and Versyp v. Belgium* the ECtHR found a violation of the right to challenge the lawfulness of detention because the review, for a vagrancy case, had been performed by a magistrate who had all the fundamental features of a court except for a judicial function. He had an administrative function instead because, pursuant to the legislative texts in force in Belgium, keeping vagrants in detention was not because they had committed a crime but ‘an

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<sup>170</sup> For example, in *A v. Australia* the Human Rights Committee found a breach of the right to challenge the lawfulness of the detention when the court could not perform the review and order the release, for an applicant whose application for refugee status was rejected, because the procedure ‘was limited to an assessment of whether this individual was a “designated person” within the meaning of the Migration Amendment Act’. *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/ 560/1993 (1997), para 9.5.

<sup>171</sup> *Chahal v. the United Kingdom*, App no 22414/93 (EHRR, 15 November 1996), 1996-V, para 131.

<sup>172</sup> *Antti Vuolanne v. Finland* (n 160), para 9.6.

<sup>173</sup> *Weeks v. the United Kingdom*, App no 9787/82 (EHRR, 2 March 1987), series A no 114, para 61.

administrative security measure’, and the decision against the vagrants therefore had an administrative nature.<sup>174</sup> Also, in *Keus v. the Netherlands*, the same court mentioned that the Minister for Justice cannot be considered to be a court,<sup>175</sup> while in *Wassink v. the Netherlands* it was stated that the President of the District Court would be accepted if s/he had the basic features of a court.<sup>176</sup>

#### 7.4 The procedural requirements

The procedure of the right to challenge the lawfulness of arrest or detention should begin after the application of the arrested or detained person or it should be started automatically by the court.<sup>177</sup> The person who is deprived of his/her liberty has the right to a judicial review immediately after the deprivation of liberty has taken place.<sup>178</sup> In *Iğdeli v. Turkey* the ECtHR ensured this when it found a violation of the detainee’s rights ‘where a detained person has to wait for a period to challenge the lawfulness of his custody’.<sup>179</sup>

The court that undertakes the review is required to perform a broad enough review to be able to examine all the conditions that are necessary for a lawful deprivation of liberty, according to the conventions.<sup>180</sup> Therefore, the court must not only examine whether the deprivation of liberty fulfils the requirements of the relevant domestic procedural law,

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<sup>174</sup> *De Wilde, Ooms and Versyp* (‘*Vagrancy*’) *v. Belgium* (Merits) (n 153), paras 37, 77-80.

<sup>175</sup> *Keus v. the Netherlands* (n 49), para 28.

<sup>176</sup> *Wassink v. the Netherlands*, App no 12535/86 (EHRR, 27 September 1990), series A no 185-A, para 30.

<sup>177</sup> Francis G. Jacobs, Robin C. A. White and Clare Ovey (n 46) 238.

<sup>178</sup> Stefan Trechsel (n 12) 466.

<sup>179</sup> *Iğdeli v. Turkey* App no 29296/95 (ECHR, 20 June 2002), para 34. See also *Assenov and Others v. Bulgaria* (n 84), para 162.

<sup>180</sup> *E. v. Norway* (n 162), para 50; *A. and others v. the United Kingdom*, App no 3455/05 (ECHR, 19 February 2009), para 202.



but also whether it is in compliance with the conventional requirements for lawful deprivation.<sup>181</sup>

The right to challenge lawful arrest or detention requires a fundamental procedure from the court, which is a review of the arrest or detention. Therefore, if the domestic court or the government examines the case and does not give the detained person the chance to review their detention, it means that this requirement is not being fulfilled. Case-law gives the clearest examples with regard to this point; in *Sabeur Ben Ali v. Malta* Strasbourg Court found that the primary aim of one section of the Maltese Criminal Code was merely to punish officers who did not attend to the lawfulness of detention complaints, not to allow the detained persons to challenge their detention.<sup>182</sup> In *Öcalan v. Turkey* the same court stated that compensation alone was insufficient to meet the requirements of the review.<sup>183</sup>

One of the most important procedures is the principle of equality of arms. The ECtHR indicated that equality of arms is one of the most important safeguards imposed by the ECHR on judicial proceedings<sup>184</sup> and it results from the right to a fair trial, which is required by Article 6 of the ECHR<sup>185</sup> (and by the very similar Articles 16 ArCHR and 14 ICCPR). Equality of arms should exist between the parties of the case, the prosecutor and the detainee.<sup>186</sup> Therefore, this right requires that the arrestee or detainee appear at the same time as the prosecutor to give him/her the opportunity to reply to the prosecutor's arguments.<sup>187</sup> One procedure of the equality of arms is the appearance of the detainee before the court. This procedure provides the detainee with the ability to

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<sup>181</sup> *Ilijkov v. Bulgaria* (n 168), para 94.

<sup>182</sup> *Sabeur Ben Ali v. Malta*, App no 35892/97 (ECHR, 29 June 2000), para 39.

<sup>183</sup> *Öcalan v. Turkey*, App no 46221/99 (ECHR, 12 March 2003), para 75.

<sup>184</sup> *Kampanis v. Greece*, App no 17977/91 (ECRR, 13 July 1995,) Series A no 318-B, para 47.

<sup>185</sup> *Assenov and Others v. Bulgaria* (n 84), para 162; *Garcia Alva v. Germany*, App no 23541/94 (ECHR, 13 February 2001), para 39.

<sup>186</sup> *Garcia Alva v. Germany* (n 185), para 39; *A. and others v. the United Kingdom* (n 180), para 204.

<sup>187</sup> *Kampanis v. Greece* (n 184), para 58.

hear the proceedings of the court him/herself or through his legal representative.<sup>188</sup> In other words, the person deprived of his/her liberty should be given the opportunity to appear at an oral hearing.<sup>189</sup> Moreover, equality of arms gives the detainee's counsel a permit to access the investigation file; this is necessary in order to successfully challenge the lawfulness of the detainee's detention.<sup>190</sup> The requirement with regard to the equality of arms is, however, capable of some modification in 'security' cases so long as there is minimum degree of disclosure mandated by *A. and others v. the United Kingdom*.<sup>191</sup>

The right to challenge the lawfulness of their deprivation of liberty requires that the arrestee or detainee must be fully aware of his/her situation, and therefore that s/he must know the statements and other evidence against him/her. For example, the person must be aware of the results of the different investigations. Since all this information is very important for the detainee, the prosecution is not allowed to hide any of it, even if it had been kept secret to prevent any attempt at tampering with the evidence and perverting the course of justice.<sup>192</sup> In several places, the ECtHR found violations of the right to challenge the lawfulness of arrest or detention, and in many cases the detainees or their lawyers were denied sufficient information. For example, in *Lamy v. Belgium* and *Włoch v. Poland* the detainees' counsels were not permitted to study the investigation file.<sup>193</sup> Consequently, the detained person should be admitted not only to the oral

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<sup>188</sup> *Sanchez-Reisse v. Switzerland*, App no 9862/82 (EHRR, 21 October 1986), series A no 107, para 51. See also, *Idalov v. Russia* App no 5826/03 (ECHR, 22 May 2012), paras 161- 164.

<sup>189</sup> *Hussain v. the United Kingdom*, App no 21928/93 (EHRR, 21 February 1996), 1996-I, para 59.

<sup>190</sup> *Garcia Alva v. Germany* (n 185), para 39.

<sup>191</sup> See Chapter 4, section 2.4: The requirement of 'equality of arms' when appearing before a court; *A. and others v. the United Kingdom* (n 180) paras, 205, 218.

<sup>192</sup> *Ibid* paras 41, 42.

<sup>193</sup> *Lamy v. Belgium* (n 48), para 29; *Włoch v. Poland*, App no 27785/95 (ECHR, 19 October 2000), paras 131, 132.

hearing but, also, have access to the case file; if s/he is prevented from gaining access then s/he will not have been granted their rights.<sup>194</sup>

#### 7.4.1 Periodic review of continuing detention

Challenging the lawfulness of an arrest or detention requires the court to undertake a series of periodic reviews, not just one review. This procedure is necessary, even if the arrest or detention is legal, or the arrested or detained person has not been subjected to any inhumane treatment, because of the possibility of the reasons for the deprivation of liberty changing during the period of detention. In other words, it can be said that a periodic review is important in order to guarantee that the detention continues to be justified.<sup>195</sup> For the same purpose, the HRC emphasises that ‘the requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.’<sup>196</sup>

The periodic review is required for all kinds of deprivation of liberty, whether as part of a criminal procedure or any other deprivation of liberty, but it is appropriate to talk here about provisional detention, without considering the other types of deprivation.

In *Bezicheri v. Italy* the ECtHR stressed the importance of the periodic review for detention on remand. It required that the intervals between periodic reviews should be short because, as was mentioned in the previous section, the period for pre-trial detention is limited,<sup>197</sup> and the accused should be released unless there are relevant and sufficient reasons for keeping him in detention on remand. So, the review is important,

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<sup>194</sup> *Wloch v. Poland* (n 193), paras 129, 130.

<sup>195</sup> J. G. Merrills and A. H. Robertson (n 28) 81.

<sup>196</sup> *Mr. Tai Wairiki Rameka et al. v. New Zealand*, Communication No. 1090/2002, U.N. Doc. CCPR/C/79/D/1090/2002 (2003), para 7.3.

<sup>197</sup> *Bezicheri v. Italy*, App no 11400/85 (EHRR, 25 October 1989), series A no 164, para 21.

with regard to checking these conditions, when keeping the accused in pre-trial detention. For clarification, in *Nikolova v. Bulgaria* the applicant was kept in detention on remand because she was charged with the misappropriation of a large amount of money, which is classified as a ‘serious wilful crime’ under Bulgarian law. The applicant had sufficient evidence that she would not try to abscond or obstruct the investigation, but domestic law did not provide for a periodic review of her pre-trial detention. The Strasbourg Court found that there had been a violation of the Article that specifies the right to challenge the lawfulness of the detention.<sup>198</sup>

#### 7.4.2 The notion of ‘without delay’

Articles 14 (6) ArCHR and 9 (4) ICCPR use the term ‘without delay’ for the time that must be taken by the court to make a decision regarding lawful detention, while Article 5 (4) ECHR uses the term ‘speedily’. In fact, it appears that the period which is required by these Articles is much like the other time periods that are required in the international human rights instruments for different rights, depending on the situation of each case. For example, in *Sanchez-Reisse v. Switzerland* the ECtHR stated that the term ‘speedily’, which is used in Article 5 (4), should ‘be determined in the light of the circumstances of each case.’<sup>199</sup> Moreover, the HRC stated that there is no fixed period for a court’s decision in this matter and that, as stated in Article 9 (4), it must ‘be decided on a case by case basis.’<sup>200</sup>

As this right is required for all types of deprivation of liberty, the relevant time will depend on the specific deprivation.<sup>201</sup> For example, in *Bezicheri v. Italy* the ECtHR

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<sup>198</sup> *Nikolova v. Bulgaria*, App no 31195/96 (ECHR, 25 March 1999), paras 61-66.

<sup>199</sup> *Sanchez-Reisse v. Switzerland* (n 188), para 55.

<sup>200</sup> *Mario Inés Torres v. Finland* (n 169), para 7.3.

<sup>201</sup> Manfred Nowak (n 105) 179.

stated that ‘the nature of detention on remand calls for short intervals.’<sup>202</sup> Furthermore, in *Sakik and Others v. Turkey* the same court found that the right of judicial review was violated when the review started 12 days after the arrest for pre-trial detention,<sup>203</sup> while the HRC in *Mario Inés Torres v. Finland*, accepted a 2 week period for the purpose of examining the detention under extradition proceedings and found that this fulfilled the requirements of this right.<sup>204</sup>

In summary, under Article 14 (6) ArCHR the right to have the lawfulness of the arrest or detention decided without delay by a court applies to all kinds of deprivation of liberty and in all circumstances (ordinary or extraordinary). This procedure must be taken by a court or other institution that have a judicial nature, being independent from both the executive and the case parties and being impartial, in order to ensure a high degree of objectivity and independence. Also, it must have the power to release a person deprived of his/her liberty in the case of unlawful deprivation of liberty. This right should be started automatically by the court. The court should review all the conditions that are necessary for a lawful deprivation of liberty. Regarding the principle of equality of arms, the arrestee or detainee should be appeared at the same time as the prosecutor to give him/her the opportunity to reply to the prosecutor’s arguments. The court should undertake a series of periodic reviews, not just one review. The notion of ‘without delay’ is dependent on the situation of each case.

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<sup>202</sup> *Bezicheri v. Italy* (n 197), para 21.

<sup>203</sup> *Sakik and Others v. Turkey*, App no 87/1996/706/898-903 (EHRR, 26 November 1997), 1997-VII, para 51.

<sup>204</sup> *Mario Inés Torres v. Finland* (n 169), para 7.4.

## **8. The right to compensation in the event of unlawful deprivation of liberty**

One of the most essential principles of human rights is the protection of individual liberty, especially from the abuse of government authority.<sup>205</sup> So, Articles 14 (7) ArCHR, 9 (5) ICCPR, and 5 (5) ECHR provide the right to compensation in the event of an arbitrary or unlawful deprivation of liberty.

The importance of this right is to ensure that victims of unlawful arrest or detention can use domestic law to obtain compensation for damage resulting from illegal arrest or detention.<sup>206</sup>

### *8.1 The relevance of the right*

Article 14 (7) ArCHR and Article 9 (5) ICCPR provide general terms for arrestees and detainees who are entitled to the right to compensation in the event that they are the victim of unlawful arrest or detention, while Article 5 (5) ECHR limits this right to only a ‘victim of arrest or detention in contravention of the provisions of this Article’. Despite the differences in what the Articles say, with one widening the right and the other restricting it, they still have the same meaning. This is because any unlawful arrest or detention (as in Article 14 (7) ArCHR and Article 9 (5) ICCPR) is a breach of the Articles that provide conditions and procedural guarantee requirements for arrests and detention. In other words, any unlawful arrest or detention, for example in relation to the ArCHR, means that the arrest or detention is contrary to the provisions of Article 14, while if it is in relation to the ECHR it breaches Article 5.

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<sup>205</sup> Stuart Beresford, ‘Redressing the wrongs of the international justice system: compensation for persons erroneously detained, prosecuted, or convicted by the ad hoc tribunals’ (2002) 96 Am. J. Int’l L. 628, 632.

<sup>206</sup> J. G. Merrills and A. H. Robertson (n 28) 85.

The right to compensation arises in the event of arbitrary or unlawful arrest or detention because such a deprivation of liberty breaches domestic law or violates the requirements of the international Human Rights instruments.<sup>207</sup> An example of the first circumstance is in *Rehbock v. Slovenia*, where the ECtHR found that there had been a violation of the right to compensation by the Slovenian Government, even though it had violated the applicant's right to have the lawfulness of the detention decided speedily or without delay. This was because the Court of Slovenia was delayed for 23 days twice in response to applications for release and this was contrary to the 'speed' required by Article 5 (4).<sup>208</sup> The second situation appears in *Brogan and Others v. the United Kingdom*. In this case the Strasbourg Court confirmed the right to compensation for the applicants despite the fact that they were deprived of their liberty lawfully under domestic law but in violation of Article 5 (3) which provides the right to be promptly brought before a judge or other judicial officer.<sup>209</sup>

In addition to this right to compensation, only the European Convention on Human Rights, under Article 41, provides a different kind of compensation. The difference between them is that the compensation under Article 5 (5) arises when there is an unlawful detention or arrest,<sup>210</sup> while the second compensation arises if there is a violation of any right that is provided by the ECHR.<sup>211</sup> Secondly, the compensation for unlawful detention or arrest is enforced in the domestic court, while the other compensation is a prerogative of the human rights courts and committees.<sup>212</sup>

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<sup>207</sup> Jim Murdoch (n 117) 106.

<sup>208</sup> *Rehbock v. Slovenia*, App no 29462/95 (ECHR, 28 November 2000), paras 86, 89-93.

<sup>209</sup> *Brogan and Others v. the United Kingdom* (n 107), para 67.

<sup>210</sup> *Benham v. United Kingdom*, App no 19380/92 (EHRR, 10 June 1996), 1996-III, para 50. See also Stanislaw Frankowski and Dinah Shelton (n 65) 31.

<sup>211</sup> Jim Murdoch (n 117) 106.

<sup>212</sup> *Ibid.*

## 8.2 *The need for damage to the victim*

All the previous Articles in the international conventions on human rights, which provide the right to compensation, include the term ‘victim’ for the arrestee or detainee who qualifies for this right. The literal or textual reading of these Articles shows that any victim of an illegal arrest or detention has the right to compensation. However, there are in fact two kinds of victim: one who qualifies and one who does not. This is clear in *Wassink v. the Netherlands*. In this case, the ECtHR said that the status of ‘victim’ arises in any case of unlawful detention or arrest, whether there is damage or not, but the claim for compensation only stands when the victim suffers damage as a result of illegal detention or arrest.<sup>213</sup> Stefan Trechsel has a different point of view, which is that ‘unlawful detention always generates damage, even if it is not of a pecuniary nature.’<sup>214</sup>

In fact, illegal detention or arrest does not necessarily create damage (contrary to what Trechsel says). This is because some people may benefit from unlawful detention. For example, a homeless or poor person may be able to find a place to live and eat because of unlawful detention.<sup>215</sup> Consequently, compensation covers damage caused by illegal detention or arrest, whether this damage is of a pecuniary or non-pecuniary nature.<sup>216</sup> In other words, the compensation includes material and moral damage.<sup>217</sup>

In summary, Articles 14 (7) ArCHR provides the right to compensation in the event of an arbitrary or unlawful deprivation of liberty because such a deprivation of liberty

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<sup>213</sup> *Wassink v. the Netherlands* (n 176), para 38.

<sup>214</sup> Stefan Trechsel (n 12) 500.

<sup>215</sup> For example, in *De Wilde, Ooms and Versyp ('Vagrancy') v. Belgium (merits)*, Edgard Versyp asked the deputy superintendent of police at Brussels for a night's shelter as he had no place to live, no work and no resources. *De Wilde, Ooms and Versyp ('Vagrancy') v. Belgium (merits)* (n 153), para 28.

<sup>216</sup> Manfred Nowak (n 105) 182.

<sup>217</sup> *Huber v. Austria*, App no 6821/74 (Commission Decision, 05 July 1976), D.R. 6, p. 65, 69.



breaches domestic law or violates the requirements of the ArCHR. This right arises for the victim in the event of existence of the material and moral damage.

## **9. Conclusion**

The ArCHR, the ICCPR and the EHCR provide broadly the same guarantees for a person who is deprived of his/her liberty, even though they do not contain the exact same terms. This is because they all have the same purpose, which is to protect a person who is deprived of his/her liberty from any arbitrary deprivation of liberty. Furthermore, the ArCHR provides two additional rights, to which there is no counterpart in the other international human rights instruments. These rights are the right to contact with family members and relatives and the right to have a medical examination.

The guarantees following the deprivation of liberty are provided under Articles 14 (3)-(7) ArCHR. Investigating these procedural guarantees in detail leads to the conclusion that arrest and provisional detention is not a punishment; rather, it is a procedure required in certain situations.

Article 14 (3) provides the right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself. The notification must be in a simple language that a person understands and it must be sufficient. There is no particular method of informing, which may be orally or in writing.

Article 14 (3), after providing the previously mentioned right, mentions the right to contact with family members and relatives. The person deprived of his/her liberty should , promptly after the deprivation of liberty, be entitled to both physical contact and correspondence with his/her family members and relatives.

Article 14 (4) regulates the right to have a medical examination. The arrestee or detainee should be informed about this right and it must be granted promptly unless if there is no obvious medical problem and it would interfere with the investigation.

Article 14 (5) grants the right to be promptly brought before a judge or other judicial officer for a person is arrested or detained regarding a criminal charge. The word 'promptly' does not mean immediately. It depends on the different circumstances of each case. There are three requirements for officers who are authorised to exercise judicial power. Firstly, the independence from both the executive and the parties of the case. Secondly, hearing the person deprived of his/her liberty. Finally, reviewing the case brought before him/her before making a decision.

Article 14 (5), also, emphasis the right to trial within a reasonable period of time, or to release pending a trial. The words 'reasonable time' depends on the facts of each case. Regarding this right, the general rule is to release a detainee pending trial and the exception is keeping him/her in the existence of 'relevant and sufficient' reasons.

Article 14 (6) gives the right to have the lawfulness of the arrest or detention decided without delay by a court to all kinds of deprivation of liberty and in all circumstances (ordinary or extraordinary). The notion of 'without delay' depends on the situation of each case. These procedures must be performed by a court or other institution which have a judicial nature, being independent from both the executive and the case parties; being impartial; and having the power to release a person deprived of his/her liberty in the event of unlawful arrest or detention. This right should be started automatically and the court should review all the factors of the case. The main procedure is the principle of equality of arms, which permits the arrestee or detainee to be presented at the same

time as the prosecutor to give him/her the opportunity to reply to the prosecutor's arguments. The court should undertake a series of periodic reviews, not just one review.

Article 14 (7) confirms the right to compensation in the event of unlawful deprivation of liberty. This right is for the victim who faces material or moral damage.

Analysing an individual's rights following the deprivation of their liberty may help during the following examination of the famous situations that could affect the applicable procedural guarantees following the deprivation of liberty. These are – as will be discussed in the following chapter- counter-terrorism regimes and the exceptional situation of emergency which threatens the life of the nation.

## **CHAPTER 4**

### **ARREST AND PROVISIONAL DETENTION IN TERRORIST CASES AND IN EMERGENCY SITUATIONS**

#### **1. Introduction**

Following the examination of the requirements of the deprivation of liberty (Chapter 2) and the guarantees required following the deprivation of liberty (Chapter 3) which are all provided under Article 14 ArCHR, this chapter explores these requirements in the face of counter-terrorism and the principle of derogation.

Firstly, this chapter assesses whether the normal provisions of Article 14 ArCHR, using comparable provisions from Articles 9 ICCPR and 5 ECHR, have the flexibility to allow a different response to terrorism than to other serious crimes. This is because - as mentioned in the previous chapters - the right to liberty and the rights following the deprivation of liberty are all protected, and governments must respect this right, in ordinary situations, for normal crimes and acts of terrorism.

Secondly, there will be a consideration of the extent to which Article 14 ArCHR's provision is properly modifiable under Article 4 ArCHR during an exceptional emergency situation that threatens the life of the nation, using Article 4 ICCPR and 15 ECHR as tools to suggest an appropriate interpretation of Article 4 ArCHR.

What is really remarkable is that exploring Article 14 ArCHR in the case of counter-terrorism, and the principle of derogation which provided under Article 4 ArCHR indicates that requirement of judicial supervision of arrest and provisional detention

applies generally, perhaps with the ‘equality of arms’ aspect of fair hearing being modified to protect a public interest such as domestic security.

## **2. Security concerns (counter-terrorism)**

The available experience of cases of terrorist crime indicates that these kinds of cases are complicated, in terms of material seized, use of false identities, and international links.<sup>1</sup> Firstly, regarding material seized: ‘the amount of evidence that needs to be sifted during terrorist investigations has been growing. There is a greater use of encrypted computers and multiple mobile phones – in part as terrorists deliberately seek to use multiple media to cover their tracks. Where there is suspicion of Chemical, Biological, Radiological or Nuclear (CBRN) material in a site which needs investigating, this can introduce further delay.’<sup>2</sup> Secondly, regarding use of false identities: usually, the terrorists use a number of false identities, which reaches in some cases up to 10 identities for each terrorist. All these create difficulty when attempting to establish the identity of suspects, so it takes time.<sup>3</sup> Finally, regarding international links: since any terrorist network is global, this requires the existence of international links between States to discover and investigate the terrorist threat or crime. For example, on the 2004 fertiliser plot, Peter Clarke commented that: ‘At the time, it was the largest counter-terrorism operation ever seen in the United Kingdom. The success was achieved through close cooperation and sharing of intelligence between the United Kingdom, the USA, Canada and Pakistan.’<sup>4</sup>

Despite the fact that these kinds of crimes are complicated, the States involved in terrorist cases must fulfil the requirements of the international human rights instruments

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<sup>1</sup> Home Office, *Options for Pre-Charge Detention in Terrorist Cases* (20 July 2007), 3.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

(Article 14 ArCHR, Article 9 ICCPR and Article 5 ECHR) applicable in an ordinary situation. For example, in the *Brogan* case, despite the fact that the applicant was a terrorist suspect, the ECtHR found a violation of Article 5 (3) ECHR, which provides the right to be promptly brought before a judge or other judicial officer. This was because the detainee was kept in pre-charge detention for a period of 4 days and 6 hours without being brought before a judge, which exceeds the period of 4 days permitted under the ordinary law in England and Wales (Police and Criminal Evidence Act 1984).<sup>5</sup>

Thus, the following passages ascertain what leeway or flexibility (if any) is afforded by Article 14 ArCHR as interpreted in the light of comparator provisions of Articles 9 ICCPR and 5 ECHR. In particular, four areas that are usually affected during the counter-terrorism will be examined. These are: the deprivation of liberty on reasonable suspicion of a ‘specific criminal offence’; the degree of ‘promptness’ that is required in the bringing of the detainee before a judge or other judicial officer; the ‘reasonable time’ required for pre-trial detention; and the requirements of ‘equality of arms’ when appearing before a court.

### *2.1 The deprivation of liberty on reasonable suspicion of a ‘specific criminal offence’*

Article 14 (2) ArCHR (similar to Article 9 (1) ICCPR) does not mention the grounds and circumstances for the deprivation of liberty, instead referring to the domestic laws of each State. It states that ‘No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law.’ In contrast, Article 5 (1) (c) ECHR provides such grounds. These are: bringing a person before the competent legal authority, on the reasonable suspicion of them having committed an offence;

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<sup>5</sup> *Brogan and Others v. the United Kingdom*, App no 11209/84; 11234/84; 11266/84; 11386/85 (EHRR, 29 November 1988), Series A145-B, paras 55, 62.

preventing a person from committing a crime, when it is reasonably considered to be necessary; and preventing a person from fleeing after committing a crime.

Despite the fact that these grounds are not mentioned in Article 14 (2) ArCHR, according to which the deprivation of liberty should be on grounds and circumstances that are determined by law, the usual ground for deprivation of liberty is bringing a person before the judicial authority on the reasonable suspicion of their having committed an offence. For example, Article 45 FLCP states that a Judicial Police Officer can arrest any person without a warrant from the Public Prosecutor if there is sufficient evidence to suggest that s/he has committed one of the crimes that are mentioned in the Article.

The question that would be raised here is whether or not arrest and detention will be arbitrary if not grounded on reasonable suspicion of a specific criminal offence. In other words, is this arbitrary under ArCHR, if the police do not have a specific offence for which to arrest the suspected person, or it is flexible?

The ECtHR addressed this issue in *Brogan and Others v. the United Kingdom*. In this case, the applicants argued that their deprivation of liberty, on the basis of reasonable suspicion and not of having committed a specific offence, but rather of having been party to unspecified acts of terrorism, was arbitrary and unlawful. Despite that, the Court after investigation of the facts of the case found that the deprivation of liberty was based on a reasonable suspicion of the commission of an offence within the meaning of Article 5 (1) (c) ECHR.<sup>6</sup> This indicates that an arrest power not requiring reasonable suspicion of a criminal offence but of ‘involvement in terrorism’ may well be

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<sup>6</sup> *Brogan and Others v. the United Kingdom* (n 5), paras 50- 54.

compatible with Art 5 ECHR because ‘offence’ has an autonomous ECHR meaning not tied to the precise classification adopted by national law.

The HRC, in its General Comment on Article 9, does not specifically provide for this issue. It states in general that the protection under Article 9 (1), in which are forbidden arbitrary arrest and the deprivation of liberty, should be based on grounds and procedures established by law, and should be respected even for preventive detention in order to assure public security.<sup>7</sup>

To sum up, under Article 14 (2) ArCHR, a person may be arrested on reasonable suspicion of involvement in terrorism and in this situation, arrest need not be grounded on a specific offence.

In UAE law, terrorism is considered as a criminal offence, therefore arresting a suspected person for involvement in a terrorist action is regarded as deprivation of liberty for a specific criminal offence.

## *2.2 The degree of ‘promptness’ that is required in the bringing of the detainee before a judge or other judicial officer*

Under Article 14 (5) ArCHR and its comparable Articles 9 (3) ICCPR and 5 (3) ECHR, the person deprived of his/her liberty should be promptly brought before a judge or other judicial officer. The term ‘promptly’ is limited to the circumstances of the case.

The question here is whether or not ‘promptly’ as an aspect of the requirement to be brought before a judge or other judicial officer can be interpreted less strictly in terrorist

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<sup>7</sup> Human Right Committee, ‘General Comment 8: Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (U.N. Doc. HRI/GEN/1/Rev.1 at 8, 1994), para 4.



cases than in cases of ordinary crime, which might allow the authorities to be afforded a longer time.

The best answer to this issue can also be found in *Brogan and Others v. the United Kingdom*. In this case, the ECtHR stated that 4 days is the maximum period that could be compatible with the first sentence of Article 5 (3).<sup>8</sup> As a result of this limited flexibility, in the same case, the court found that spending 4 days and 6 hours in police custody without being brought before a judge or other officer was a violation of Article 5 (3). It argued that the need to protect the community from a serious crime such as terrorism is not enough, on its own, to meet the requirements of Article 5 (3).<sup>9</sup> This case shows that the ECHR approach does not give significantly greater leeway as regards non-judicially supervised pre-charge detention even in terrorist cases.

In addition, since terrorist crimes are complicated and the investigation of these kinds of crimes is difficult, the extension of police custody beyond the normal time is lawful provided that there is judicial supervision. In the same case, the ECtHR stated that ‘The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.’<sup>10</sup>

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<sup>8</sup> *Brogan and Others v. the United Kingdom* (n 5), para 60.

<sup>9</sup> *Ibid* para 62.

<sup>10</sup> *Ibid* para 61.

Also, here, the HRC does not particularly mention this issue. In the General Comment on Article 9 it states that the protection under Article 9 (3), should be granted even in the case of preventive detention for reasons of public security.<sup>11</sup>

Consequently, Article 14 (5) ArCHR does not permit flexibility (beyond the normal situation without judicial supervision) as regards the degree of promptness that is required in the bringing of the detainee before a judge or other judicial officer.

### 2.3 *The ‘reasonable time’ required for pre-trial detention*

The general rule in Article 14 (5) ArCHR requires release of the detainee immediately after charge. The exception to this rule is keeping the detainee in pre-trial detention for a reasonable period of time depending on the circumstances of each case. There must be ‘relevant and sufficient’ reasons to justify keeping him/her in detention. The relevant reasons are the risk of absconding; the risk of tampering with evidence and/or suborning or bringing pressure to bear on the witnesses; the protection of public order; and the protection of the suspect.<sup>12</sup>

The question here is whether or not ‘reasonable time’ in the context of entitlement to trial within a reasonable time can be interpreted less strictly in terrorist cases.

In general, the particular nature of the offence of itself does not justify keeping a person detained in pre-trial detention. The ECtHR, in *Caballero v. the United Kingdom*, found a breach of Article 5 (3) when the domestic law does not allow the officer or the judge involved to release detainees who have committed a serious crime.<sup>13</sup> In addition, The

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<sup>11</sup> Human Rights Committee, General Comment 8 (n 7), para 4.

<sup>12</sup> See Chapter 3, section 6: The right to trial within a reasonable period of time or to release, pending a trial.

<sup>13</sup> *Caballero v. the United Kingdom*, App no 32819/96 (ECHR, 8 February 2000), para 21.

HRC emphasises that the relationship between the offence that a detainee has been charged with and the length of detention should be dropped.<sup>14</sup>

Consequently, a serious crime alone does not justify keeping the detainee in pre-trial detention; there must be 'relevant and sufficient' reasons to keep a person in pre-trial detention. For clarification, in *Grishin v. Russia* the applicant was charged 'on suspicion of having committed aggravated robbery..., and hooliganism...., described as a flagrant violation of public order demonstrating blatant disrespect for society, accompanied by the use of violence against citizens and threats of such violence, committed by a group of individuals according to a premeditated plan, with the use of arms.'<sup>15</sup> The government argued that the pre-trial detention for the accused relied on 'relevant and sufficient' reasons. This is because the gravity of the charges and the behaviour of the accused indicated that there was risk of his fleeing from justice and of obstructing justice.<sup>16</sup> The ECtHR did not accept this argument. It stated that the gravity of the charges alone do not indicate that the accused may flee from justice or obstruct justice. It concluded that there was a violation of Article 5 (3).<sup>17</sup>

Although in terrorist cases there is a greater danger of absconding; and interfering with witnesses or evidence, there is a lack of case-law on these points. This is because in some terrorist cases (regarding the pre-trial detention) the suspected person should be treated as the one who committed a normal crime, since in terrorist cases there is no need to have a huge group of people who have international links. It could be only one person who makes an action considered to be a terrorist act. Therefore, in this case, s/he

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<sup>14</sup> Human Rights Committee, 'Concluding Observations of the Human Rights Committee, Italy' (U.N. Doc. CCPR/C/79/Add.94, 1998), para 15.

<sup>15</sup> *Grishin v. Russia* App no 14807/08 (ECHR, 24 July 2012), para 8.

<sup>16</sup> Ibid para 134.

<sup>17</sup> Ibid paras 142-156.

should be released pending trial except in the case of the existence of ‘relevant and sufficient’ reasons to justify keeping him/her in detention.

All this indicates that ‘reasonable time’ in the context of entitlement to trial within a reasonable time that is provided by Article 14 (5) ArCHR cannot be interpreted less strictly in terrorist cases.

#### *2.4 The requirement of ‘equality of arms’ when appearing before a court*

The detainee who challenges the lawfulness of his/her deprivation of liberty under Article 14 (6) ArCHR should appear himself/herself or send a legal representative at the same time as the prosecutor, to give him/her the opportunity to reply to the prosecutor’s arguments. Regarding this procedure (equality of arms), all information should be delivered to the detainee or the legal representative without hiding any of it.<sup>18</sup>

In *A. and others v. the United Kingdom*, the ECtHR emphasised that the requirement of ‘equality of arms’ is not absolute. In other words, it is capable of some modification. It stated that ‘there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person.’<sup>19</sup> Despite that, the detainee must have the opportunity effectively to challenge the allegation against him/her,<sup>20</sup> which means that there is an irreducible minimum of material which cannot be withheld without violating equality of arms.

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<sup>18</sup> For more details, see Chapter 3, section 7.4: The procedural requirements.

<sup>19</sup> *A. and others v. the United Kingdom*, App no 3455/05 (ECHR, 19 February 2009), para 205.

<sup>20</sup> *Ibid* para 218.

For clarification, in the same case, the detainees who received detailed information about the allegations against them had the possibility to effectively challenge the allegation against them. These allegations were ‘the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places.’<sup>21</sup> In contrast, the detainees, whose link between the money suspected and terrorism was not disclosed; and whose the allegations against them were merely that they were members of groups linked to al’Qaeda without disclosing any more details, had not had the opportunity to effectively challenge the allegation against them.<sup>22</sup>

In conclusion, under Article 14 (6) ArCHR, the requirement of ‘equality of arms’ is capable of some modification in ‘security’ cases, provided that the detainee has the opportunity effectively to challenge the lawfulness of his/her deprivation of liberty. Similar to SIAC, and with regard to a case of provisional detention as regards a criminal matter, it could be suggested that in ‘security’ cases, a Special Advocate system should be established, which is a specially appointed lawyer (typically a barrister) who is instructed to assist the court by representing a person’s interests in relation to material which is kept secret from that person (and his ordinary lawyers) but analysed by a court or equivalent body at hearing held in the absence of the detainee and his legal team but one in which the Special Advocate assists the court fully to scrutinize the strengths and weaknesses of the material and its relation to the case.’<sup>23</sup>

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<sup>21</sup> Ibid para 222.

<sup>22</sup> Ibid paras 223, 224.

<sup>23</sup> The Constitutional Affairs Committee, *Seventh Report* (HC 2005), para 44.

### **3. Arrest and provisional detention in emergency situations (the principle of derogation)**

The existence of terrorists and their violations could threaten the life of a nation. In this case, under Articles 4 ArCHR, 4 ICCPR and 15 ECHR, the State can derogate from the right to liberty, provided that all conditions of the derogation from the right to liberty are met. For example, in *Lawless v. Ireland* the ECtHR found that there were three positions which supported the position of the State of Ireland, which was that the incident had occurred during a situation of public emergency and it was therefore appropriate to exercise the principle of derogation that is provided under Article 15 ECHR. Firstly, there was a secret army in the region of Ireland that engaged in illegal actions, such as using violence to achieve its objectives. Secondly, the practices of this army were threatening the foreign relations of the Republic of Ireland with its neighbours, because they involved engaging in activities outside the territory of Ireland. Finally, there was a continuous increase of terrorist activities resulting in the declaration of a public emergency.<sup>24</sup> Also, in *Brannigan and McBride v. the United Kingdom*, the same court found that terrorist violence in Northern Ireland (35,104 people injured) was a public emergency that allowed the State to derogate from some human rights that are provided under Article 15 ECHR.<sup>25</sup>

Article 4 ArCHR provides:

1. In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation.....

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<sup>24</sup> *Lawless v. Ireland* (no 3), App no 332/57 (EHRR, 1 July 1961), Series A no 3, the law, para 28.

<sup>25</sup> *Brannigan and McBride v. The United Kingdom*, App no 14553/89; 14554/89 (EHRR, 25 May 1993), Series A no 258-B, para 47.

The corresponding provision of Article 4 ICCPR provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.....

The corresponding provision of Article 15 ECHR states:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.....

Despite the history of the UAE law demonstrating that there are no derogations in force, it seems very important to discuss the requirements set out in Article 4 ArCHR, which allow the State to derogate from some human rights in an exceptional situation of emergency that threatens the life of the nation.<sup>26</sup> This is because there is currently no emergency legislation in the UAE, and the first goals of the National Emergency and Crisis Management Authority (NCEMA) are to ‘Compose a unified federal emergency law that governs the management of national emergencies and consequently develop a National Response Plan (NRP).’<sup>27</sup> Therefore, analysing the requirements set out in Article 4 ArCHR may help the relevant decision makers in the UAE to establish legislation that is compatible with Article 4 ArCHR. This would provide a guarantee against any arbitrary procedures, such as the deprivation of liberty, especially in the

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<sup>26</sup> Up to the present day (the date of submission of the thesis) no derogations in respect of Article 14 ArCHR have been filed.

<sup>27</sup> ‘The National Emergency and Crisis Management Authority (NCEMA) falls under the authority of the National Security Council (NSC). It is the leading national organization responsible for managing and coordinating all efforts related to crisis and emergency. It is the federal organization responsible for developing national policies and procedures for training and auditing of all crisis and emergency management related activities on a national level. NCEMA’s mission is to coordinate all national efforts to save lives, preserve national properties and assets by hindering the effect of emergencies and crisis, and coordinate the national recovery efforts.’ Crisis and Emergency Management Conference website, ‘About NCEMA’ <<http://www.cemc.ae/subindex.aspx?Id=104&Lid=1>> accessed 19 September 2012.

event that the UAE faces an act of terrorism that threatens the life of the nation. In addition, if the last situation occurs (as could happen suddenly and at any time) before the existence of an emergency legislation, analysing the relevant requirements under Article 4 ArCHR will help to guide the Government of the UAE to take actions compatible with the ArCHR, which will ensure that there is no arbitrary action on the part of a public authority against an individual's liberty.

### *3.1 Conditions of the derogation from the right to liberty*

As was indicated at the beginning of this section, the existence of terrorists and their violations could lead the governments of States to derogate from the right to liberty. This is acceptable provided that all conditions for the derogation from the right to liberty that are set out by Articles 4 ArCHR, 4 ICCPR and 15 ECHR are met.

These conditions are that: there must be an exceptional situation of emergency which threatens the life of the nation; any derogation from the right to liberty must be strictly required by the exigencies of the situation; and any derogation from the right to liberty must not be inconsistent with a State's other obligations under international law.

Since this chapter concentrates on Article 14 ArCHR, this section does not analyse all the conditions of the principle of the derogation, only the first two conditions. This is because these are the main two conditions for derogation from the right to liberty, especially the condition that any derogation from the right to liberty must be strictly required by the exigencies of the situation. This is because, under this condition, there are two important principles: necessity and proportionality. Also, this condition requires the provision of adequate safeguards against abuse.



### 3.1.1 There must be an exceptional situation of emergency which threatens the life of the nation

The first paragraphs of Articles 4 ArCHR, 4 ICCPR and 15 ECHR provide the first derogation condition; that there must be an exceptional emergency situation which threatens the life of the nation. The HRC emphasises that this condition, which is set out under Article 4 ICCPR, must be available before a State moves to exercise the right to derogation.<sup>28</sup>

#### 3.1.1.1 The notion of ‘Emergency’.

The meaning of a public emergency is provided by several cases that have come before the ECtHR, the European Commission on Human Rights and the Human Rights Committee.

In *Lawless v. Ireland*, the ECtHR stated that in ‘the general context of Article 15 of the Convention, the natural and customary meaning of the words “other public emergency threatening the life of the nation” is sufficiently clear’.<sup>29</sup> Also, it added, that a public emergency is ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.’<sup>30</sup>

In the *Greek* case, the European Commission on Human Rights emphasised the essential elements of the European Court’s definition in *Lawless* of a public emergency threatening the life of the nation, when it stated that:

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<sup>28</sup> Human Rights Committee, ‘General Comment 29: States of Emergency (Article 4)’ (U.N. Doc. CCPR/C/21/Rev.1/ Add. 11, 2001), para 2.

<sup>29</sup> *Lawless v. Ireland* (n 24), the law, para 28.

<sup>30</sup> Ibid.

such a public emergency may then be seen to have, in particular, the following characteristics:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.<sup>31</sup>

Despite the fact that Article 15 permits derogation only when a public emergency situation threatens the whole population or nation, it could be accepted that the danger affects only part of a State and, in this situation, the derogation would apply only to the affected part.<sup>32</sup> For instance, in *Ireland v. the United Kingdom* the ECtHR confirmed the existence of a public emergency, although it only existed in Northern Ireland and not in the whole of the United Kingdom.<sup>33</sup> Also, in *Aksoy v. Turkey*, there was a threatening situation which only affected the South-Eastern part of Turkey, and ten of the eleven provinces there declared a state of emergency. The ECtHR concluded that the situation was a ‘public emergency threatening the life of the nation’, which Article 15 provided for.<sup>34</sup> Also, Mrs. N. Questiaux, was a ‘special rapporteur’, confirmed in her study that the circumstance of danger must affect either the whole territory of the State or certain parts of it.<sup>35</sup> This means that where a part only is affected, the derogation from normally applicable provisions must be confined to the affected part.

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<sup>31</sup> *Government of Denmark and others v. The Government of Greece*, App no 3321/67; 3322/67; 3323/67; 3344/67 (Commission Decision, 05 November 1969), para 113.

<sup>32</sup> Mohamed M. El Zeidy, ‘The ECHR and states of emergency: Article 15 - a domestic power of derogation from human rights obligations’ (2003), 4 San Diego Int’l L.J. 277, 284.

<sup>33</sup> *Ireland v. the United Kingdom*, App no 5310/71 (EHRR, 18 January 1978), Series A, para 205.

<sup>34</sup> *Aksoy v. Turkey*, App no 21987/93 (EHRR, 18 December 1996), 1996-VI, paras 8, 9, 70.

<sup>35</sup> Nicole Questiaux, ‘Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency’ (U.N. Doc. E/CN.4/Sub.2/1982/15) 15.

In *A. and others v. the United Kingdom*, the ECtHR emphasised that ‘in determining the nature and degree of the actual or imminent threat to the “nation”’, the situation would be considered as an emergency situation even if the threat would not stretch to the extent of destroying the institutions of the State and the life of the nation.<sup>36</sup>

In addition, the ECtHR accepts the existence of a public emergency despite an ongoing peace process. For example, in *Brannigan and McBride v. the United Kingdom* the ECtHR concluded that there was a public emergency, as envisioned by Article 15 ECHR, in the United Kingdom. This was for the reason that the Government of the United Kingdom, after a terrorist campaign and with the need to bring terrorists to justice, explained that it could not provide the judicial control that was required under Article 5 (3) ECHR ‘because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable.’<sup>37</sup>

According to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,<sup>38</sup> for the danger which threatens the life of a nation to be accepted as falling within the scope of Article 4 ICCPR, it must be ‘exceptional and actual or imminent’ and include some conditions.

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<sup>36</sup> *A. and others v. the United Kingdom* (n 19), para 179.

<sup>37</sup> *Brannigan and McBride v. the United Kingdom* (n 25), paras 47, 51.

<sup>38</sup> Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights were regulated during a conference, which was held at Siracusa (Italy) from 30 April to 4 May 1984. This conference was sponsored by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the International Institute of Higher Studies in Criminal Sciences. In addition, it is important to indicate here that despite the significance of these principles it seems that they are not compulsory principles as they were regulated by non-government organisations. For this purpose, in its Forty-first session, Item 18, the Commission on Human Rights stipulated that ‘In the view of the Government of the Netherlands it would be extremely useful if the members of the Commission on Human Rights, as well as the members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Committee were acquainted with these principles and could examine them more closely, if they so wish. Accordingly, the Government of the Netherlands requests that the “Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights” be circulated as an official document of the forty-first session of the Commission on Human Rights under the agenda item pertaining to the International Covenants on Human Rights.’ UN Commission on Human Rights, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, (E/CN.4/1985/4, 28 September 1984), 1, 2.

Firstly, the danger must affect either the whole population and the whole region of the State, or any part of it. Secondly, it has to ‘threaten the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant’.<sup>39</sup> Consequently, for example, if there is internal conflict or turmoil in a State but this does not actually, or at least not imminently, threaten the whole nation, then the situation could not be categorised as a public emergency according to the provisions of Article 4.<sup>40</sup> The HRC emphasised that ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation’.<sup>41</sup> In the situation of an armed conflict [or siege]<sup>42</sup>, the State could not use the exceptional measures permitted under Article 4, unless the situation contained the conditional elements of a public emergency.<sup>43</sup>

Thus, an exceptional emergency situation that threatens the life of the nation, as provided under Article 4 (1) ArCHR, has some elements. It must be exceptional; must have actual or imminent danger, or threats to the life of the nation; and must cover the whole territory of the State or parts of it.

### 3.1.1.2 The margin of appreciation principle

Following the definition of a public emergency, it is left to the State, with its margin of appreciation, to initially determine whether the circumstances meet the definition of an exceptional situation of emergency. This is because this principle (margin of

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<sup>39</sup> Ibid para 39.

<sup>40</sup> Ibid para 40.

<sup>41</sup> Human Rights Committee, General Comment 29 (n 28), para 3.

<sup>42</sup> The example of siege provided in UNGA, ‘Report of the Human Rights Committee, Volume 1’ (45<sup>th</sup> Session. UN Doc Supp Vol. I, A/45/40, 4 October 1990), para 219; UNGA, ‘Report of the Human Rights Committee, Volume 1’ (57<sup>th</sup> Session. UN Doc Supp Vol. I, A/57/40, 30 October 2002), para 34.

<sup>43</sup> Human Rights Committee, General Comment 29 (n 28), para 3.

appreciation) grants a State's authorities the power to assess the facts of a situation and then apply the provisions provided by the Articles of the international human rights instruments.<sup>44</sup> This doctrine is very important for the States concerned because it assures them that they can protect their own interests without being affected by international policies.<sup>45</sup> Since in Europe, for example, States differ in terms of their social, political, cultural and legal traditions, this principle provides flexibility for the member states to interpret the Articles of the ECHR in accordance with their local politics.<sup>46</sup> This margin of appreciation places the court's explanation of human rights as secondary to the member States' interpretations of their rights.<sup>47</sup> The ECtHR confirmed this in *Ireland v. the United Kingdom* when it stated that 'the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.'<sup>48</sup> Furthermore, in *A. and others v. the United Kingdom* the same court stated that the national court is considered as part of the 'national authorities', which are granted a wide margin of appreciation under Article 15 ECHR.<sup>49</sup> In the same case, it added that 'significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.'<sup>50</sup>

In addition, in *Ireland v. the United Kingdom* the ECtHR highlighted an important issue when it stated that, despite the fact that each State has a wide margin of

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<sup>44</sup> Yutaka Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia 2002), 2.

<sup>45</sup> Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001), 15 *Emory Int'l L. Rev.* 391, 451.

<sup>46</sup> Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007), 8 *German Law Journal* 711, 711.

<sup>47</sup> Aaron A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1 *Hanse. L. R.* 47, 48.

<sup>48</sup> *Ireland v. the United Kingdom* (n 33), para 207.

<sup>49</sup> *A. and others v. the United Kingdom* (n 19), para 174.

<sup>50</sup> *Ibid* para 180.

appreciation, this authority is not absolute: it must be followed by European Commission or Court supervision.<sup>51</sup>

Regarding Article 4 ICCPR, the HRC, in *Jorge Landinelli Silva v. Uruguay*, confirmed the same approach. It stated that, despite the State's sovereign right to declare a situation of public emergency, they should justify the existence of such a public emergency which threatens the life of the nation. Subsequently, the committee's role is to examine the facts presented by the State to assess whether or not there is a state of emergency as set out in the provisions of Article 4.<sup>52</sup>

Regarding Article 4 ArCHR the same the principle of the margin of appreciation should also be applied. Then, the role of the Arab Human Rights Committee (assuming it has a similar role to the Human Rights Committee, which is commenting on State reports) is to investigate the facts provided by the State to determine whether or not there is an exceptional emergency situation such as that mentioned in Article 4 ArCHR.

3.1.2 Any derogation from the right to liberty must be strictly required by the exigencies of the situation

Articles 4 (1) ArCHR, 4 (1) ICCPR and 15 (1) ECHR include the same condition, which is that the measures that might derogate from some obligations of human rights conventions, must be 'strictly required by the exigencies of the situation'.

#### 3.1.2.1 Necessity

The term 'exigency' indicates the absolute necessity for a special measure to be taken in a time of emergency. Therefore, if the State (by using normal measures) could achieve

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<sup>51</sup> *Ireland v. the United Kingdom* (n 33), para 207.

<sup>52</sup> *Jorge Landinelli Silva v. Uruguay*, Communication No. R.8/34, U.N. Doc. Supp. No. 40 (A/36/40) at 130 (1981), para 8.3.

the same results in a case of derogation from some human rights, this means that the special measure has not been ‘strictly required by the exigencies of the situation.’<sup>53</sup> In other words, this means that, to qualify, the ordinary measures should be ‘insufficient’<sup>54</sup> and indicates that exceptional action is required to confront the danger which normal measures are unable to deal with. For example, the ECtHR in *Lawless v Ireland* found that the measures taken by the Republic of Ireland were necessary in the situation, since the ordinary measures had proved incapable of preventing the danger which was affecting the country.<sup>55</sup>

Furthermore, regarding Article 4 ICCPR, the HRC made an important point. It stated that because some human rights are listed as rights from which there is no derogation, it does not mean that merely by declaring a state of emergency there is derogation from other rights. However, there could be derogation from these rights as required by the exigencies of the situation.<sup>56</sup> Also, it emphasised that the duty of the member States and the Committee, in analysing each Article of the Covenant carefully, depended on an objective evaluation of the actual circumstances.<sup>57</sup>

This condition indicates that derogation has a temporary rather than permanent character<sup>58</sup> and that it must cease with the end of the exigencies of the situation.<sup>59</sup> There is no specific duration for the special measures, as they depend on the severity and

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<sup>53</sup> Joan F. Hartman, ‘Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations’ (1981), 22 Harv. Int’l. L. J. 17.

<sup>54</sup> Sara Stapleton, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’ (1999), 31 N.Y.U. J. Int’l L. & Pol. 535, 590.

<sup>55</sup> *Lawless v. Ireland* (n 24), the law, para 36.

<sup>56</sup> Human Rights Committee, General Comment 29 (n 28), para 6.

<sup>57</sup> Ibid para 6.

<sup>58</sup> OHCHR, *Human Rights, Terrorism and Counter-terrorism*, (Fact Sheet No. 32, 2008), 29.

<sup>59</sup> R. St. J. Macdonald, ‘Derogations under Article 15 of the European Convention on Human Rights’ (1998), 36, Colum. J. Transnat’l L. 225, 241.

length of the danger that is a threat to the life of the nation.<sup>60</sup> Indeed, the ECtHR stated that it did not require that the emergency be temporary and that the special measure could continue for many years.<sup>61</sup> It added that ‘the Court does not consider that derogating measures put in place in the immediate aftermath of the al’Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not “temporary”’.<sup>62</sup>

### 3.1.2.2 Proportionality

The term ‘strictly required’ is consistent with the principle of proportionality,<sup>63</sup> which means that the extraordinary measures utilised in the case of a public emergency must be strictly in response to the exigency, to deal with public danger, and commensurate with the nature and extent of the threat.<sup>64</sup> In other words, it means that ‘the greater the need ...the greater the permissible derogation’.<sup>65</sup> Also, the phrase ‘strictly required’ refers to an implicit compulsion to work in good faith, which means that a government cannot use the state of emergency to take repressive measures against political opponents or to disfavoured minorities, as this term implies necessity rather than the State’s subjective assessment.<sup>66</sup>

The HRC, in its General Comment 29 (States of Emergency that are regulated under Article 4 ICCPR), confirmed this principle when it stated that the special measures, in a time of public emergency, must be limited ‘to the extent strictly required by the

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<sup>60</sup> Committee on Legal Affairs and Human Rights, ‘The protection of human rights in emergency situations’, Council of Europe (Doc. 11858, 9 April 2009), para 13.

<sup>61</sup> *A. and others v. the United Kingdom* (n 19), para 178.

<sup>62</sup> *Ibid.*

<sup>63</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publisher, 1993), 84.

<sup>64</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (n 38), para 51.

<sup>65</sup> David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 635.

<sup>66</sup> Joan F. Hartman (n 53), 17.



exigencies of the situation'. Therefore, 'if States purport to invoke the right to derogate from the covenant .... they must be able to justify not only that such a situation constitutes a threat to the life of the nation but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.'<sup>67</sup>

Regarding Article 15 ECHR, the ECtHR, in *Brannigan and McBride v. the United Kingdom*, stated that 'the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.'<sup>68</sup>

Also, this principle is supported by the Sub-Commission on Prevention of Discrimination and Protection of Minorities; it states that this principle utilises the concept of 'legitimate defence' against the existence of an imminent danger. Therefore, in order for the special measure to be legitimate it should be proportional to the severity of the danger and any measure which is out of proportion with this severity makes the 'defence' illegal and converts it into aggression.<sup>69</sup>

In addition, the principle of proportionality requires the special measure, taken in a state of emergency, to avoid any permanent characteristics which might effectively derogate from individuals' rights. Therefore, the human rights courts or committees should examine the effectiveness of the special measures and decide whether or not these are justifiable.<sup>70</sup> In this regard, Harris and others state that 'in principle, the argument about

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<sup>67</sup> Human Rights Committee, General Comment 29 (n 28), para 5.

<sup>68</sup> *Brannigan and McBride v. The United Kingdom* (n 25), para 43.

<sup>69</sup> U.N. Economic and Social Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, 'The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency' (E/CN.4/Sub.2/1997/19, 23 June 1997), paras 83-85.

<sup>70</sup> R. St. J. Macdonald (n 59) 243.

effectiveness has much to recommend it: how can an interference with human rights which does not contribute to some other good end be “strictly required”?’<sup>71</sup>

### 3.1.2.3 Margin of appreciation

States have the authority to determine when a situation constitutes a public emergency and also the authority to determine what measures are required by the exigencies of the situation. In *Ireland v. the United Kingdom*, the ECtHR stated that the national authorities were in a better position than an international judge to make a decision on the existence of such an emergency situation, and also on ‘the nature and scope’ of the measures required to deal with the circumstances of the public emergency. Therefore, States have a wide margin of appreciation.<sup>72</sup> Although the national authorities have this wide margin of appreciation to define the necessary exceptional measures for the emergency case, they must not exceed what is ‘strictly required by the exigencies of the situation’.<sup>73</sup>

Consequently, the role of the European Court of Human Rights [and of other human rights courts and committees] is to examine the appropriateness of the nature and duration of any exceptional proceedings, along with the special factors which caused a public emergency.<sup>74</sup> This is necessary in order to protect individuals from any abuse by the State’s government.

The HRC, in relation to this issue, reported that States had to submit a detailed report on situations related to any public emergency and the extraordinary measures taken to overcome them. The Committee’s role is to ensure that the State’s actions in a given

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<sup>71</sup> David Harris and others (n 65), 634.

<sup>72</sup> *Ireland v. the United Kingdom* (n 33), para 207.

<sup>73</sup> Ibid.

<sup>74</sup> *Brannigan and McBride v. the United Kingdom* (n 25), para 43.

situation were in accordance with the needs of the situation and compatible with the requirements of the Covenant.<sup>75</sup> In addition, the Committee stressed that there must always be an immediate and continuous independent review by the legislature of the need for the actions taken in cases of public emergency, in order to ensure that the exceptional measures were still required by the exigencies of the situation. Additionally, this would provide effective remedies for people affected by any measures which were not required by the exigencies of the situation.<sup>76</sup>

In summary, regarding Article 4 ArCHR, the Arab Human Rights Committee must review any measures taken by a State in an emergency situation, to ensure that they were strictly required by the exigencies of the situation.

Also, this can be done domestically by the judiciary Authority, who are considered to be neutral, and separate from the legislative authority that initiated the emergency measures and the executive authority that implemented the emergency measures.

#### 3.1.2.4 Safeguards against abuse

The condition that requires any derogation from the right to liberty to be strictly required by the exigencies of the situation also requires the State involved to provide adequate safeguards against abuse. These safeguards can be divided into three groups: firstly, the non-derogable rights; secondly, safeguards granted by States; and finally, the notification.

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<sup>75</sup> The Human Rights Committee, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Convention on Civil and Political Rights' (twelfth session, Communication No. 34/1978), para 8.3.

<sup>76</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (n 38), paras 52, 55, 56.

#### 3.1.2.4.1 Non-derogable rights

Articles 4 (2) ArCHR, 4 (2) ICCPR and 15 (2) ECHR list the rights from which there is no derogation, such as the right to life, the right to humane treatment, the right to freedom from slavery and others. Since the right to liberty is not mentioned in these Articles, it can be subject to derogation. Of the three human rights instruments discussed here, only the ArCHR lists one of the procedural guarantees following the deprivation of liberty (arrestees or detainees' rights) as a non-derogable right. This procedure is the right to have the lawfulness of an arrest or detention decided, without delay, by a court. Article 4 (2) ArCHR states that 'In exceptional situations of emergency, no derogation shall be made from the following Articles: ... Article 14 (6)...'

Due to the condition that any derogation from human rights must be 'strictly required' by the exigencies of the situation, it is hard to envisage situations in which derogation from the majority of them could be strictly required by the exigencies of any emergency situation, even if they are not listed as rights from which there is no derogation. These rights are: the right to be promptly informed of the reasons for arrest and detention and of any charges against oneself; the right to contact with family members and relatives; the right to have a medical examination; the right to trial within a reasonable period of time, or to release, pending a trial; the right to have the lawfulness of the detention decided speedily or without delay by a court; and the right to compensation in the event of the unlawful deprivation of liberty.<sup>77</sup>

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<sup>77</sup> Several cases indicate this. See, for example, *Nuray Şen v. Turkey*, App no 41478/98 (ECHR, 17th June, 2003), paras 17-24; *Brannigan and McBride v. the United Kingdom* (n 25) paras. 10, 11, 66; *Ireland v. the United Kingdom* (n 33) paras. 198, 199.

Regarding Article 4 ICCPR, the HRC confirmed this point when it stated that, simply because some human rights are listed as rights from which there is no derogation, this does not mean that by merely declaring a state of emergency there is derogation from the other derogable rights. However, there could be derogation from these rights as required by the exigencies of the situation.<sup>78</sup>

In *Aksoy v. Turkey*, the ECtHR emphasised the significance of this point when it stated that Article 5 ECHR ‘enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty.’<sup>79</sup>

The grounds for deprivation of liberty and the right to be promptly brought before a judge or other judicial officer are the two rights which may be derogated in an exceptional situation of emergency.

Firstly, as it mentioned above, there are three grounds under Article 5 (1) (c) of the ECHR which allow the States to arrest or detain the people. So, if there is any other circumstances of arrest or detention it will be unlawful.

Although the cases of arrest and detention are specified and limited, the States in time of public emergency could take measures further than which are classified by the Convention. For illustration, in the *Lawless v. Ireland* the applicant was detained upon the order of the minister of state under the offences against the State Act. This was a preventive measure for ‘the sole purpose of restraining him from engaging in activities prejudicial to the preservation of public peace and order or the security of the State.’<sup>80</sup>

The European Commission of Human Rights considered that such detention is not one of the categories of cases mentioned in Article 5 which permits arrest or detention, and

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<sup>78</sup> Human Rights Committee, General Comment 29 (n 28), para 6.

<sup>79</sup> *Aksoy v. Turkey* (n 34), para 76.

<sup>80</sup> *Lawless v. Ireland* (n 24), the law, (para 19).

it emphasised that the Irish Government can only justify this detention through the presentation of the special circumstances of the case which gives the State the power to take exceptional measures under Article 15.<sup>81</sup>

The ECtHR, after investigation of the facts of the case, concluded that the previously mentioned administrative detention was compatible with the convention as a measure required by the emergency situation. These facts were; firstly, it had been demonstrated that the ordinary law is unable to check the growing threat to the Republic of Ireland. Secondly, all domestic courts such as, the ordinary criminal courts, the special criminal courts or military courts were unable to restore peace and order for the State. Thirdly, the government faced great difficulties in collecting evidence against the organisers of people who involved in the activities of the IRA and dissident groups from it, all this because of a military, confidentiality and terrorist of such groups, in addition to the horror they caused to the population. Something which further increased the difficulties in gathering evidence was that these groups existed in Northern Ireland, and their activities are restricted to the preparation of armed attacks across the border which leading to the disappearance of sufficient evidences. One option for dealing with their activities – closing the Border – was inappropriate because of the serious implications of such action on the population as a whole.<sup>82</sup> Also, in *Ireland v. the United Kingdom* the ECtHR accepted the measure of detain and arrest the people ‘for the sole purpose of obtaining from him information about others’ which was not one of the reasons listed in Article 5 that allow arrest and detention. This was because of the danger posed by the

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<sup>81</sup> *Lawless v. Ireland*, App. no. 332/57 (Commission Decision, 19 December 1959), (para 64).

<sup>82</sup> *Lawless v. Ireland* (n 24), the law, ( para 36).

IRA to the life of the nation and the workings of the ordinary criminal process which danger could only adequately be met by indefinite detention without trial.<sup>83</sup>

In addition, however, administrative detention is forbidden except for a special categories of people such as vagrancy; educational purposes; mental illness; immigration control; and drug addiction the Human Right Committee in *David Alberto Cámpora Schweizer v. Uruguay* asserted that the government can issue administrative detention of the person who poses an obvious and serious danger to society which cannot be cured in any other way.<sup>84</sup>

In addition, in its Annual Report to the U.N. General Assembly, the HRC recommended that the States should not be allowed to take a measure of administrative detention and incommunicado except in very limited and extraordinary circumstances.<sup>85</sup>

The second right that may be derogated in an exceptional situation of emergency, is the right to be promptly brought before a judge or other judicial officer. This right puts an instance of deprivation of liberty under judicial supervision at a very early stage. Therefore, the ECtHR stated that ‘judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5, paragraph 3, which is intended to minimise the risk of arbitrariness and to ensure the rule of law.’<sup>86</sup>

The time element, as part of the right to be promptly brought before a judge or other judicial officer, is very important, and the ‘scope for flexibility in interpreting and

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<sup>83</sup> *Ireland v. the United Kingdom*, (n 33), paras 212-214.

<sup>84</sup> *David Alberto Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, U.N. Doc. CCPR/C/OP/2 at 90 (1990) (para 18.1).

<sup>85</sup> Human Rights Committee, ‘Annual Report to the U.N. General Assembly’ (U.N. Doc. A/49/40 vol. 1, 1994), Jordan (para 41).

<sup>86</sup> *Aksoy v. Turkey* (n 34) para. 76.

applying the concept of “promptness” is very limited’.<sup>87</sup> Therefore, the declaration of the existence of a state of emergency is not enough, on its own, to allow the government to keep a detainee in detention for a long period of time without bringing him/her before a judge. There must be very good reasons to permit this delay in an emergency situation and/or it must be strictly required by the exigencies of the situation during the excess period. For example, on the one hand, in *Nuray Şen v. Turkey*, the applicant was kept in detention for a period of 11 days without being brought before a judge or other judicial officer. The government justified this period of detention on account of the scale of PKK violence and terrorism that was threatening south-east Turkey at that time. After investigating the specific situation at that time, despite the circumstances that existed in south-east Turkey because of PKK violence and the complexity encountered by officials when investigating terrorist crimes, the ECtHR stated that the government did not provide valid reasons why judicial review was impossible at that time, so it decided that the period of 11 days’ detention was ‘not strictly required by the crisis.’<sup>88</sup>

On the other hand, in *Brannigan and McBride v. the United Kingdom*, the first appellant was detained for a total period of 6 days, 14 hours and 30 minutes without being brought before a judicial authority, and the second was detained for a total period of 4 days, 6 hours and 25 minutes. Both detentions exceeded the ordinary time for detention. Although the government had exceeded the detention period without being brought before a judicial authority allowed in a normal situation, and the extension of detention was by the Secretary of State (and not a judge), the European Human Right Court after

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<sup>87</sup> *Brogan and Others v. the United Kingdom* (n 5), para 62.

<sup>88</sup> *Nuray Şen v. Turkey*, App no 41478/98 (ECHR, 17th June 2003), paras 17-24.



examining the situation in Northern Ireland and the nature of the terrorist danger there admitted that the government had not exceeded its margin of appreciation.<sup>89</sup>

To sum up, under Article 4 ArCHR, the grounds for deprivation of liberty and the right to be promptly brought before a judge or other judicial officer is the two rights that may be derogated in an exceptional situation of emergency

#### 3.1.2.4.2 Safeguards required to be granted by States

The case-laws indicate that the ECtHR, in time of public emergency, always asks about the availability of adequate legal and political safeguards against abuse. This means that each State should provide these safeguards against abuse to fulfil the condition that the special measures should be strictly required by the exigencies of the situation.

On the one hand, in *Lawless v. Ireland* the ECtHR decided that the special measure of detention without trial that was provided by the offences against the State (Amendment) Act of 1940 was a measure strictly required by the exigencies of the situation. This was because it provided several safeguards against abuse.<sup>90</sup> These safeguards were as follows: firstly, the application of this Act was subject to constant supervision by Parliament, who not only received precise details of its implementation at regular intervals but also had the power, at any time, to cancel the government announcement that brought the Act into effect, with a Resolution. Secondly, the Act provided for the institution of a Commission for detention which was composed of three members, an officer of the Defence Forces and two judges. Thirdly, the detainee, under the provisions of this Act, might send his/her case to the Commission, and if it considered that the person should be released then this decision was binding on the government.

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<sup>89</sup> *Brannigan and McBride v. the United Kingdom* (n 25), paras 10, 11, 66.

<sup>90</sup> *Lawless v. Ireland* (n 24), para 37.

Next, the normal courts were able to compel the Commission to carry out its duties. Finally, the Government made a public announcement that any detainee would be released in the event that s/he gave an undertaking to follow the Constitution and the Law and not to become involved in any unlawful actions.<sup>91</sup>

Also, in *Brannigan and McBride v. the United Kingdom*, the ECtHR agreed that the safeguards provided by the UK Government were adequate to protect a person deprived of his/her liberty against arbitrary behaviour and incommunicado detention.<sup>92</sup> These safeguards were firstly, that the right to habeas corpus was sustained, to test the legality of the original arrest and detention. Secondly, after 48 hours from the time of arrest, any detained person had an absolute and legally enforceable right to consult a solicitor. Thirdly, anyone detained had the right to inform a relative or friend about his/her deprivation of liberty and to have access to a doctor.<sup>93</sup> Also, in the same case, the extend of the detention beyond the 48 hours by the Secretary of State for Northern Ireland or by junior minister could be conceded as a safeguard against abuse.

On the other hand, in *Aksoy v. Turkey* the ECtHR found that the Turkish Government did not provide adequate safeguards against abuse in cases of detention over a long period of time. 'In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.'<sup>94</sup>

This evidence shows that the all States Parties to the ArCHR must provide adequate safeguards against abuse in the event of the exercise of the principle of derogation in a

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<sup>91</sup> Ibid.

<sup>92</sup> *Brannigan and McBride v. the United Kingdom* (n 25), para 62.

<sup>93</sup> Ibid paras, 62-63.

<sup>94</sup> *Aksoy v. Turkey* (n 34), para 83.

time of public emergency, and a judicial supervision is generally required. There are no fixed adequate safeguards against abuse, rather than it depends on the exact circumstances of the case.

#### 3.1.2.4.2.1 The domestic notification (Official proclamation)

One of the safeguards against abuse provided by the international instruments of human rights is an official proclamation in the situation of derogation from the right to liberty.

Only Article 4 (1) ArCHR and Article 4 (1) ICCPR require the existence of a public emergency to be officially proclaimed. Therefore, it is a prerequisite for the principle of derogation, which is exercised by the States in a time of public emergency.<sup>95</sup>

When there is a serious danger facing a State, the declaration of a state of emergency is an internal State procedure, which usually involves a decision by the political authority (the executive and legislative authorities).<sup>96</sup> For example, in *Brannigan and McBride v. the United Kingdom*, the appellants argued that the UK Government - as a party to the United Nations International Covenant on Civil and Political Rights - violated Article 4 ICCPR because the public emergency was not ‘officially proclaimed’ in the United Kingdom. The ECtHR decided that the Home Secretary’s Department’s announcement to the House of Commons on 22<sup>nd</sup> December 1988 was when the state of emergency was ‘officially proclaimed’ and it ‘made public the Government’s intentions as regards derogation’.<sup>97</sup>

With regard to Article 4 (1) ICCPR, the HRC stated that this procedure ‘is essential for the maintenance of the principles of legality and rule of law at times when they are most

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<sup>95</sup> Jaime Oraá, *Human rights in states of emergency in international law* (Clarendon Press 1992), 34.

<sup>96</sup> Ibid.

<sup>97</sup> *Brannigan and McBride v. the United Kingdom* (n 25), para 73.

needed',<sup>98</sup> and it leads to the prevention of any abuse of the right to derogation, because this requirement ensures that States act within the provisions of constitutional law and other laws in the exercise of emergency powers.<sup>99</sup> For example, in its report, the HRC stated its concern that Article 165 of the Federal Constitution of Swaziland, which provides for urgent legislation 'has no constitutional basis' and could not derogate the rights protected under the covenant.<sup>100</sup> Also, the Committee was worried about the situation in Morocco, and asked if the King, in an emergency situation, could exercise the power of both the legislative and executive authorities, and if there was any way that the judicial or legislative authority could monitor the King's actions in such a situation.<sup>101</sup>

One of the benefits of proclamation is the avoidance of adverse responses or reactions on the part of individual members of the community, which may cause a disaster.<sup>102</sup>

Although this procedure is important, the ECtHR believes it is not compulsory under its Convention. Therefore, in *Lawless v. Ireland*, when the appellant argued that the Irish government had exercised the right to derogation without formal notice, the Court decided that there had been no violation of Article 15, and emphasised that there is no obligation on the part of a State to issue a formal notice.<sup>103</sup>

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<sup>98</sup> Human Rights Committee, General Comment 29 (n 28), para 2.

<sup>99</sup> Dominic McGoldrick, 'Symposium: Emergency Power and Constitutionalism, The Interface Between Public Emergency Powers And International Law' (2004), 2 Int'l J. Const. L. 380, 396.

<sup>100</sup> UNGA, UN Doc Supp Vol. I (A/57/40) (n 39), para 76 (7).

<sup>101</sup> UNGA, 'Report of the Human Rights Committee' (46<sup>th</sup> Session. UN Doc Supp. A/46/40, 10 October 1991), para 241.

<sup>102</sup> In Nicaragua, for instance, when the Miskitos were compulsorily relocated from their settlements on the Coco River to Tasba Pri, it created a situation of 'terror and confusion', which led to 10,000 Miskitos fleeing to Honduras to evade evacuation. Although Article 27 does not require a proclamation, the Inter-American Commission on Human Rights stated that if the Nicaraguan Government had proclaimed the situation of emergency and of temporary relocation, it would have avoided the resulting terror which caused the Miskito people to flee. IACHR, 'Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito origin' (OEA/Ser.L./V.II.62, Doc. 10 rev. 3, 29 November 1983), E, Right to Residence and Movement, paras 33, 34.

<sup>103</sup> *Lawless v. Ireland* (n 24), the law, paras 44, 45.

Robertson supported the argument of the appellant in this case, and the importance of a formal notice. He highlighted that each individual must have the opportunity to know whether or not there has been any modification to the rights that he enjoys under the Conventions.<sup>104</sup>

In summary, under Article 4 (1) ArCHR, it is important to ask States to issue a formal notice for three reasons. Firstly, it prevents States from abusing the exercise of the right of derogation. Secondly, it avoids adverse responses or reactions on the part of individual members of the community. Thirdly, each person should know the change that has taken place in his/her rights that s/he enjoys under the conventions.

#### 3.1.2.4.2.2 The international notification

There is another notification required by the international instruments of human rights, which provide more safeguards against abuse. This notification is stipulated under Article 4 (3) ArCHR, Article 4 (3) ICCPR and Article 15 (3) ECHR. The texts of the Articles highlight that any State availing itself of the right to derogation under the international human rights instruments has a number of commitments regarding the conditions of notification. Firstly, it must notify other Member States, through the Secretary-General, of the special actions being taken. Secondly, it has a duty to notify of the reasons for the derogation. Finally, it must inform the Secretary-General when such measures are no longer being applied.

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<sup>104</sup> Robertson, A.H., 'Lawless v. the Government of Ireland (Second phase): The British Yearbook of International Law' (1961), 37 Brit. Y. B. Int'l L. 536, 545.

It appears that this notification is different from an official proclamation, which is described under Article 4 (1) ArCHR and Article 4 (1) ICCPR. The later notification ‘operates on the international level’, while the first operates on the domestic level.<sup>105</sup>

The purpose of the requirement of notification is to prevent States from abusing their right to exercise the right of derogation.<sup>106</sup> Therefore, the HRC stated, regarding Article 4 (3) ICCPR, that this notification helps the Committee to perform its function, including an assessment of whether or not the measures taken by the State were strictly required in dealing with a public danger, and also, this condition allows other States to supervise the State’s fulfilment of the requirements of the Covenant.<sup>107</sup>

As shown below, the text of Article 15 (3) ECHR is different from that of Articles 4 (3) ArCHR and 4 (3) ICCPR, in three ways. Firstly, the latter two Articles require that the information must be delivered to the other Member States, while Article 15 (3) does not mention this. Secondly, Article 15 (3) does not state that the notification must be made ‘immediately’, while the others do. Finally, the ArCHR and the ICCPR require a government to provide information with regard to the provisions from which they have derogated, while Article 15 (3) requires the government to provide information only about the extraordinary measures taken in the emergency situation.

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<sup>105</sup> Oren Gross, ‘Once more unto the breach: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies’ (1998), 23 *Yale J. Int’l L.* 437, 450.

<sup>106</sup> Edel Hughes, ‘Entrenched emergencies and the “war on terror”: Time to reform the derogation procedure in international law’ (2007), 20 *N.Y. Int’l L. Rev.* 1, 9.

<sup>107</sup> UNGA, ‘Report of the Human Rights Committee, Volume 1’ (56<sup>th</sup>, Session. UN Doc Vol. I, A/56/40, 1 October 2001) p. 207, para 17. For clarification, it could be useful to view an example from the Inter-American Commission on Human Rights with regard to Article 27 ACHR; the Foreign Minister of Nicaragua informed the Secretary-General of the Organisation of American States that his Government had renewed the state of emergency for a period of one year from February 28, 1987, because of the continuing threats against the country’s sovereignty and territorial integrity. The Commission found in its notification that one of the rights which the Nicaraguan Government had suspended was the right of habeas corpus. Consequently, it stated that this measure was in conflict with Article 27 (2) ACHR, and that such suspension had to be repealed. IACHR, ‘Annual Report of the Inter-American Commission on Human Rights (1986-1987)’ (Inter-Am. C.H.R., OEA/Ser.L/V/II.71, Doc 9 rev. 1, 22 September 1987), Nicaragua, b. The State of Emergency.

#### 3.1.2.4.2.2.1 The timing of derogation from the right to liberty

Only Article 4 (3) ArCHR and Article 4 (3) ICCPR, and not Article 15 (3) ECHR, require that notification of derogation must be given ‘immediately’ to the Secretary-General. The term ‘immediately’ means that there can be no acceptance of any delay in the announcement of the special measures taken in emergency situations, because the notification of any temporary changes in the legal system is necessary for the other Member States.<sup>108</sup>

Although Article 15 (3) ECHR does not include the temporal element of the other two instruments, it can be implied from the ECtHR’ case-law that the European Convention requires the element of immediacy in the notification. For instance, in *Lawless v. Ireland*, the Court found that informing the Secretary-General 12 days after the adoption of the special measures taken in the case of public emergency constituted notification without delay.<sup>109</sup> Also, in this case, the European Commission confirmed the temporal element when it stated that States are supposed to inform the Secretary-General of the exceptional measures ‘without any unavoidable delay’.<sup>110</sup>

The ECtHR in *Lawless* considered that a notification without delay was an element of the adequacy of information.<sup>111</sup> Svensson-McCarthy argues that the parties to the European Convention should add the term ‘immediately’ to Article 15 (3) in the same way as is contained in Article 4 (3) ICCPR [and Article 4 (3) ArCHR].<sup>112</sup> This was

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<sup>108</sup> Anna-Lena Svensson-McCarthy, *The international law of human rights and states of exception: with special reference to the travaux préparatoires and case-law of the international monitoring organs* (International Studies in Human Rights, Martinus Nijhoff Publishers, 1998), 693.

<sup>109</sup> *Lawless v. Ireland* (n 24), the law, para 47.

<sup>110</sup> *Lawless v. Ireland* (Commission Decision) (n 81), para 80.

<sup>111</sup> *Lawless v. Ireland* (n 24), the law, para 47.

<sup>112</sup> Anna-Lena Svensson-McCarthy (n 108), 707.

because the term ‘keep ... fully informed of the measures .....’ in Article 15 (3) could not be interpreted merely as containing ‘an element of immediacy’.<sup>113</sup>

Svensson-McCarthy’s view offers an important point, which is that the European Convention on Human Rights should add the term ‘immediately’ in Article 15, for the reason that, if this term was used in Article 15, it would be one of Conventions’ requirements in time of public emergency, and could not be interpreted otherwise. In this regard, if a States did not fulfil this requirement, it would be in violation of Article 15.

#### 3.1.2.4.2.2.2 Requisite content of the derogation notice

- Special actions taken

It is obvious from a textual reading of the three Articles, that Article 4 (3) ArCHR and Article 4 (3) ICCPR oblige States to provide the Secretary-General with the required notification of the provisions from which they have derogated, while Article 15 (3) of ECHR requires States to provide information on the extraordinary measures taken in an emergency situation. For example, in *Lawless v. Ireland*, the Strasbourg Court found that the Irish Government fulfilled this requirement. This is because the Government provided the Secretary-General with adequate information about the extraordinary measures taken, along with the reason for taking these special measures, which was ‘to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution’.<sup>114</sup> Also, in *Aksoy v. Turkey* the same Court mentioned that since the Turkish Government’s notification contained sufficient information about the

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<sup>113</sup> Ibid.

<sup>114</sup> *Lawless v. Ireland* (n 24), the law, para 47.



exceptional measures taken, this meant that it had fulfilled its requirements under Article 15 (3).<sup>115</sup>

Indeed, it might be argued that informing the Secretary-General of the provisions from which a State has derogated – such as Articles 4 (3) ArCHR and 4 (3) ICCPR - is better than informing him/her merely of the extraordinary measures taken. This is because a government's notification of the provisions from which they have derogated makes it easier to ensure that they are fulfilling all the requirements of the international human rights instruments with regard to the state of emergency. This is done by examining the applicability of the derogation, and whether it is strictly required by the exigencies of the situation. Conversely, just reporting the actions taken could create some difficulties or could make procedures longer, as first it would be necessary to find out which right(s) the State has derogated from, and then test the applicability of the derogation as to whether or not it was strictly required by the exigencies of the situation. With regard to Articles 4 (3) ArCHR and 4 (3) ICCPR: if, for clarification, a government was to bring a detainee before a judge after 7 days of arrest, it must inform the Secretary-General that it has derogated from the right for that individual to be promptly brought before a judge, as provided under Article 14 (5) ArCHR or Article 9 (3) ICCPR, whichever is applicable. Consequently, this would be easy to investigate. With regard to Article 15 (3) ECHR, the ECtHR would be satisfied if the government provided merely the measure taken – allowing 7 days for pre-charge detention - and the Court would first need to pinpoint the right that had been derogated from before it could examine this special measure.

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<sup>115</sup> *Aksoy v. Turkey* (n 34), para 86.

However, the requirement of full information made by Article 15 (3) ECHR is better, in one respect, than merely requiring the provisions that have been derogated from by the State. This is because the latter may indicate that there is no obligation on the part of the State to duly submit a description of the exceptional measures which have been taken in the situation of public emergency.<sup>116</sup>

As a result of these differences, the European Commission and the Human Rights Committee brought together the various texts in order to obtain the best result in respect of the requirement of notification. Consequently, the European Commission stated that a notification should include the ‘nature and extent of the derogation from the provisions of the Convention which those measures involve’.<sup>117</sup> Also, the HRC emphasised in its general comment No. 5 that a State must inform the Secretary-General of the nature and extent of any derogations, although Article 4 (3) ICCPR simply requires the notification of the provisions from which the State has derogated.<sup>118</sup>

Despite the importance of these two approaches, both contain a weakness. This weakness relates to the lack of a duty to transfer data about the actual application of the emergency measures, such as a full notification of the number of detainees who have faced the exceptional actions.<sup>119</sup>

- The reason for derogation from the right to liberty

Article 4 (3) ArCHR, Article 4 (3) ICCPR and Article 15 (3) ECHR obligate a State to provide the reasons for any derogations. The purpose of this requirement is that a State

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<sup>116</sup> Anna-Lena Svensson-McCarthy (n 108) 701.

<sup>117</sup> *Lawless v. Ireland* (Commission Decision) (n 81), para 80.

<sup>118</sup> Human Rights Committee, ‘General Comment 5: Article 4 (Thirteenth Session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (U.N. Doc. HRI/GEN/1/Rev.1 at 5, 1994), para 3.

<sup>119</sup> Joan F. Hartman (n 53) 20.

must justify the reasons for its derogation from those human rights which are enshrined in the international conventions on human rights.<sup>120</sup>

- Notices of termination of derogations from the right to liberty

Articles 4 (3) ArCHR, 4 (3) ICCPR and 15 (3) ECHR require that a State submit a second notification to the Secretary-General when all special measures have been terminated. This indicates that there is no longer a public emergency threatening the life of the nation, and that the government has returned to applying its normal rules.

#### **4. Conclusion**

An examination of the flexibility of the normal provisions of Article 14 ArCHR to allow a different response to terrorism than to other serious crimes showed the following result. Firstly, the deprivation of liberty has no need to be grounded on reasonable suspicion of committing a specific offence, as merely a reasonable suspicion of involvement of terrorism is compatible with Article 14 (2) ArCHR.

Secondly, Article 14 (5) ArCHR does not permit leeway or flexibility as regard the degree of ‘promptness’ that is required in the bringing of the detainee before a judge or other judicial officer.

Thirdly, the ‘reasonable time’ for pre-trial detention, under Article 14 (5) ArCHR, cannot be interpreted less strictly in terrorist cases.

Finally, the requirement of ‘equality of arms’ which is required under Article 14 (6) ArCHR is capable of some modification in ‘security’ cases.

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<sup>120</sup> Ibid 21.

In a time of public emergency, a State could derogate from some human rights in the event that all conditions required by the international conventions on human rights have been met. These conditions are as follows: there must be an exceptional situation of emergency which threatens the life of the nation; any special measures made must be strictly required by the exigencies of the situation; and finally, these measures must comply with a State's other obligations under the International law. Under the principle of margin of appreciation, States have the authority to determine when a situation constitutes an exceptional situation of emergency and what measures are required by the exigencies of the situation. The role of the Arab Human Rights Committee is to investigate the facts provided by the State to determine whether or not there is an exceptional emergency situation such as that mentioned in Article 4 ArCHR and whether or not the special measures taken by a State are strictly required by the exigencies of the situation.

The condition that requires that the derogation from the right to liberty be strictly required by the exigencies of the situation also requires the State to provide adequate safeguards against abuse. These safeguards could be divided into three groups: firstly, the non-derogable rights; secondly, safeguards granted by States; and finally, the notification.

The ArCHR lists only one of the procedural guarantees following the deprivation of liberty (arrestees' or detainees' rights), which is the right to have the lawfulness of an arrest or detention decided without delay by a court, within its non-derogable rights. In contrast, both the ICCPR and the ECHR do not include any of their provisions on liberty among their non-derogable rights. The grounds for deprivation of liberty and the right to be promptly brought before a judge or other judicial officer are the two rights

that may be derogated in an exceptional situation of emergency. Regarding the second right, the judicial supervision is a key safeguard even in emergencies, and it has to be a highly exceptional situation to derogate from this.

## CHAPTER 5

# TO WHAT EXTENT DOES THE REGULATION OF ARREST AND PROVISIONAL DETENTION IN UAE LAW COMPLY WITH ARTICLE 14 ArCHR

### 1. Introduction

Since the treaties are a source of international law and ‘the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised’,<sup>1</sup> each State must respect their human rights obligations under the international human rights instruments and the purpose of these instruments is to protect individuals’ rights that are stipulated in their articles.<sup>2</sup> However, exactly what ‘protection’ means depends on the nature of the obligations imposed on the State by the instruments. Three kinds of obligation can be imposed. Firstly, there is the ‘obligation to respect’, which means a negative obligation to refrain from action which would breach the right. Secondly, the ‘obligation to protect’; this kind of obligation requires the State to provide protection of an owner’s rights from any interference by third parties and to prosecute the offenders. Finally, the ‘obligation to implement’ that requires the State to take suitable positive measures to give the right absolute realisation and to be fully effective.<sup>3</sup>

For the same purpose, Article 3 (1) ArCHR, and the very similar Article 2 (1) ICCPR and Article 1 ECHR, requires the national authorities of each State to take measures to protect the rights of the individual. Article 3 (1) ArCHR states that ‘Each State party to

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<sup>1</sup> The preambles of Vienna Convention on the Law of Treaties 1969

<sup>2</sup> See Introduction, section 2: Purpose, theme and scope of the study.

<sup>3</sup> Jean-François Akandji-Kombe, *Positive Obligations under the European Convention* (A guide to the implementation of the European Convention on Human Rights, Human Rights Handbooks, No. 7, Council of Europe, 2007) 5.

the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein.’ Article 2 (1) ICCPR indicates that ‘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 recognized in the present Covenant..’. Article 1 ECHR provides that ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ In addition, only the ArCHR (under Article 44) and the ICCPR (under Article 2 (2)) expressly address the ‘obligation to implement’, which requires the parties, in their national law, to achieve the instrument’s requirements. Article 44 ArCHR states that ‘The States parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein.’ Article 2 (2) emphasizes that ‘Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’

The main objective of the current thesis most fully realised in this chapter is to determine whether or not the regulation of arrest and provisional detention in UAE law is compliant with the requirements of Article 14 ArCHR.<sup>4</sup>

For the UAE, the ArCHR is the only international human rights instrument which offers protection, as the UAE has not signed up to any other international human rights instruments.

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<sup>4</sup> See Introduction, section 2: Purpose, theme and scope of the study.

Given the lack of any report by the UAE on the measures which they have taken to give effect to the rights recognised in the ArCHR and the absence of effective institutions under the ArCHR to provide authoritative interpretation of the Charter's Articles. Therefore, it is to be expected that there will be gaps between the current law and the requirements of the ArCHR. Filling these gaps requires an interpretation of the requirement of the ArCHR, analyses of UAE law and an indication of the number of changes that need to be made in UAE law.

To achieve this aim, this chapter draws together the analyses of UAE law and the requirements of the ArCHR (illuminated by analysis in Chapters 1- 4 of the ICCPR and the ECHR as 'interpretative guides'). This is done in order to determine the extent to which UAE law is currently compliant with the requirements of Article 14 ArCHR and, by drawing on compatible elements of approaches elsewhere addressing the same issue, particularly of the UK, to identify what changes could be made to UAE law to ensure, in some places, complete compliance with the ArCHR.

The main issue regarding UAE law is the role of the Public Prosecutor who exercises the duty of the judicial authority despite lacking the character of independence, from the parties to a case, required for such authority despite being regarded by UAE law as a judge, s/he is clearly one of the parties to a criminal case. The requisite of independence is crucial because the independent judicial authority protects an individual's rights against the abuse of power, such as maltreatment, torture, inhuman or degrading treatment, or physical and psychological damage; the danger of false confession and wrongful conviction as an injustice to society, as well as the victim of maltreatment, and the victim and family of the person who suffered as a result of the crime in question and protecting the judicial system and the administration of justice from being tainted. The



independent judicial authority has the freedom to make a fair and impartial decision based solely on the facts presented and the applicable laws.<sup>5</sup> In other words, this condition is necessary to ensure that the officer is objective and impartial with the cases that s/he deals with, and to prevent the relevant government from allowing arbitrary detention.<sup>6</sup> This ensures the detainee's rights under Article 14 ArCHR; and helps prevent breaches of the Article 8 ArCHR that forbids torture and UAE's UNCAT obligations.

It is worth indicating here that in the UAE system there is, in general, a lack of case-law that may be used to interpret the provisions of UAE law and in particular the Constitution for the following reasons. Firstly, only the Highest Court can make a binding interpretation according to Article 99 (4) of the Constitution of the UAE. However, whether a case reaches the Federal Highest Court depends on whether the person deprived of his/her liberty appeals which is not normally the case. Secondly, only in one situation a person can make a complaint against the arbitrary deprivation of liberty. Under Article 197 of the UAE Federal Law of Civil Procedure, a person can make a complaint against the judge or the Public Prosecutor if it appears from his/her decision that there has been cheating, fraud or a serious professional error. This means that if any person faces arbitrary deprivation of liberty s/he cannot make a complaint in the court, except in the aforementioned case. Since this situation is very rare, there is a lack of case-law reviewing the lawfulness of deprivation of liberty.

The remainder of this chapter is divided into three main sections. The next section most importantly, explores the areas where UAE law is not compliant with Article 14 ArCHR and advances realistic reforms to remove incompatibility, which will also be consistent

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<sup>5</sup> See Introduction, section 2: Purpose, theme and scope of the study.

<sup>6</sup> See Chapter 3, section 5.3.1: The notion of 'officers' authorised by law to exercise judicial power.

with the obligations under ICCPR of other ArCHR States. The third section determines the areas where it is arguably or questionably compliant. Finally, the fourth section outlines the areas where UAE law is compliant.

## **2. The non-compliant areas**

There are four aspects of Article 14 with which UAE law does not fully comply. These are: the right to be promptly brought before a judge or other judicial officer; the right to trial within a reasonable period of time or to release, pending a trial; the right to have the lawfulness of the arrest or detention decided without delay by a court; and the right to receive compensation, in the event of unlawful deprivation of liberty.

### *2.1 The right to be promptly brought before a judge or other judicial officer*

Article 14 (5) ArCHR provides that ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.’<sup>7</sup>

#### **2.1.1 The requisites of being a judge or other judicial officer**

Under Article 14 (5), any other officer authorised by law to exercise judicial power should satisfy certain conditions thereby providing a guarantee to the arrested or detained against any arbitrary or unjustified deprivation of liberty. Firstly, the officer should be independent from the executive and the parties involved in the case to protect an individual’s rights against the abuse of power. Secondly, the officer should hear the

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<sup>7</sup> See Chapter 3, section 5: The right to be promptly brought before a judge or other judicial officer.

detainee or arrestee. Finally, the officer should have the power to review the different circumstances of the case.<sup>8</sup>

Responding to the right to be brought promptly before a judge or other judicial officer, as regulated under Article 14 (5) ArCHR, Article 47 FLCP provides that a Judicial Police Officer must either release the arrested person or send him/her to the Public Prosecutor (as part of the judiciary) within 48 hours.

Although, the person deprived of his/her liberty should be brought before the Public Prosecutor as an officer authorised by law to exercise judicial power, this is incompatible with Article 14 (5) ArCHR.<sup>9</sup> This is because the Public Prosecutor satisfies only two of the three conditions which are required of the officer whom the arrested or detained person is brought before. These two conditions are that the Public Prosecution himself/herself hears the person brought before him/her and that s/he reviews all the circumstances brought before him/her, which could stand for or against the deprivation of liberty. This ensures that his/her decision is made with reference to the legal standards or to order the release of the person in the absence of such standards.

However, the Public Prosecutor does not have the character of independence as s/he is one of the case parties. Under Article 5 FLCP, the Public Prosecutor has the duty to direct indictments in addition to his/her role in investigating crimes, and under Article 7 of the same Federal Law s/he has exclusive jurisdiction to lodge and pursue criminal cases.

The Federal Highest Court justified the role of the Public Prosecutor. It stated that the Public Prosecutor is an *Impartial Adversary*; s/he works within his/her authority to

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<sup>8</sup> See Chapter 3, section 5.3.1: The notion of ‘officers’ authorised by law to exercise judicial power.

<sup>9</sup> For more information about the Public Prosecutor, see Chapter 1, section 2.1.2.1: The Public Prosecutor.

ensure access to justice, whether for the benefit of society, or for the benefit of the accused.<sup>10</sup> Also, it stated that s/he is given the authority under Article 7 (exclusive right to bring criminal cases to courts and pursue them) because s/he is an original adversary in the case, but his/her adversarial role is impartial aimed to protect the community from crime.<sup>11</sup> This means that s/he acts on behalf of the community and not out of self-interest.

Despite of all these justification, in conclusion, the Public Prosecutor cannot be considered as an officer authorised by law to exercise judicial power as s/he does not have the character of independence from the parties to the case, because s/he is one of them.

#### 2.1.2 The issue of ‘promptly’

Bringing the detainee promptly before a judicial authority is very important as it can detect and prevent the serious ill-treatment of a detainee. Also, it reduces the risk of disappearance.<sup>12</sup> In other words, it prevents maltreatment of the suspect and protects the police authorities from damaging false allegations of maltreatment. This is because it puts the deprivation of liberty under legal control, which helps to prevent arbitrary deprivation of liberty.<sup>13</sup>

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<sup>10</sup> The Federal Highest Court, Sharia and Criminal 24 September 2005, Appeal No. 640, for the 26th judicial year, para 3.

<sup>11</sup> The Federal Highest Court, Sharia 02 September 2002, Appeal No. 110, for the 23rd judicial year, para 2.

<sup>12</sup> See Chapter 3, section 5.2: The rationale of the right.

<sup>13</sup> See Introduction, section 2: Purpose, theme and scope of the study.

Therefore, Article 14 (5) ArCHR does not permit flexibility (beyond the normal situation) in regard to the term ‘promptly’ in terrorist cases.<sup>14</sup>

Regarding the term ‘promptly’, as it required to bring the detainee before a judge or other judicial officer, the HRC stated that the requirement of ‘promptly’ is determined on a case-by-case basis,<sup>15</sup> and any ‘delays must not exceed a few days’.<sup>16</sup> Therefore, the Committee found in *Michael Freemantle v. Jamaica*, that the delay of 4 days before bringing the arrestee to a judicial authority without rationalisation is a violation of the Article 9 (3) ICCPR.<sup>17</sup>

Similarly, the ECtHR stated that the term ‘promptly’ is evidence of some degree of flexibility which is limited according to the circumstances of the case.<sup>18</sup> However, in *Brogan and Others v. the United Kingdom* the court stated that 4 days is the maximum period allowed before bringing the detainee before a judge or other judicial officer.<sup>19</sup> It might also be worth pointing out that, in *Aksoy v. Turkey*, despite the fact there was a public emergency that denied access to a judge for 14 days, the authorities went beyond what was necessitated by the exigencies of that emergency.<sup>20</sup>

To achieve a balance between the need for keeping the detainee in detention before being brought before a judge (the need of the investigation) and the importance of doing so promptly (the detainee’s rights), it could be argued that 48 hours detention could be

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<sup>14</sup> See Chapter 4, section 2.2: The degree of ‘promptness’ that is required in the bringing of the detainee before a judge or other judicial officer.

<sup>15</sup> *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995), para 9.6.

<sup>16</sup> Human Right Committee, ‘General Comment 8: Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (U.N. Doc. HRI/GEN/1/Rev.1 at 8, 1994), para 2.

<sup>17</sup> *Michael Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000), para 7.4.

<sup>18</sup> *Brogan and Others v. the United Kingdom*, App no 11209/84; 11234/84; 11266/84; 11386/85 (EHRR, 29 November 1988), Series A145-B, para 59.

<sup>19</sup> Ibid para 60.

<sup>20</sup> *Aksoy v. Turkey*, App no 21987/93 (EHRR, 18 December 1996), 1996-VI, para 78.

the most suitable period of time. For the investigation, in practice it has been shown that it is difficult to reduce this period,<sup>21</sup> whilst, for the detainee, this period is enough to detect and prevent any serious ill-treatment. This period could be extended for a short period in very special or exceptional cases but should be monitored by a judge or judicial authority. The law of England and Wales provides a model of this procedure. Under this law, the maximum period of detention without charge at a police station is 36 hours. Under section 41 (1) PACE, a suspect cannot normally be detained for more than 24 hours without being charged, but a Police Officer of the rank of superintendent or above can extend this 24 hour period, but only by 12 hours.<sup>22</sup> To extend this period beyond the 36 hours, the superintendent or higher-ranked officer should authorise an application to the Magistrates' Court.<sup>23</sup> The Magistrate may issue a warrant for further detention if s/he is satisfied that there are reasonable grounds for believing that further detention is justified.<sup>24</sup> For a further extension, the Police must apply again to the Magistrates' Court who may grant an additional period of 36 hours.<sup>25</sup>

In UAE law, the period of bringing the detainee before the Public Prosecutor is compatible with Article 14 (regardless of whether or not the Public Prosecutor could be considered a judicial officer). Under Article 47 FLCP, a Judicial Police Officer must either release the arrested person or send him/her to the Public Prosecutor within 48 hours.<sup>26</sup> The procedure is the same for both ordinary and security cases. For the importance of this procedure, the Federal Highest Court emphasised that the Judicial

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<sup>21</sup> UNGA, 'Report of the Human Rights Committee' (45th Session. UN Doc Supp 40, A/45/40, 1 January 1990), para 335.

<sup>22</sup> PACE, s 41 (2).

<sup>23</sup> PACE, s 42 (2), s 43 (1).

<sup>24</sup> PACE, s 43 (1).

<sup>25</sup> PACE, s 44.

<sup>26</sup> See Chapter 1, section 2.1.1.1.1: Period of arrest.

Police Officer will be called in cases where the detainee is not brought within 48 hours.<sup>27</sup>

To achieve compatibility, the role of the public prosecutor should be transferred to a court or judge. This is because the detainee needs to be monitored and supervised by an independent judicial authority to prevent the abuse of power. The period of 48 hours prior to bringing the accused before a judge is appropriate as it makes for a balance between the needs of the investigation and the suspect's rights. Also, there should be a system of internal monitoring or review in the period before someone being brought before a judge, which can aid the aim behind the need for monitoring of the suspect's position to protect an individual's rights against the abuse of power. Section 40 of PACE provides a good model for such monitoring. For example, under this section, any detainee who has not yet been charged with an offence, his/her detention must be reviewed by an officer of at least the rank of inspector directly involved in the investigation.<sup>28</sup> The first review must begin no later than 6 hours after the detention was ordered.<sup>29</sup> The second review must start not later than 9 hours after the first review.<sup>30</sup> Finally, any following reviews shall be taken place at intervals of no more than 9 hours.<sup>31</sup>

These prompt monitoring (both internally and by independent judge), ensure the detainee's rights under Article 14 ArCHR, and help prevent breaches of the Article 8 ArCHR that forbids torture and UAE's UNCAT obligations. In particular, concerns have been expressed by International and Non-Governmental Organisations about the

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<sup>27</sup> The Federal Highest Court, Sharia and Criminal 21 May 2007, appeal No. 37 for the 28th judicial year.

<sup>28</sup> PACE, s 40 (1) (b).

<sup>29</sup> PACE, s 40 (3) (a).

<sup>30</sup> PACE, s 40 (3) (b).

<sup>31</sup> PACE, s 40 (3) (c).

UAE's record on human rights. Some of these concerns were overlong provisional detention, incommunicado detention for political reasons and the resort to torture.<sup>32</sup>

## *2.2 The right to trial within a reasonable period of time or to release pending a trial*

Article 14 (5) ArCHR states that any arrestee or detainee should be brought to trial within a reasonable time, otherwise the arrestee or detainee should be released. Also, it emphasises that provided the arrested or detained person released is subject to guarantees to appear for trial, pre-trial detention is not the general rule.<sup>33</sup>

In cases of ordinary<sup>34</sup> and terrorist crime<sup>35</sup>, UAE law gives the Public Prosecutor the ability to keep a person in pre-trial detention for certain periods of time. This is incompatible with ArCHR because, as mentioned previously, Article 14 (5) requires that the detainee should be brought before a judge or other officer authorised by law to exercise judicial power. However, the Public Prosecutor is not a judge, and cannot be considered to be an officer authorised by law to exercise judicial power since s/he does not have the character of independence.

### *2.2.1 The issue of reasonable time*

The trial within a reasonable time or to release pending trial is very significant as it places a limit on the length of time that the person may be kept in pre-trial detention because a long period in detention is like a punishment before being sentenced by a regular court.<sup>36</sup> Consequently, even in terrorist cases,<sup>37</sup> the 'reasonable time' required

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<sup>32</sup> See Introduction, section 2: Purpose, theme and scope of the study.

<sup>33</sup> For more about the right to trial within a reasonable period of time in normal crime, see Chapter 3, section 6: The right to trial within a reasonable period of time or to release, pending a trial.

<sup>34</sup> For ordinary crime, see Chapter 1, section 2.1.2.4: Provisional detention.

<sup>35</sup> For terrorist crime, see Chapter 1, section 2.1.3.2 : Provisional detention.

<sup>36</sup> See Chapter 3, section 6: The right to trial within a reasonable period of time or to release, pending a trial.



under Article 14 (5) ArCHR cannot be interpreted less strictly, and the person must be released immediately pending trial, except when there are ‘relevant and sufficient’ reasons to justify keeping him/her in detention.<sup>38</sup>

The HRC emphasised that ‘reasonable time’ depends on the circumstances of each case.<sup>39</sup> The ECtHR agreed,<sup>40</sup> despite having reached a different decision about time limits. The HRC indicated that the length of any pre-trial detention must not exceed 12 months,<sup>41</sup> while, the ECtHR argued that the word ‘reasonable time’ could not be interpreted in terms of a fixed period, such as a numbers of days, weeks, months or years, because it depends on the distinct features of each case.<sup>42</sup>

It could be argued that it is inappropriate to try to reach a definite time limit for pre-trial detention, but it could be accepted that this period should be controlled by ordering certain conditions, such as the existence of relevant and sufficient reasons to justify keeping the detainee in pre-trial detention. In any case, the period of pre-trial detention should not go beyond the period of the sentence, if the accused was to be convicted and sentenced.

As shown in chapter 1, the requirements and procedures of arrest and provisional detention in the case of a terrorist crime are similar to ordinary crime requirements and procedures, except for the procedure of the right to trial within a reasonable period of

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<sup>37</sup> See Chapter 4, section 2.3: The ‘reasonable time’ required for pre-trial detention.

<sup>38</sup> See Chapter 3, section 6.1: The relevant reasons for detention on remand.

<sup>39</sup> *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 at 96 (1991), para 6.5

<sup>40</sup> *Kubicz v. Poland*, App no 16535/02 (ECHR, 28 March 2006), para 38.

<sup>41</sup> Human Right Committee, ‘Concluding Observations of the Human Rights Committee, Poland’ (U.N. Doc. CCPR/C/79/Add.110, 1999), para 18.

<sup>42</sup> *Stögmüller v. Austria*, App no 1602/62 (EHRR 10 November 1969), series A9, the law, para 4.

time or to release pending a trial.<sup>43</sup> Therefore, it will be useful to discuss this procedure in relation to the different circumstances of both normal and terrorist crimes.

#### 2.2.1.1 Normal crime

For the normal crime, in the UAE system, the Public Prosecutor can order provisional detention for an initial period of 7 days; the Public Prosecutor may renew this period for a further period not exceeding 14 days.<sup>44</sup> Therefore, the total period of pre-trial detention, which the Public Prosecutor can authorise is 21 days.<sup>45</sup>

Under Article 14 (5), the period of pre-trial detention should be reasonable. By the same token, without requiring this period of detention to be reasonable, Article 110 FLCP permits the Public Prosecutor to keep a person in detention for up to 21 days. In contrast, the latest Article requires this condition if the Public Prosecutor intends to exceed the period of pre-trial detention of 21 days. It states that, if the investigation necessitates the continuation of provisional detention beyond 21 days, the Public Prosecutor must present the case to a competent criminal court. The judge must review the papers and hear the accused's statements before making a decision. Then, the court can extend the period of provisional detention by a further period not exceeding 30 days. This extension is subject to renewal. In other words, the FLCP provides only one reasonable situation to keep a person in pre-trial detention; that is in the event of the investigation requiring it. Also, this condition is required only for a period exceeding 21 days.

In addition to transferring to a court the role undertaken by the Public Prosecutor, for the normal crime in the UAE, it could be argued that, for the period of pre-trial

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<sup>43</sup> See Chapter 1, section 2.1.3: Arrest and provisional detention in terrorism offences.

<sup>44</sup> FLCP, art 110.

<sup>45</sup> See Chapter 1, section 2.1.2.4: Provisional detention.

detention, to be compatible with the ArCHR requirement, it should make the following changes. It should require that any period of pre-trial detention be reasonable, not only if it is to go beyond 21 days as required clearly by Article 14 (5) of the ArCHR. Furthermore, in the interest of the investigation, there must be more than one sufficient reason to keep a person in pre-trial detention. For example, the risk of the detainee absconding; the protection of public order; and the suspect's protection. In other words, generally, any person must be released immediately pending trial except when there are relevant and sufficient reasons to justify keeping him/her in pre-trial detention.

In addition, since the FLCP does not determine a maximum period for provisional detention during investigation, the judge of the competent criminal court can repeatedly extend the period of provisional detention by a further renewable period of up to 30 days. This can lead to the duration of the arrestee's provisional detention exceeding the length of the prison sentence applicable to his/her offence. Accordingly, it can be said that it is fair to provide a limit to the period of pre-trial detention because the person may be deprived of his/her liberty for a period longer than the penalty for the crime committed by him/her. For example, in the UAE system, the pre-trial detention period should not go beyond the period of the sentence that would be applied if the person was to be convicted and sentenced; or the period of pre-trial detention should be limited depending on the offence committed by the person.

The English and Welsh system afford a model to the period of pre-trial detention. In this system, the maximum period of pre-trial detention in a magistrates' court varies between 56 and 98 days. This depends on the charge as well as on the location of the

court. The maximum period of pre-trial detention in the Crown Court is 112 days. This period can be extended in some circumstances.<sup>46</sup>

#### 2.2.1.2 Terrorist crime

Article 35 of the UAE Federal Decree Law No. 1 (2004) on Combating Terrorism Offences states that, before sending the case to court for trial, the public prosecutor may retain the accused in provisional detention for a period of 14 days. This period is extendable by the public prosecutor for other similar periods, not exceeding 6 months, provided that the interest of the investigation so requires it. The competent court can extend the latest period of provisional detention.<sup>47</sup>

In addition to the need to transfer the role to a court, it can be argued that, while the rest of the periods seem compatible, the first 14 days of pre-trial detention by the Public Prosecutor is incompatible with Article 14 (5). This is because, under Article 35, the Public Prosecutor can order such pre-trial detention without requiring any reasonable grounds. This is contrary to the general rule, under Article 14 (5), which is to release, pending trial, any detainee charged with an offence in cases when relevant and sufficient reasons do not exist. Oppositely, the Public Prosecutor's right to extend the period of pre-trial detention beyond the initial 14 days seems compatible with Article 14 (5). This is because it requires the existence of a sufficient reason (the interest of the investigation) to justify keeping a person in pre-trial detention beyond the initial 14 days.

With regard to terrorist crime, for UAE law to be compatible with the ArCHR requirement, it should require that the whole period and not only a part (the initial 14

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<sup>46</sup> See Chapter 1, section 3.1.2.5: Period of pre-trial detention.

<sup>47</sup> See Chapter 1, section 2.1.3.2: Provisional detention.

days) of pre-trial detention to be reasonable. Also, there must be more than one sufficient reason (the interest of the investigation) to keep a person in pre-trial detention. This might be guided by the Prosecution of Offences Act 1985 of England and Wales, which permits for the extension of detention due to, ‘the illness or absence of the accused, a necessary witness, a judge or a magistrate; a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or some other good and sufficient cause.’<sup>48</sup>

In addition, there is similarity between cases of terrorism and ordinary criminal procedures. At present, the UAE Federal Decree Law on Combating Terrorism Offences does not determine a limited, minimum or maximum period for provisional detention during an investigation of terrorist crimes, and the competent court can extend the period of provisional detention to an unlimited period. Consequently, in the UAE System, there should be a limit to the period of pre-trial detention for terrorist crimes.

### 2.2.2 The issue of detention pending trial or conditional release (bail).

The last sentence of Article 14 (5) ArCHR indicates that ‘pre-trial detention shall in no case be the general rule’. The HRC stated that the general rule in Article 9 (3) ICCPR requires release from custody pending trial; detention in custody pending trial should be regarded as an exception to this general rule.<sup>49</sup> The ECtHR confirmed that ‘until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.’<sup>50</sup>

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<sup>48</sup> The Prosecution of Offences Act 1985, s 22 (3) (a).

<sup>49</sup> Human Right Committee, General Comment 8, (n 16) para 3; *Jorge A. Giménez v. Argentina*, Case 11.245, Report no 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996), para 84.

<sup>50</sup> *Neumeister v. Austria*, App no 1936/63 (EHRR, 27 June 1968), series A8, the law, para 4.

Article 14 (5) ArCHR emphasises that the arrested or detained person release may be subject to guarantees to appear for trial. This means that the person who was charged with an offence must immediately be released pending trial except when there are ‘relevant and sufficient’ reasons to justify keeping him/her in detention. Therefore, the relationship between the offence with which a detainee has been charged and the length of detention should be dropped. In other words, it is incompatible with ArCHR, if under domestic law, the officer or the judge has no ability to release the detainee, even on bail in certain circumstances, such as when s/he has committed a serious crime.<sup>51</sup>

Despite that, Article 111 FLCP seems contrary to this fact. This is because it does not permit any person convicted of a crime, which is sanctioned by a death penalty or a sentence of life imprisonment, to be released. Consequently, this Article of the FLCP should be dropped completely or replaced with another provision affording the judge a ‘structured’ discretion.

### *2.3 The right to have the lawfulness of the arrest or detention decided without delay by a court*

Article 14 (6) ArCHR requires that ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.’<sup>52</sup>

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<sup>51</sup> See Chapter 3, section 6.1: The relevant reasons for detention on remand.

<sup>52</sup> For the right to have the lawfulness of the deprivation of liberty decided without delay, see Chapter 3, section 7: The right to have the lawfulness of the arrest or detention decided without delay by a court.

The importance of this right is that it gives the opportunity to test the legality of the detention to ensure that there is no possibility of arbitrariness against the detainee.<sup>53</sup>

The person, who is deprived of his/her liberty, has the right to a judicial review immediately after the deprivation of liberty has taken place.<sup>54</sup>

The ‘court’, required by Article 14 (6), does not need to be one of the standard law courts of the State’s judicial machinery. It could be an authority that contains the essential features of a court including the judicial nature and independence from the executive and the involved parties. Also, it must be able to deal with the judicial procedure which is required for the type of deprivation of liberty presented for review.<sup>55</sup>

Regarding this right, equality of arms is one of the most important safeguards because it provides the detainee with the ability to hear the proceedings of the court him/herself or through his legal representative. The ECtHR confirmed that equality of arms is an important guarantee imposed by the ECHR on judicial proceedings<sup>56</sup> and it results from the right to a fair trial, which is required by Article 6 of the ECHR<sup>57</sup> (and similar Articles 16 ArCHR and 14 ICCPR). Therefore, this procedure should be carried out between the parties of the case; the prosecutor and the detainee. It requires, at the same time, the arrestee or detainee’s appearance before the prosecutor to give him the opportunity to reply to the prosecutor’s arguments.<sup>58</sup> The requirement of ‘equality of arms’ is capable of some modification in ‘security’ cases, provided that the detainee has the opportunity to effectively challenge the lawfulness of his/her deprivation of

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<sup>53</sup> See Chapter 3, section 7.2: The rationale of the right.

<sup>54</sup> See Chapter 3, section 7.4: The procedural requirements.

<sup>55</sup> See Chapter 3, section 7.3: The nature of the ‘court’ undertaking the review.

<sup>56</sup> *Kampanis v. Greece*, App no 17977/91 (ECRR, 13 July 1995,) Series A no 318-B, para 47.

<sup>57</sup> *Assenov and Others v. Bulgaria* App no 90/1997/874/1086 (EHRR, 28 October 1998) Reports 1998-VIII, para 162; *Garcia Alva v. Germany*, App no 23541/94 (ECHR, 13 February 2001), para 39.

<sup>58</sup> See Chapter 3, section 7.4: The procedural requirements.

liberty.<sup>59</sup> This is in the event that it necessary for public interest, such as national security, hiding some police investigation methods or to protect the rights of another person.

Challenging the lawfulness of arrest or detention requires the court to undertake a series of periodic reviews, not only one review, in order to guarantee that the detention continues to be justified.<sup>60</sup>

The right to have the lawfulness of the arrest or detention decided without delay is provided under Articles 320 and 321 FLCP.<sup>61</sup> Article 320 FLCP states that members of the Public Prosecution are entitled to enter buildings situated within the scope of jurisdiction of the courts, in which they operate, for the purpose of verifying that there are no illegally detained persons. In this respect, the Public Prosecutor must peruse the registers of writs of arrest and detention; take copies thereof; contact all detained persons; and listen to any complaints which they wish to make.

Furthermore, Article 321 FLCP gives the person, who is deprived of his/her liberty, the entitlement to submit, at any time, a written or verbal complaint asking the person in charge of the detention to notify the Public Prosecutor. The administrator has to accept this request and immediately inform the Public Prosecutor of the complaint. Upon learning of an illegally detained person, a member of the Public Prosecutor has to go immediately to the place where the person is detained, make relevant investigations and order the release of the illegally detained person.

Although the FLCP attempts to provide the right to have the lawfulness of the arrest or detention decided without delay by a judicial authority (the Public Prosecutor being

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<sup>59</sup> See Chapter 4, section 2.4: The requirement of ‘equality of arms’ when appearing before a court.

<sup>60</sup> See Chapter 3, section 7.4.1: Periodic review of continuing detention

<sup>61</sup> See Chapter 1, section 2.2.4: Review of detention.



regarded in UAE law as part of the judiciary),<sup>62</sup> it seems not compliant with the requirements provided under Article 14 (6) ArCHR.

The main issue is that, under Article 14 (6) of the ArCHR, the review of the lawfulness of deprivation of liberty should be taken by a court or an authority, which contains the essential features of a court, including the judicial nature and independence from the executive and the involved parties. However, since the Public Prosecutor in the UAE system is considered to be a part of the judiciary, it is the Public Prosecutor's duty to carry out reviews of the lawfulness of the arrest or detention. This is incompatible with Article 14 (6) because the Public Prosecutor cannot be the court so s/he cannot undertake a review of the lawfulness of deprivation of liberty.

In contrast, Article 321 FLCP is compatible with Article 14 (6) ArCHR in that it gives the arrestee or detainee the opportunity, at any time, to test the lawfulness of his/her deprivation of liberty. It states that the Public Prosecutor, when learning of an unlawful deprivation of liberty, should go to the place where the person has been deprived of his/her liberty; make relevant investigations; and order the release of the person who has been unlawfully deprived of liberty. In addition, regarding the requirement of the appearance of the arrestee or detainee, Article 320 requires that the Public Prosecutor himself/herself, when they review the place of deprivation of liberty, should examine the registers of writs of arrest and detention and contact all persons deprived of their liberty and listen to any complaints which they wish to make.

Consequently, in the UAE system, the right to have the lawfulness of the arrest or detention decided without delay should take place only within a court, because within the State, no other authority has the same features. Also, the requirements of equality of

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<sup>62</sup> See Chapter 1, section 2.1.2.1: The Public Prosecutor.

arms should be adopted between the parties of the case, which is the prosecutor and the detainee. There could be some modification in the equality of arms in ‘security’ cases, provided that the detainee has the opportunity to effectively challenge the lawfulness of his/her deprivation of liberty. Similar to the Special Advocate of the UK, used for national security deportation and for control orders and their replacement – terrorism prevention and investigation measures notices - here UAE law should establish the Special Advocate system for the criminal case, which is ‘a specially appointed lawyer (typically a barrister) who is instructed to represent a person’s interests in relation to material which is kept secret from that person (and his ordinary lawyers) but analysed by a court or equivalent body at an adversarial hearing held in private.’<sup>63</sup>

In addition, Articles 320 and 321 FLCP should provide a further requirement in order to be compatible with Article 14 (6). This requirement is mentioned in the interpretations of the Articles of international human rights instruments, which provide the right to have the lawfulness of the arrest or detention decided without delay by a court. For clarification, the FLCP does not mention how often the Public Prosecutor must perform the review or at which stage of arrest or detention the review must be undertaken. Instead, Article 321 FLCP provides only that, upon learning of an illegally detained person, a member of the Public Prosecution has to go immediately to the place where the person is detained; make relevant investigations; and order the release of the illegally detained person.

Therefore, in the UAE, the court should undertake a series of periodic reviews, not just one review. This procedure is necessary, even if the deprivation of liberty is lawful. This is because providing more monitoring for the deprivation of liberty ensures that the

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<sup>63</sup> The Constitutional Affairs Committee, *Seventh Report* (HC 2005), para 44. See Chapter 1, section 3.1.3.2: Detention without charge in a terrorist case.

deprivation of liberty continues to be justified. The HRC emphasises that ‘the requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.’<sup>64</sup> Moreover, the ECtHR emphasised that the intervals between periodic reviews should be short as the period for pre-trial detention is limited.<sup>65</sup>

#### *2.4 The right to compensation in the event of unlawful deprivation of liberty*

Article 14 (7) ArCHR grants the victim of arbitrary or unlawful arrest or detention the right to compensation, in order to ensure that s/he can use domestic law to obtain compensation for damage resulting from illegal arrest or detention.<sup>66</sup>

What should be emphasised here is that this right is purely making recompense for a breach of a right but, also, it has a further function. It can be a deterrent to prevent the abuse of a suspect in the same way as criminal proceedings against the perpetrators of maltreatment of a suspect, which helps to protect a person’s human rights under ArCHR and UNCAT.

This right applies, whether of arbitrary or unlawful arrest or detention, because of breaches of domestic law or the requirements under Article 14 ArCHR.<sup>67</sup> Furthermore, the term ‘victim’, which is provided under Article 14 (7), includes anyone who suffers material or moral damage because of the illegal deprivation of liberty.<sup>68</sup>

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<sup>64</sup> *Mr. Tai Wairiki Rameka et al. v. New Zealand*, Communication No. 1090/2002, U.N. Doc. CCPR/C/79/D/1090/2002 (2003), para 7.3.

<sup>65</sup> *Bezicheri v. Italy*, App no 11400/85 (EHRR, 25 October 1989), series A no 164, para 21.

<sup>66</sup> See Chapter 3, section 8: The right to compensation in the event of unlawful deprivation of liberty.

<sup>67</sup> See Chapter 3, section 8.1: The relevance of the right.

<sup>68</sup> See Chapter 3, section 8.2: The need for damage to the victim.

Despite the importance of this right, in the UAE system, there is no counterpart to this right for both kinds of arbitrary deprivation of liberty (violation of the domestic law or the ArCHR).

Although Article 197 of the UAE Federal Law of Civil Procedure provides for a general compensation complaint, the compensation complaint referred to in this Article is only against the judge and Public Prosecutor if it appears from his/her decision that there has been cheating, fraud or a serious professional error.<sup>69</sup>

It could be argued that, as required clearly in Article 14 (7) ArCHR, there should be a particular compensation complaint in the event of unlawful arrest or detention. Furthermore, this particular complaint must be sufficiently comprehensive and not only cases of cheating, fraud or a serious professional error to cover any arbitrary or unlawful deprivation of liberty. Also, such a complaint must be allowed against any category of person, and not only the judge and Public Prosecutor, who has the authority to take procedures against the right to liberty.

### **3. The questionably compliant areas**

There are three procedures which can be considered questionably compliant. The requirements of the right to liberty and security; the right to contact with family members and relatives; and the right to have a medical examination.

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<sup>69</sup> Serious professional error is the error committed by the judge or Public Prosecutor in the incidence of them being grossly wrong, and this error must show that the judge or Public Prosecutor has been negligent in his/her duties. Egyptian Appeal No51/1163: 05/03/1985.

### *3.1 The right to liberty and security*

Article 14 (1) ArCHR provides for an individual's right to liberty and security. It states that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.'<sup>70</sup>

Article 14 (1), provides a guarantee against arbitrary deprivation of liberty. This guarantee ensures that, in applying the domestic law, there is no arbitrary deprivation of liberty by a public authority, or that the arbitrary deprivation of liberty is considered in the event that the domestic law itself is incompatible with Article 14.<sup>71</sup>

In the UAE system, the right to liberty is considered to be one of an individual's essential rights. Therefore, it is provided for in the Constitution of the UAE. Article 26 states that 'Personal liberty is guaranteed to all citizens. No person may be arrested, searched, detained or imprisoned except in accordance with the provisions of law.' Also, Article 28 provides that 'An accused shall be presumed innocent until proven guilty in a legal fair trial. The accused shall have the right to appoint the person who is capable to conduct his defence during the trial.'

Although it seems that UAE law is compatible with Article 14 (1), there is no explicit condition forbidding the arbitrary deprivation of liberty. This is because the concept of arbitrary deprivation of liberty can be applied to two situations. Firstly, it could be arbitrary in the case that deprivation of liberty is incompatible with domestic law. Secondly, the case of the deprivation of liberty could be compatible with domestic law but the latter could be incompatible with the ArCHR. Consequently, the UAE system seems questionably compliant with the ArCHR because it provides only for the first

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<sup>70</sup> See Chapter 2 section 2: The right to liberty and security of a person.

<sup>71</sup> See Chapter 2 section 3.2.1.2: Two situations of arbitrary deprivation of liberty.

instance of protection against arbitrary deprivation of liberty. This is clear under Article 26 of the UAE Constitution, which states that ‘Personal liberty is guaranteed to all citizens. No person may be arrested, searched, detained or imprisoned except in accordance with the provisions of law.’ Consequently, any breach of the provisions of UAE law leads to the invalidity of the unlawful measure and the invalidity of any evidence, which follows from related procedures. Thus, there is no UAE case-law to deal with the matter of whether or not domestic law itself is incompatible with the ArCHR; they only deal with breaches of domestic law. For example, in Appeals No. 289 and 358, the Federal Highest Court emphasised that, for the non- Arabic speaker without an interpreter, the investigation was invalid and any evidence that followed from this invalid procedure was also invalid.<sup>72</sup>

Therefore, since UAE law must cover both cases of arbitrary deprivation of liberty, the UAE Constitution should provide in general for the condition of forbidding the arbitrary deprivation of liberty to be compatible with Article 14 (1).

Article 14 (2) ArCHR provides the requirements for the deprivation of liberty. It states that ‘No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.’<sup>73</sup>

It can be argued that Article 2 FLCP provides a similar requirement regarding the deprivation of liberty. It emphasises that no one shall be arrested, searched, detained or imprisoned except in cases under the conditions provided for in the FLCP. It adds that detention and imprisonment may not occur except in places specially reserved for each

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<sup>72</sup> The Federal Highest Court, Sharia and Criminal 03 June 2007: Appeal No. 289, 358 for the 26<sup>th</sup> judicial year, para 2.

<sup>73</sup> See Chapter 2 section 3.2.2.3: Grounds and circumstances for deprivation of liberty.

of them, and for the period specified in the order issued by the competent authority. For illustration, Article 45 FLCP regulates the requirements that permit a Judicial Police Officer to arrest any person without a warrant from a Public Prosecutor. It states that a Judicial Police Officer can arrest without warrant if there is sufficient evidence to suggest that a person has committed a crime in any of the following circumstances. These are: firstly, where s/he has committed a felony. Secondly, if s/he is caught in the act of committing a misdemeanour punishable by a penalty other than a fine. Thirdly, in the case of a misdemeanour sanctioned by a penalty other than a fine where it is feared that the accused will flee; and finally, in cases of misdemeanours of theft, deceit, breach of trust, severe transgression, assault of public authority officers, violation of public morals, and misdemeanours concerning arms, ammunitions, intoxicants and dangerous drugs.

### 3.1.1 The concept of a deprivation of liberty

Under Article 14 ArCHR, there is no express requirement for the State to make clear provision for those situations of deprivation of liberty. Since the concept of deprivation of liberty has given rise to some difficulties of interpretation, the State should provide clearer guidance for interpretation of deprivation of liberty.<sup>74</sup> For example, keeping a person under house arrest is sometimes considered to be a deprivation of liberty,<sup>75</sup> while sometimes there is a restriction on it.<sup>76</sup> Also, in some cases, stopping and searching a person for a short period was a deprivation of liberty.<sup>77</sup> In contrast, in some situations,

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<sup>74</sup> See Chapter 2, section 3.1: The notion of deprivation of liberty.

<sup>75</sup> *N.C. v. Italy*, App no 24952/94 (ECHR, 11 January 2001), para 33

<sup>76</sup> *Raimondo v. Italy* App no 12954/87 (EHRR, 22 February 1994), Series A no 281-A, paras 9, 39.

<sup>77</sup> *Gillan and Quinton v. The United Kingdom*, App no 4158/05 (ECHR 12 January 2010), para 57.

forcing some people to remain in a location for many hours in a police cordon was not a deprivation of liberty.<sup>78</sup>

The important of consideration of what is considered to be a deprivation of liberty is to ensure that the one deprived of his/her liberty is entitled to receive the certain guaranties provided in Articles 14 ArCHR, as no such guarantees are provided for the one restricted on his/her liberty.

Consequently, UAE law should provide a clear picture for the situations of deprivation of liberty and the restriction on liberty.

### 3.2 *The right to contact with family members and relatives*

The second sentence of Article 14 (3) ArCHR provides the right to contact with family members and relatives. There is no explicit statement of such a right in either the ICCPR or ECHR. However, case-law under Articles 17 ICCPR (*Miguel Angel Estrella v. Uruguay*)<sup>79</sup> and 8 ECHR (*Mcveigh and others v. The United Kingdom*)<sup>80</sup> read such a right into respect for family life.<sup>81</sup>

This right is important, as this could decrease the arrestee or detainee's suffering. This is because it is usual that the deprivation of liberty comes unexpectedly, which could influence the daily life of the person deprived of his/her liberty. Furthermore, this right could provide a protection of detainee's rights. This is because allowing the person

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<sup>78</sup> *Austin and others v. the United Kingdom* App no 39692/09, 40713/09 and 41008/09 (ECHR, 15 March 2012), para 67

<sup>79</sup> *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990), para 9.2.

<sup>80</sup> *Bernard Leo McVeigh, Oliver Anthony O'Neill and Arthur Walter Evans v. The United Kingdom* App no 8022/77, 8025/77 and 8027/77 (Commission Decision, 18 March, 1981), para 237.

<sup>81</sup> See Chapter 3, section 3: The right to contact with family members and relatives.



deprived of his/her liberty to contact with the outside world, means that it provides an external monitoring, thus ensuring the respecting of an individual's right.

The literal or textual reading of the term 'contact', provided under Article 14 (3), indicates that all kinds of contact (physical contact and correspondence) shall be permitted.

Regarding the provisional detainee's right to contact with family members and relatives, Article 17 of the UAE Federal Law of the Regulation of Punitive Facilities provides that category 'A' prisoners shall be entitled to the right to receive visits and communicate with any person by correspondence unless prohibited by the confinement order.<sup>82</sup> In addition, Article 18 mentions that foreign detainees shall have the right to communicate with their consuls or other authorities governing their interests.

The FLCP provides one case which could allow the Public Prosecutor to prevent the arrestee or detainee from contact with other people, with the exception of his/her attorney. This is in the event that the investigation procedures so necessitate.<sup>83</sup>

It seems clear that the UAE system provides this right as required by the ArCHR. Nevertheless, to be compatible with Article 14 (3), it needs to be widened to cover any arrested or detained person, not only those kept in punitive facilities. This is because some people may be arrested and be released before entering detention, and some people may be detained in other places such as hospitals.

In addition, it could be suggested that, after the deprivation of liberty, this right should be given promptly to the arrestee or detainee, since it could reduce their suffering

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<sup>82</sup> Article 16 of the Federal Law of the Regulation of Punitive Facilities provides four categories (A,B, C and D) of people who may be kept in punitive facilities, and the provisional detainee classified in Category 'A'. See Chapter 1, section 2.2.6: The right to contact with family members and relatives.

<sup>83</sup> FLCP, art 109.

because, as mentioned previously, the deprivation of liberty usually comes unexpectedly, which influences the person's daily life.

With regard to this issue, the UAE's decision makers could be guided by section 56 of the PACE which provided the right, when arrested, to have someone informed. It states that 'Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there.'<sup>84</sup> The same section provides the circumstances in which delay is permitted. These are in the case that exercising this right might lead to interference with evidence; physical injury to other persons; aware the other suspected not yet arrested; prevent return property obtained from a crime;<sup>85</sup> or gain the detainee an advantage from his/her 'criminal conduct'.<sup>86</sup> In any case, the detainee must be allowed to exercise this right no later than 36 hours from arrival at the police station.<sup>87</sup> For the UAE, this right should not be delayed more than 48 hours. This is because the aim of the specific period of 36 hours, in England and Wales, is that it provides an external monitoring of the legality of the deprivation of liberty before bringing the detainee before a judicial authority, which tests the lawfulness of the deprivation of liberty. Therefore, as in the UAE, the arrestee or detainee may be brought before a judicial authority within 48 hours, s/he must be allowed contact with family members and relatives no later than 48 hours.

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<sup>84</sup> Regarding the right to have someone informed when arrested in the UK, see Chapter 1, section 3.2.3: The right to have someone informed when arrested.

<sup>85</sup> PACE, s 56 (5) (a) - (c).

<sup>86</sup> PACE, s 56 (5A) (a), (b).

<sup>87</sup> PACE, s 56 (3).

This is because allowing the person deprived of his/her liberty to contact with the outside world, means that it provides an external monitoring, thus ensuring the respecting of an individual's right.

### *3.3 The right to have a medical examination*

Article 14 (4) ArCHR provides that 'Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.'<sup>88</sup>

The reading of Article 14 (4) indicates that it requires merely that the arrestee or detainee can ask for a medical examination, without further requirements such as that there must be a medical place in each institution containing arrestees or detainees. It only requires that the arrested or detained person 'must be informed of that right'.

Article 29 of the Federal Law of the Regulation of Punitive Facilities requires that every facility has one or several physicians, one of whom should reside therein, and shall be entrusted with prisoners' medical care as determined by the implemented regulation.<sup>89</sup>

Also, the same Article states that a physician is required to examine every prisoner who enters the facility; to enter his/her physical and mental condition in the General Register for every category of prisoner; and to determine the works s/he can perform based on his/her physical condition. Furthermore, Article 30 of the same law requires that the physician inspect the facility and the prisoners to assess the health aspects and that, as decided by the physician, the facility officer is required to implement health measures.

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<sup>88</sup> For more about this right, see Chapter 3, section 4: The right to have a medical examination.

<sup>89</sup> See Chapter 1, section 2.2.7: The right to have a medical care.

Since provisional detainees are one type of people who may be kept in punitive facilities, it is obvious that the UAE system provides the medical care for the detained person required under Article 14 (4). Despite this, it appears that it is only questionably compliant with the ArCHR. This is because Article 14 (4) requires this right for anyone deprived of his/her liberty and detained in any place but the medical care, provided under the Federal Law of the Regulation of Punitive Facilities, seems to be restricted to people kept in punitive facilities. Furthermore, it is important under Article 14 (4) that the person deprived of his/her liberty is informed of this right. However, there is no such requirement in the UAE system.

As a result, it could be suggested that the UAE System should grant this right to all persons deprived of his/her liberty and arrested or detained in any place. Also, the arrestee and detainee should be informed of this right.

#### **4. The compliant areas**

There is one area, in the UAE system, which is clearly compliant with the ArCHR's requirements. This is the right to be informed of the reasons for arrest at the time of arrest and to be informed promptly of any charges against oneself.

Article 14 (3) ArCHR requires that 'anyone who is arrested shall be informed at the time of arrest, in a language which he understands, of the reasons for his arrest, and shall be promptly informed of any charges against him.'<sup>90</sup>

This right protects a person's liberty from a deprivation of liberty without legal basis.

This is because the aim for notification is to make clear whether or not there are any

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<sup>90</sup> For the requirement of the right of notification and the interpreting of Articles 14 (3), see Chapter 3, section 2: The right to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges against oneself.

legal grounds for a person's deprivation of liberty. In other words, it gives the person deprived of his/her liberty a chance to challenge the lawfulness of his/her deprivation of liberty and take the necessary steps to question it if they deem it inappropriate.<sup>91</sup>

Under Article 14 (3), there are two kinds of notification which the arrestee must receive. These are the reason for arrest and the charge against the arrested person. The reason for arrest must be given to the arrestee when it occurs, whilst the second notification should be delivered promptly; a matter which depends on the circumstances of each case.<sup>92</sup> The necessary information should be delivered in a language, which the person understands,<sup>93</sup> and should be sufficient for the arrested person.<sup>94</sup> Also, it is required to be delivered, in an adequate manner, either orally or in writing.<sup>95</sup>

With regard to the UAE system, a person can be arrested by a Judicial Police Officer or a Public Prosecutor.<sup>96</sup> Where arrest is by a Judicial Police Officer, the reason for arrest is implicitly required, under Article 47 FLCP, to be delivered immediately after arrest. While, in the case that a person is arrested by the Public Prosecutor, Article 99 explicitly requires that a member of the Public Prosecutor must inform the arrested person of the charge against him/her at the beginning of the investigation [after the arrest or within 24 hours].<sup>97</sup>

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<sup>91</sup> See Chapter 3, section 2.2: The rationale of the right.

<sup>92</sup> See Chapter 3, section 2.2.1: The notions of 'at the time of arrest' and 'promptly'.

<sup>93</sup> See Chapter 3, section 2.2.2: The language of the notification.

<sup>94</sup> See Chapter 3, section 2.2.3: The nature of the information to be conveyed.

<sup>95</sup> See Chapter 3, section 2.2.4: The method of informing the detainee.

<sup>96</sup> Regarding the right of notification in the UAE law, see Chapter 1, section 2.2.2: The right to be informed of the reason for arrest and the charge against oneself.

<sup>97</sup> Article 104 states that 'The public prosecution member must immediately interrogate the arrested person or, if this be impossible, he should be put in one of the specialized places of detention until his interrogation. The period of detention must not exceed twenty four hours.....'

Regarding the first situation, the arrested person should be brought before the Public Prosecutor within 48 hours from the time of the arrest,<sup>98</sup> this means that the arrestee will be informed within 48 hours of the charge against him/her (by the Public Prosecutor). There is an exemption for this procedure, which allows for the arrested person to be informed about the charge against him/her within 72 hours rather than 48 hours. Under Article 104 FLCP, the member of the Public Prosecutor must interrogate the arrested person immediately [after bringing him/her before the Public Prosecutor within 48 hours from the time of the arrest], or if this is impossible, s/he should be put in one of the specialised places of detention until his/her interrogation. The period of detention must not exceed 24 hours. Altogether, bringing the arrestee before the Public Prosecutor within 48 hours from the time of the arrest and detaining him/her by the Public Prosecutor for up to 24 hours before the interrogation, means that the arrestee must receive the charge against him/her within 72 hours.

In summary, firstly, in the case of the arrest being by a Judicial Police Officer, the reason for arrest will be delivered immediately after arrest and the charge against the arrested person will be delivered promptly (within 72 hours). All these procedures are compatible with Article 14 ArCHR. Secondly, in the case that a person is arrested by the Public Prosecutor, the charge against the arrestee will be delivered immediately after arrest or within 24 hours. This is also compatible with Article 14.

In addition, although Article 14 (3) requires that the notification be provided in a language, which a person deprived of his/her liberty understands, the previous Articles of the FLCP do not stipulate such a requirement. However, it can be said that there is a similar requirement in UAE law. This can be found under the right to have an

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<sup>98</sup> FLCP, art 47.

interpreter that provided under Article 70 FLCP.<sup>99</sup> Under this right, the existence of the interpreter must be in all criminal processes.<sup>100</sup> This indicates that the arrestee should be informed in a language s/he understands.

As a result, all requirements of the right to be informed of the reasons for arrest at the time of arrest, and to be informed promptly of any charges against oneself, are fulfilled under the FLCP. Despite this fact, it would be preferable if Article 47 FLCP explicitly required that the arrestee should be informed of the reason for arrest, immediately upon arrest, exactly as provided for in Article 14 (3). This is because it may help the person to understand that s/he is under arrest, and not only being asked questions by the Judicial Police Officer.<sup>101</sup>

Moreover, rather than depending on the right to have an interpreter provided under Article 70 FLCP, Articles 47 and 99 should add the condition that notification should be delivered in a language that the person understands. This is because it will be one of the arrestee's rights in the evidence gathering and investigation stages, and it cannot be interpreted otherwise, as happened in Appeals No. 294 and 709 for the 26<sup>th</sup> judicial year.<sup>102</sup> Also, if it is one of the arrestee's rights s/he can use the right to compensation in the event of unlawful deprivation of liberty provided under Article 14 (7) ArCHR, which specified the victim's unlawful deprivation of liberty.

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<sup>99</sup> See Chapter 1, section 2.2.5: The right to have an interpreter.

<sup>100</sup> The Federal Highest Court, Sharia and Criminal 05 December 2006, Appeal No. 12 for the 24<sup>th</sup> judicial year and Appeal No. 88, 165 for the 27<sup>th</sup> judicial year, para 3.

<sup>101</sup> Similar to s 28 (1) PACE, which provides that '...where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest.'

<sup>102</sup> In Appeals No 294 and 709 in the 26<sup>th</sup> judicial year, the Federal Highest Court found that the confession in the front of the Judicial Police Officer (during the evidence gathering stage) was unlawful since the applicant was Iranian and did not understand Arabic and because of the absence of an interpreter. The Federal Highest Court, Sharia and Criminal 14 November 2006, Appeal No 294, 709 for the 26<sup>th</sup> judicial year, para 4.

## **5. Conclusion**

This evaluation of the regulations of arrest and provisional detention in UAE law has revealed gaps between the current law and the requirements of the ArCHR. The main issue regarding incompatibility with Article 14 ArCHR of UAE law is the role of the Public Prosecutor. S/he exercises the duty of the judicial authority despite lacking the character of independence required for such authority to protect an individual's rights against the abuse of power. Therefore, his/her duty should be transferred to a court or judge because the independent judicial authority monitoring ensures the detainee's rights under Article 14 ArCHR; and helps prevent a breach of the Article 8 ArCHR that forbids torture and UAE's UNCAT obligations.

The UAE system could be divided into three categories. These are: the compliant areas with Article 14 ArCHR; the questionably compliant areas; and the non-compliant areas. Therefore, the following passage considers these three categories.

There are four areas which are non-compliant with the requirements of the ArCHR.

The first example of non-compliance can be found in the right, provided under Article 47 FLCP, to be brought promptly before a judge or other judicial officer. Under this Article, any person, deprived of his/her liberty, must be brought before the Public Prosecutor within 48 hours or be released. This procedure is incompatible with Article 14 (5) ArCHR. The main issue regarding this is that, under UAE law, the arrestee is brought before the Public Prosecutor, although s/he does not have the independent character required for the officer, authorised by law, to exercise judicial power. In addition, the 48 hours detention without judicial supervision could be the most suitable



period of time to achieve a balance between the need of the investigation and the detainee's rights.

Secondly, the right to trial within a reasonable period of time or to release pending a trial, which is regulated under Article 110 FLCP (for normal crimes) and under Article 35 of the UAE Federal Decree law No. 1 (2004) on Combating Terrorism (for terrorist crimes), is also non-compliant with Article 14 (5). This is because the first two Articles permit the Public Prosecutor to keep a detainee for a limited period (up to 21 days in normal crimes and up to 6 months in terrorist crimes), while the Public Prosecutor is not a judge, and cannot be considered to be an officer, authorised by law, to exercise judicial power since s/he does not have the character of independence. Secondly, under the same Articles, the Public Prosecutor may keep a detainee (up to 21 days in normal crimes and up to 14 days in terrorist crimes) in pre-trial detention without requiring the existence of sufficient reasons.

Next, Articles 320 and 321 FLCP provide together a similar right to that of Article 14 (6) ArCHR. The two Articles of the FLCP grant the person deprived of his/her liberty the entitlement to have the lawfulness of the arrest or detention decided by the Public Prosecutor immediately upon the submission of his/her complaint. Despite this fact, these Articles are deemed to be non-compliant with Article 14 (6) ArCHR. This is because the review of the lawfulness of deprivation of liberty should be taken by a court or an authority that contains the essential features of a court. These are independence of the parties and conducting proceedings in accordance with equality of arms. The Public Prosecutor lacks these because s/he is a party to the case.

Finally, Article 14 (7) ArCHR grants the victim of arbitrary or unlawful arrest or detention the right to compensation, while Article 197 of the UAE Federal Law of Civil

Procedure provides only for general compensation and not specifically for the arbitrary or unlawful deprivation of liberty. Also, the latter Article restricts the compensation to decisions made by cheating, fraud or serious professional error, while Article 14 (7) ArCHR permits such a complaint against any arbitrary or unlawful deprivation of liberty. In addition, under Article 14 (7) ArCHR, this right can be against anyone who has performed arbitrary or unlawful arrest or detention, while the UAE Federal Law of Civil Procedure restricts this compensation claim to being against a judge or Public Prosecutor.

With regard to the areas where UAE law seems questionably compliant with the ArCHR's requirements, there are three procedures that can be considered questionably compliant. Firstly, Article 26 of the UAE Constitution grants a person the right to liberty, which means that no one shall be deprived of his/her liberty except in accordance with the provisions of law. This Article is questionably compliant with Article 14 (1) ArCHR because both Articles provide the right to liberty. However, the UAE Article does not provide the requirement of forbidding the arbitrary deprivation of liberty, which covers two situations. Firstly, in the case that deprivation of liberty is incompatible with domestic law. Secondly, the case of the domestic law but the latter could be incompatible with the ArCHR.

Secondly, despite the fact that Article 14 (3) ArCHR grants any arrested or detained person the right to contact his/her family members and relatives, the UAE system, under Articles 17 and 18 of the Federal Law of the Regulation of Punitive Facilities, restricts that right only to detainees kept in punitive facilities.

Finally, similar to the previous right, Article 29 of the Federal Law of the Regulation of Punitive Facilities grants the right to have a medical examination only to detainees of

punitive facilities, although Article 14 (4) grants this right to anyone arrested or detained. Also, although it is mentioned explicitly in Article 14 (4), Article 29 of the Federal Law does not provide that the person, deprived of his/her liberty, must be informed of this right.

In UAE law, the area compliant with the ArCHR, can be found only under the right to be informed of the reasons for arrest at the time of arrest and to be informed promptly of any charges against oneself, which is provided under Articles 47 and 99 FLCP. These are well-matched with Article 14 (3) ArCHR.

## CONCLUSION

This study has explored the regulation of arrest and provisional detention in the UAE and whether or not these procedures were compatible with Article 14 ArCHR, which provides the right to liberty. This is very important since it offers guidance to the UAE's decision makers, which will help to enact a law containing procedures compatible with the requirements of Article 14 ArCHR. To determine the compatibility of the UAE system with the ArCHR (in particular Article 14) one must first interpret the requirements under the ArCHR's Articles. Since there is no interpretation by the Arab Committee of Human Rights for the ArCHR's Articles, which came into force on 15 March 2008, a clear interpretation of this Charter is nearly impossible without using the established interpretations of comparable instruments. Both Article 9 ICCPR and Article 5 ECHR are drafted in similar terms, and have been subject to interpretation. Accordingly, reference has been made to these two instruments in interpreting Article 14. A further reason for using Article 9 ICCPR is that a number of States parties to the ArCHR have also ratified the ICCPR.

To achieve the aim of this thesis, the following questions were raised:

- How is arrest and provisional detention regulated currently (in the context of both ordinary crime and counter-terrorism) in the UAE, and how does this compare with the approach adopted by England and Wales?
- To what extent do, or should, provisions of the ICCPR and the ECHR properly inform the interpretation of Article 14 ArCHR, both in relation to its substantive limits and the procedural guarantees required?

- To what extent are the requirements of deprivation of liberty, and guarantees following this deprivation, affected during counter-terrorism regimes and times of war or public emergency?
- Does the regulation of arrest and provisional detention in the UAE comply fully with the standards set by Article 14 ArCHR? If not, what further reforms are required by international standards binding on the UAE, taking into account the implementation of international standards in England and Wales?

Since this thesis used the explanation of Article 9 ICCPR and Article 5 ECHR to suggest an appropriate interpretation of Article 14 ArCHR, the study considered relevant case-law and judgments of the Human Rights Committee and the European Court of Human Rights. Also, this thesis analysed written legal literature that involved the right to liberty and the procedures of deprivation of liberty, which were found in books and articles.

Chapter 5 of the thesis evaluated arrest and provisional detention in UAE law to establish whether or not the UAE system was compatible with the requirements of Article 14 ArCHR. In analysing the compliance of UAE law with the requirements of Article 14 ArCHR, only the ‘law in the books’ has been considered. There have not been empirical studies of the ‘law in action’ in this area in the UAE, which would indicate whether the law as set out in UAE legislation is reflected in the practice of the authorities in their day to day actions. Carrying out such empirical studies in the UAE would be a valuable addition to research in this area. The conclusions of the analysis in this thesis are as follows:

Firstly, the only the fully compliant area was found under the right to be informed of the reasons for arrest at the time of arrest, and to be informed promptly of any charges against oneself.

Secondly, three areas were found where the UAE law is questionably compliant with the ArCHR. These are: the requirement of the right to liberty and security; the right to contact with family members and relatives; and the right to have a medical examination.

Finally, there are four areas in the UAE system found to be non-compliant with the requirements of the ArCHR. These are: the right to be promptly brought before a judge or other judicial officer; the right to trial within a reasonable period of time, or to be released while trial is pending; the right to have the lawfulness of the arrest or detention decided without delay by a court; and the right to compensation in the event of unlawful deprivation of liberty.

With regard to non-compliant areas, the main problem is that the role of the Public Prosecutor, who exercises the duty of the judicial authority, lacks the character of independence required for such an authority.

There are a number of important changes that need to be made in UAE law concerning the regulation of arrest and provisional detention, in order to ensure complete compliance with the ArCHR. The UK system provides a model that can be adapted to achieve this compatibility.

Firstly, for the requirements of the right to liberty and security, the Constitution of the UAE should provide the requirement of forbidding the arbitrary deprivation of liberty as it protects a person deprived of his/her liberty from all kinds of arbitrary arrest or

detention. This runs counter to the current Constitution, which provides only a guarantee against the breach of the domestic law.

Secondly, the right to contact with family members and relatives should be extended to any arrested or detained person and not only persons kept in punitive facilities.

Thirdly, the right to have a medical examination should be granted, also to everybody who has been arrested or detained, and not only to the categories of persons kept in punitive facilities. In addition, the person deprived of his/her liberty must be informed of these rights.

Fourthly, the role of the Public Prosecutor should be amended. In fact, this issue should be raised not only in UAE law but, also, in all Arab States since they have the same procedure, whereby the Public Prosecutor is a part of judicial authority. This is despite the Public Prosecutor's lack of independence from the case parties since s/he investigates the person brought before him/her; directs indictment; and brings criminal cases to courts and pursues them.

This matter is also relevant to the Arab States, which are parties to the ICCPR.<sup>1</sup> With regard to the role of the Public Prosecutor, these States did not make any reservation or interpretative declarations to their application of the ICCPR.<sup>2</sup> Consequently, all the Arab States breach the requirements of the ArCHR, assuming that Article 14 ArCHR is to be interpreted in the same way as Article 9 ICCPR and Article 5 ECHR. Therefore, because the Public Prosecutors are considered to be part of the judicial authority,

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<sup>1</sup> As at 08 May 2011 there are 11 parties to the Arab Charter: these are Jordan, Algeria, Bahrain, Libya, Syrian Arab Republic, Palestine, the UAE, Yemen, Qatar, the KSA and Lebanon. Of these, the following are also parties to the ICCPR: these are Jordan, Algeria, Bahrain, Libya, Syrian Arab Republic, Yemen, and Lebanon.

<sup>2</sup> UN, 'Treaty Collection: Chapter IV, Human Rights, International Covenant on Civil and Political Rights'. <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)> accessed 15 September 2012.

despite lacking the character of independence, many of their key roles must be transferred to a court or judge. This is because there is no other authority in the UAE who may exercise the role of the court. Adopting this reform would mean that anyone arrested should be brought before a court within 48 hours, or be released.

Moreover, with regard to pre-trial detention, the judge of the court should be the one to order a detainee to be kept in such detention. There must be relevant and sufficient reasons to justify pre-trial detention, in order to avoid the duration of provisional detention exceeding the length of the prison sentence commensurate to a detainee's crime.

Next, the performance of the role of reviewing the lawfulness of the deprivation of liberty should be referred only to the court, and there should be a periodic review of continuing detention. The equality of arms should be adopted between the parties of the case, that is, the prosecutor and the detainee. This procedure should apply regardless of the facts and circumstances of the case. The detainee, or his/her legal representative, has the opportunity to appear at an oral hearing during which no information should be hidden. There is an exception that may allow for restrictions, which enables a prosecution to conceal some information when public interest, such as national security, is concerned. Nevertheless, the detainees must obtain sufficient information to challenge the lawfulness of their deprivation of liberty. There is a recommendation here (for the criminal case), which is to adopt the Special Advocate procedure similar to which the UK uses for national security deportation and for control orders. Regarding this, the Special Advocate is able to represent a detainee's interests in relation to material that is kept secret.



Finally, there should be a particular compensation complaint in the event of unlawful arrest or detention, in addition to the general compensation complaint against the judge and Public Prosecutor, if it appears from his/her decision that there has been cheating, fraud or a serious professional error. Moreover, it should be against any category of person, not only the judge and Public Prosecutor, who has the authority to take procedures of arrest or detention.

After what have seen that the Human Rights Committee has played a major role in providing an interpretation of the ICCPR. There is considerable scope for the Arab Human Rights Committee to undertake a similar role in relation to the interpretation of the ArCHR. Firstly, it should establish general comments on the Articles of the ArCHR, which should include a comprehensive interpretation of the requirements under these Articles. Secondly, referring to Article 52 ArCHR, which states that ‘Any State party may propose additional optional protocols to the present Charter ....’ there should be an Optional Protocol to the ArCHR (similar to the First Optional Protocol to the ICCPR)<sup>3</sup> that gives the Arab Human Rights Committee competence to examine individual complaints, in light of an alleged breach of the ArCHR by State parties, which generates or produces case-law to explain the ArCHR’s Articles.

Since this study is offering an authoritative interpretation for Article 14 ArCHR, this may encourage other researchers to develop appropriate interpretations for the other Articles.

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<sup>3</sup> This Optional Protocol, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9.

## **APPENDICES**

### **Appendix 1**

#### **Article 4 of the Arab Charter of Human rights**

1. In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.
2. In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13 , article 14, paragraph 6, article 15, article 18, article 19, article 20, article 22, article 27, article 28, article 29 and article 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.
3. Any State party to the present Charter availing itself of the right of derogation shall immediately inform the other States parties, through the intermediary of the Secretary-General of the League of Arab States, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

## **Appendix 2**

### **Article 14 of the Arab Charter of Human rights**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
2. No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.
6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

## **Appendix 3**

### **Article 4 of the International Covenant on Civil and Political Rights**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

## **Appendix 4**

### **Article 9 of the International Covenant on Civil and Political Rights**

1. 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.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **Appendix 5**

### **Article 5 of the European Convention on Human Rights and Fundamental Freedoms**

1. 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:
  - a. the lawful detention of a person after conviction by a competent court;
  - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
  - f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## **Appendix 6**

### **Article 15 of the European Convention on Human Rights and Fundamental Freedoms**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.



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