



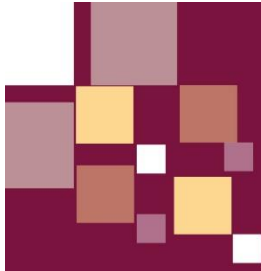
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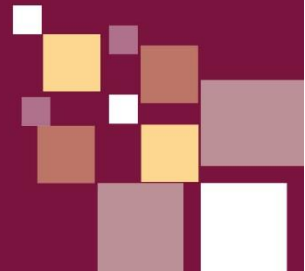


**A HUMAN RIGHTS
FRAMEWORK:**

**BACKGROUND RESEARCH FOR THE
TRUTH RECOVERY DESIGN PROCESS**

Maeve O'Rourke

September 2021



**A HUMAN RIGHTS FRAMEWORK:
BACKGROUND RESEARCH FOR THE TRUTH RECOVERY DESIGN PROCESS**

Maeve O'Rourke¹

27 September 2021

Introduction

This Background Research Report supports Chapter 2 of the Truth Recovery Design Panel's Report and the Panel's recommendations and rationale (which are derived from victims-survivors' and relatives' submissions, contextualised by the applicable human rights law framework and research regarding comparative investigation and reparation models). The paper focuses on the human rights violations that are continuing today as a result of the gender-based institutional and family separation system that operated in Northern Ireland (NI), with cross-border and international elements, during the 20th century. The most clearly apparent of these ongoing forms of human rights violation are: continuing disappearances, continuing denial of the right to identity, continuing interference with freedom of expression, continuing discrimination, and a continuing lack of an effective investigation and other measures to ensure access to justice and redress for widespread, systematic and gravely harmful human rights abuses.

Part 1 of this paper provides a summary of the international and European human rights treaties that applied in the past and continue to apply today to the actions of the United Kingdom (UK) and NI state authorities, including the State's actions (or lack thereof) to prevent and respond to abuse by non-state / 'private' individuals and organisations.

Part 2 explores human rights case law (primarily that of the European Court of Human Rights (ECtHR)) to illuminate the meaning of disappearances, denial of the right to identity, unlawful interference with freedom of expression, and discrimination.

Part 3 explains, again by reference primarily to ECtHR case law, the circumstances in which the state is obliged to establish a human rights-based, 'effective investigation'. These circumstances are, in summary, where the state has reason to believe that serious human rights violations have occurred concerning the right to life; the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery, servitude and forced or compulsory labour; the right to liberty; or the right to respect for private and family life.

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Part 4 outlines the requirements of an ‘effective investigation’ according to European human rights law and a range of other international human rights law instruments and documents. The Republic of Ireland’s (ROI) legal responsibility to facilitate and cooperate with an investigation in NI is also discussed in this part.

Part 5 discusses the additional access to justice and redress measures that the state authorities must implement given the extensive evidence of serious and systematic human rights violations, including continuing human rights violations, arising from the 20th century system of gender-based institutionalisation and family separation.

1. Overview of the UK and NI authorities’ human rights law obligations

The human rights treaties which applied to the UK (Great Britain and Northern Ireland) during the period of the institutions’ operation include:

- the Forced Labour Convention 1930, which came into effect in 1932 and the UK ratified on 3 June 1931,¹
- the European Convention on Human Rights (ECHR), which came into effect in 1953 and the UK ratified in 1951,²
- the Abolition of Forced Labour Convention 1957, which came into effect in 1959 and the UK ratified in 1957,³
- the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which came into effect in 1957 and the UK ratified that same year,⁴ and
- the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which came into effect in 1976 and the UK ratified that same year.

In addition, the UK became bound by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵ in 1986, and by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁶ in 1988—shortly before the last Mother and Baby institution closed. Since the institutions closed, the UK has become party to the Convention on the Rights of the Child (UNCRC) (which entered into force in 1990 and the UK ratified in 1991)⁷ and the Convention on the Rights of Persons with Disabilities (which entered into force in 2008 and the UK ratified in 2009).⁸ The NI and UK state authorities must today treat victims and survivors and the relatives of those who experienced institutionalisation and family separation in a way that complies with these treaties also.

These human rights treaties apply to the state only: they do not impose duties on ‘private’ individuals or organisations. However, the state’s responsibility under international human rights law is extensive. As the ECtHR has repeatedly held, a state cannot ‘absolve itself from responsibility by delegating its obligations to private bodies or individuals’.⁹ The state is

directly responsible not just for the actions of bodies and personnel exercising legislative, executive or judicial powers, but also for the actions of:

- any other person or organisation which the state has empowered to exercise elements of governmental authority (while they are acting in that capacity);
- any person or group acting on the instructions of, or under the direction or control of, the state; and
- any person or group of persons in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.¹⁰

In addition, the state is obliged by all of the above human rights treaties to take positive steps to prevent abuse at the hands of ‘private’ actors—as explained further below.¹¹

Therefore, both the state’s own participation in institutional and family separation abuses *and* its failure to prevent non-state organisations and individuals perpetrating these abuses are essential aspects of the state’s responsibility under human rights law. Today, the state has obligations relating to its own actions and those of non-state actors: as explained further below, these obligations are (1) to bring an end to continuing situations of human rights abuse, (2) to establish an ‘effective investigation’ into apparent gross and systematic human rights violations, and (3) to ensure comprehensive access to justice and redress.

It is important not to view the human rights abuses perpetrated in the institutional and family separation system as solely ‘historical’, for two key reasons. First, several forms of abuse that began in the institutions can be said to be continuing, such as the disappearance of relatives, the unlawful denial of information about one’s identity and the circumstances of their separation from family, and the discrimination that these experiences constitute. Second, continuing human rights violations arise also from the state’s failure over many decades to respond by way of an ‘effective investigation’ and other measures of access to justice and redress to what it has known and ought to have known about the abuses previously perpetrated in the institutions and family separation system.

Some survivors raised with the Panel the question of whether human rights laws apply to the experiences of those who suffered abuse in institutions and/or through family separation before the ECHR entered into force in 1953. In the Panel’s view, the abuses suffered prior to 1953 *do* deserve a human rights-based response—first, because the Forced Labour Convention applied from 1932 onwards; second, because discrimination against any survivors and relatives in the state’s design of its investigation and other access to justice and redress measures must be avoided; and third, because many people who suffered prior to 1953, and/or their relatives, are still undergoing abuse or state failures to respond to previous abuse which violate present-day human rights law obligations. The ECtHR has recognised that the European Convention applies to a ‘disappearance’ which began prior to the Convention coming into force but continued after that date. The UN Human Rights Committee, similarly, has found that the ICCPR applies to a situation of ‘enforced disappearance’ which may have begun prior to the Convention’s entry

into force in respect of a particular country but continued or continues to exist afterwards.¹² In addition, according to the ECtHR, the state is under a continuing obligation to investigate apparent unlawful death which allegedly occurred prior to the Convention's entry into force if the gap between the alleged abuse and the Convention's entry into force is not more than ten years and much of the investigation took place or ought to have taken place in the period following the entry into force of the Convention.¹³ The principles espoused by the ECtHR concerning the obligation to investigate under Article 2 ECHR violations are generally understood also to apply to Article 3 ECHR violations (which concern torture or inhuman or degrading treatment or punishment), and to serious violations of Articles 4, 5 and 8, as explained further below.

The UN Committee Against Torture (CAT) has clarified that states' obligations under the Convention Against Torture to investigate, and to ensure access to justice and reparation in respect of, apparent torture or ill-treatment apply retrospectively. According to the CAT's General Comment No 3, 'States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to a remedy and to obtain redress.'¹⁴ The CAT's reasoning is that: 'For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those whom have not received redress.'¹⁵ This reasoning explains the CAT's repeated recommendations to the UK and ROI to implement the states' Convention Against Torture obligations towards survivors and relatives affected by the Magdalene, Mother and Baby and related institutions. Furthermore, the CAT has explained that 'victims' of torture and ill-treatment include 'affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.'¹⁶

As for abuses which occurred *after* the entry into force of a particular human rights treaty in respect of the UK but nonetheless a long time ago: the state's legal obligations regarding these abuses have not disappeared over the decades during which it did not provide remedies. As noted already, for many people, abuse which began decades ago is still continuing. The ECtHR has recognised that for as long as there is a 'continuing situation' of a Convention violation the right to a remedy remains.¹⁷ Regarding forms of abuse that ceased decades ago, the ECtHR has agreed to hear complaints that relate to torture or ill-treatment suffered many years or decades in the past.¹⁸ In *Mocanu v Romania* the ECtHR held that the responsibility is on the state, not the victim of torture or ill-treatment, to initiate an investigation—and this is especially the case where the state has witnessed the abuse in question.¹⁹

Finally, regarding timeframes, survivors have also raised the question of whether the Human Rights Act 1998 (HRA 1998) is relevant to the abuses arising from the 20th century institutional and family separation system. The HRA 1998 came into force in October 2000 and incorporates the ECHR into UK law by requiring, insofar as is possible, all 'public authorities' to act compatibly with the ECHR and all legislation to be interpreted compatibly with the ECHR. What is clear from UK case law is that the HRA 1998 applies to all actions of public authorities

and legislation since 2000 and into the future, including insofar as they relate to historical events. In the 2011 case of *McCaughey*, the UK Supreme Court held that where, following the HRA 1998 coming into effect, the state decides to hold an investigation into a potentially unlawful death which occurred many years or decades ago the HRA 1998 requires the investigation to comply with ECHR standards.²⁰

2. Continuing situations of human rights violations

Disappearance

It may be the case that disappearances are occurring where girls or women were detained in institutions and their fate and whereabouts are still being withheld from their relatives by either state or non-state actors (e.g. through a lack of disclosure of burial information or other personal records). Disappearances may also be occurring where a parent and child were unlawfully separated, i.e. without due process of law or through extreme coercion which negated consent, and they are still being prevented from discovering what became of each other.

An ‘enforced disappearance’ is defined in international human rights law as occurring where:

persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.²¹

The ECtHR recognised a situation similar to an enforced disappearance—which it described as a ‘disappearance’²²—in the 2015 case of *Jovanovic v Serbia* where a state-run hospital had taken a woman’s new-born son from her in 1983 and from then on:

the body of the applicant’s son was never released to the applicant or her family, and that the cause of death was never determined. Furthermore, the applicant was never provided with an autopsy report or informed of when and where her son had allegedly been buried, and his death was never officially recorded. The criminal complaint lodged by the applicant’s husband would also appear to have been rejected without adequate consideration and the applicant herself still has no credible information as to what happened to her son.²³

The 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances explains that ‘[a]cts constituting enforced disappearance shall be considered a continuing offence as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared’.²⁴ A similar definition is used by the ECtHR, which noted in *Varnava and Others v Turkey* that a ‘disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a

deliberate concealment and obfuscation of what has occurred'.²⁵ In *Jovanowicz v Russia*, the ECtHR emphasised that the 'essence of the issue...lies...in the authorities' dismissive reactions and attitudes in respect of that situation when it was brought to their attention' or in 'the failure of the authorities to respond to the quest for information by the relatives or from the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts'.²⁶

Crucially, the ECtHR has held that the state is obliged to assist in the discovery of a missing relative not only where the state was involved in the disappearance but also in cases where non-state actors were involved. In *Varnava and Others v Turkey*, the ECtHR found that a state will violate the Convention where, regardless of who is responsible for the disappearance, the state's response to relatives' requests for assistance 'may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person'.²⁷ In *Jovanovic*, the ECtHR acknowledged that '[t]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention' and that Article 8 not only prohibits 'arbitrary interference' with family life but also imposes positive obligations on the state to assist in the discovery of a missing relative.²⁸ It is worth noting that other ECtHR case law has recognised sibling relationships,²⁹ and the relationship of uncles and aunts with their nieces and nephews,³⁰ to comprise 'family life' within the meaning of Article 8.³¹

In addition to violating numerous rights of the disappeared individuals themselves,³² continuing situations of enforced disappearance have been found by the ECtHR and UN Human Rights Committee (HRC) in several cases to give rise to a continuing situation of inhuman or degrading treatment of relatives on account of the suffering caused by their inability to discover their loved one's fate and whereabouts.³³ Additionally, in *Jovanovic v Serbia* the ECtHR held that the mother's right to respect for her private and family life was being breached continuously due to her inability to access information about her child.

Notably, Article 9(4) UNCRC explicitly requires that where the separation of parent and child:

results from any action initiated by a State Party such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Denial of identity

Identity rights are a core aspect of the right to respect for private and family life which is protected by Article 8 ECHR and Article 17 ICCPR.³⁴ In *SH v Austria* the ECtHR held that:

respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.³⁵

In *Gaskin v United Kingdom*³⁶ the ECtHR confirmed that Article 8 ECHR also protects the right to access records about one's treatment as a child in state care; the Court acknowledged that the applicant's care file 'no doubt contained information concerning highly personal aspects of the applicant's childhood and history and thus could constitute his principal source of information about his past and formative years.'³⁷

The right to respect for private and family life is not an absolute right; however, there are strict criteria for permissible interferences with it. Article 8 ECHR allows a public authority to interfere with the right *only if* the interference is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

'In accordance with the law' has been explained by the ECtHR to mean that there must be a national law basis for the interference in order for the interference to be lawful. This does not necessarily require primary legislation (judge-made law will satisfy the requirement, for example³⁸). Whatever the form of law is, it must be 'adequately accessible' in that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case',³⁹ and the texts of the legal rules must be available to those affected.⁴⁰ The law must also be 'formulated with sufficient precision to enable the citizen to regulate his conduct'.⁴¹ A discretionary power that is wholly unconfined in its terms, even if formally subject to judicial scrutiny, will not satisfy this test.⁴² The law must 'indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'.⁴³

Meanwhile, the requirement that the interference is 'necessary in a democratic society' means that the interference must be 'proportionate to the legitimate aim pursued'.⁴⁴ An interference might lack proportionality if there has been minimal consideration by Parliament of its implications for those it affects;⁴⁵ or if there are less restrictive methods available to the state to achieve the relevant public interest;⁴⁶ or if the interference does not represent 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.⁴⁷

In addition to requiring the state to refrain from unlawfully interfering, Article 8 ECHR also requires the state to take positive steps to enable individuals to enjoy their privacy rights and

to prevent other, non-state actors from impinging on them.⁴⁸ In *Gaskin v United Kingdom*,⁴⁹ for example, the ECtHR held that the state must have in place a clear regulatory regime with an independent decision-maker that can ensure that a person's information is not improperly or disproportionately withheld where professionals involved in their care do not proactively consent to its release.

In *Mikulic v Croatia*⁵⁰ the ECtHR held that a state is required to have in place a system capable of determining a child's genetic origins. In this case, which concerned the question of a child's paternity, the Croatian legal system had no way of forcing a person to comply with a court order requiring them to take a DNA test—and while that was not itself a breach of the Convention, the ECtHR held that a violation of Article 8 ECHR arose from the fact that there were no 'alternative means enabling an independent authority to determine the paternity claim speedily'.⁵¹ According to the ECtHR, the State's inaction where the putative father did not consent over the course of several years to a DNA test left the child 'in a state of prolonged uncertainty as to her personal identity' and thus violated Article 8 ECHR.

In *Jäggi v. Switzerland*⁵² the ECtHR found that the Article 8 ECHR rights of a 67-year-old man were violated when he was denied permission by the state authorities to have a DNA test carried out on the remains of the person whom he believed to be his father. The Court held that 'persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity'.⁵³ The Court also emphasised that 'an individual's interest in discovering his parentage does not disappear with age, quite the reverse'.⁵⁴ While the Court held that this interest must be balanced fairly against any competing interests—meaning that states could not be required to force living persons to undergo DNA testing⁵⁵—the Court also noted that 'the deceased's family had not cited any religious or philosophical grounds for opposing the taking of a DNA sample, a measure which is, moreover, relatively unintrusive'.⁵⁶ Noting that deceased persons do not have rights under the Convention, the Court reiterated its finding in a previous case that '[w]ith regard to the deceased's own right to respect for his private life...the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death'.⁵⁷

The UNCRC contains specific identity rights protections. Article 8 requires states 'to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference' and specifies that 'Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.' Although the UNCRC explicitly refers to 'children', it is notable that in a case concerning an adult—the 2020 case of *Habte v Minister for Justice and Equality*⁵⁸—the the Irish Court of Appeal referred to the Convention to support the finding that there is an unenumerated constitutional right to have one's identity correctly recognised by the state.

Other continuing Article 8 ECHR violations: deaths and burials

The ECtHR has found violations of the right to respect for private and family life to exist where state authorities, having custody of a deceased person's body (e.g. for autopsy purposes), have failed to return it or delayed unjustifiably in returning it to their family who wished to bury their relative in accordance with their own traditions.⁵⁹

Article 8 ECHR has also been violated, according to the Court, where the state has buried a child in a communal grave without the consent of its parents and without legal authority.⁶⁰

In addition, in *Znamenskaya v Russia*,⁶¹ the ECtHR found a violation of Article 8 ECHR where the state authorities refused to allow the registration of paternity of a stillborn infant in circumstances where the mother wished to place the name of the infant's father, who was now deceased, on the infant's grave. The Court noted that 'there were no interests conflicting with those of the [mother]'⁶² and 'the domestic courts did not refer to any legitimate or convincing reasons for maintaining the status quo'.⁶³

Freedom of expression

The text of Article 10 ECHR, which protects the right to freedom of expression, includes the freedom 'to *receive and impart* information and ideas' (emphasis added). The right of victims and survivors to freedom of expression is thus engaged by the archival, investigative and other truth-telling practices of the state.

The ECtHR has held that 'it is an integral part of freedom of expression to seek historical truth',⁶⁴ and in *Kenedi v Hungary* the Court found a violation of Article 10 where the government (in defiance of court orders) refused to disclose certain documents which a historian needed to write a study on the functioning of the Hungarian State Security Service in the 1960s.⁶⁵ The ECtHR held that 'access to original documentary sources for legitimate historical research was an essential element of the applicant's right to freedom of expression'.⁶⁶ The ECtHR has also found that Article 10 ECHR imposes positive as well as negative obligations on states, and in *Dink v Turkey* the Court held that states must create a favourable environment for participation in public debate by all concerned, enabling them to express their opinions without fear.⁶⁷ Arguably, the right to freedom of expression requires that those subjected to gross and systematic human rights violations must be facilitated to fully contribute to the national historical record, including by receiving and being in a position to comment on any records that concern them.

Discrimination

To the extent that people are experiencing the above situations of human rights abuse on account of their gender, the circumstances of their birth or the circumstances in which they became pregnant and gave birth, they are also being subjected to grave discrimination that interferes with their right to respect for their equal human dignity. The equal dignity of all human beings is the founding principle upon which the current international human rights regime is based. The ECtHR has held on several occasions that discrimination on grounds of

‘illegitimacy’ and discrimination against unmarried mothers and their children violates the ECHR.⁶⁸ In *Johnston v Ireland*,⁶⁹ Ireland’s discriminatory succession law was found to be in breach of the ECtHR. Albeit an Irish legal precedent, it is worth considering the definition of unconstitutional discrimination provided by the majority of the Irish Supreme Court in *Quinn’s Supermarket v Attorney General*:

The provisions of Article 40, s. 1, of the Constitution ... is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow.⁷⁰

3. Continuing violation of obligation to investigate

The State’s obligation to investigate

It is clear from extensive ECtHR case law that the state must in circumstances of apparent grave human rights violations establish an ‘effective investigation’—the precise requirements of which are discussed further below.

Investigating Article 2 ECHR violations

Under ECHR law, the obligation to carry out an ‘effective investigation’ arises wherever there is an ‘arguable claim’ that an unlawful death has occurred whether at the hands of state agents or private individuals.⁷¹ An ‘arguable claim’ exists where the ‘allegations could not be discarded as being prima facie untenable’.⁷² According to the HRC, Article 6 ICCPR also obliges the state to investigate allegations of deprivation of life by State authorities or private individuals or entities.⁷³

In *Fernandes v Portugal*, the ECtHR confirmed that the investigative obligation arises wherever a death occurs ‘in suspicious circumstances, even when the State has no direct responsibility for the death’.⁷⁴ In *Salman v Turkey*, recognising that ‘[p]ersons in custody are in a vulnerable position and the authorities are under a duty to protect them’,⁷⁵ the ECtHR held that states are obliged to carry out an effective official investigation into deaths in custody or detention even if no agent of the state was involved in the incident resulting in death. This was confirmed in *Musayeva v Russia*.⁷⁶ Furthermore, in *Oneryildiz v Turkey*, where numerous deaths were caused by an environmental disaster, the ECtHR held that the investigative obligation arises ‘when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient

relevant knowledge to identify and establish the complex phenomena that might have caused such incidents'.⁷⁷

In the same vein the United Nations Minnesota Protocol on the Investigation of Potentially Unlawful Death applies where:

(a) The death may have been caused by acts or omissions of the State, its organs or agents, or may otherwise be attributable to the State, in violation of its duty to respect the right to life... (b) The death occurred when a person was detained by, or was in the custody of, the State, its organs, or agents... [or] (c) The death occurred where the State may have failed to meet its obligations to protect life. This includes, for example, any situation where a state fails to exercise due diligence to protect an individual or individuals from foreseeable external threats or violations by non-State actors. There is also a general duty on the state to investigate any suspicious death, even where it is not alleged or suspected that the state caused the death or unlawfully failed to prevent it.⁷⁸

The 'essential purpose of such an investigation', according to the ECtHR, 'is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.⁷⁹

State responsibility for death arises where a state actor has directly participated in the unlawful killing of a person *or* where the state has failed to discharge its positive obligations under the Convention to protect the right to life, including from death in 'private' settings.

In *Makaratzis v Greece* the ECtHR held that Article 2 ECHR places a 'primary duty on the state to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.⁸⁰ In addition to the requirement of general regulation and inspection, and criminal law enforcement, the ECtHR has held that Article 2 requires the State to take practical steps to prevent loss of life in specific situations where it knows or ought to know that there is a real risk of death.⁸¹ In *Nencheva and Others v Bulgaria*, for example, the ECtHR found that Bulgaria had violated the right to life of fifteen children and young adults who died at a home for young people with disabilities as a result of cold and shortages of food, medicines and basic necessities. The manager of the home had tried without success on several occasions to alert all the public institutions which had direct responsibility for funding the home and which could have been expected to act.⁸²

Investigating Article 3 ECHR violations

The obligation to establish an 'effective investigation' further arises wherever there is an 'arguable claim' that a violation of Article 3 ECHR (right to freedom from torture or inhuman or degrading treatment or punishment) has occurred.⁸³ Similarly, the UN Convention Against Torture (UNCAT) states explicitly in Article 12 that state authorities 'shall... proceed to a

prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.’ Article 16 of the UNCAT confirms that the investigative obligation under Article 12 also applies to other forms of cruel, inhuman or degrading treatment or punishment. The ECtHR routinely refers to the content of the UNCAT and its interpretation by the CAT in order to elucidate the requirements of Article 3 ECHR.

States are obliged to investigate alleged torture or ill-treatment by private individuals or bodies as well as alleged violations of the rule against torture and ill-treatment that are attributable to the state.

Under the UNCAT, state responsibility for torture or ill-treatment arises where such harm is ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.⁸⁴ The concept of ‘acquiescence’ has been interpreted by the CAT to place direct responsibility on the state where state actors ‘know or have reasonable grounds to believe’ that non-state actors are perpetrating torture or ill-treatment and the state actors ‘fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors’.⁸⁵ The CAT contends that ‘[s]ince the failure of the State to exercise due diligence to intervene...enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission’.⁸⁶ Importantly, as set out in General Comment No 2:

Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State’s obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.⁸⁷

More broadly, Article 2 UNCAT also requires states to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’ (and the CAT has stated that this same obligation applies to ill-treatment).⁸⁸ Where a state fails to comply with the Article 2 obligation, according to the CAT, it will be considered the ‘author’ of the resulting torture or ill-treatment.⁸⁹ The HRC’s General Comment on Article 7 ICCPR, similarly, clarifies that ‘States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power’.⁹⁰

The ECtHR also finds states responsible for violating Article 3 ECHR where they have failed to exercise ‘due diligence’ in relation to the behaviour of non-state actors. In *97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v Georgia*,⁹¹ the ECtHR reiterated that:

the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals ... This protection calls for reasonable and effective measures, including with regard to children and other vulnerable individuals, in order to prevent ill-treatment of which the authorities were or ought to have been aware.⁹²

Whether a particular form of abuse will meet the minimum threshold of severity to amount to torture or another form of cruel, inhuman or degrading treatment ‘depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.’⁹³

Physical pain or suffering is not essential for a finding of torture or ill-treatment: psychological pain or suffering is sufficient.⁹⁴ For example, the HRC has found violations of Article 7 ICCPR where family members have suffered mental anguish following their relative’s disappearance and the authorities’ refusal to provide information,⁹⁵ and the ECtHR has found violations of Article 3 ECHR in similar circumstances.⁹⁶ In *Aydin v Turkey*, the ECtHR held that the rape of a 17-year-old girl in detention by a state official amounted to torture, not just because of the circumstances of the rape and the ‘acute physical pain of forced penetration’ but also because ‘rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence’.⁹⁷

Torture has been defined by the ECtHR as ‘deliberate inhuman treatment causing very serious and cruel suffering’.⁹⁸ The definition of torture under the UNCAT requires that severe pain or suffering has been intentionally inflicted for the purpose of punishing a person, intimidating or coercing her, or for any reason based on discrimination of any kind.⁹⁹ The question of intent and purpose in Article 1 is not subjective, but objective.¹⁰⁰ According to the CAT, ‘the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.’¹⁰¹ The Special Rapporteur on Torture has stated that intent ‘can be effectively implied where a person has been discriminated against’.¹⁰²

Cruel or inhuman treatment or punishment arises in situations of very serious physical or mental suffering, and does not require the evidence of intent or discrimination that torture involves. The ECtHR’s decision in *Fedotov v Russia* provides an example of inhuman treatment: there, the applicant was unlawfully detained for 22 hours in a cell unfit for an overnight stay, without food or drink or unrestricted access to a toilet.¹⁰³ Harris et al draw from this case that the ‘anguish caused to an individual by being detained illegally by the state may contribute to a finding that the conditions of their detention are inhuman treatment’.¹⁰⁴ Often the ECtHR and other human rights treaty bodies do not explicitly state what particular type of ill-treatment has occurred—i.e. whether cruel, inhuman or degrading treatment has occurred:

instead, they find a violation of the prohibition of such ill-treatment overall. Harris et al contend from a review of the ECtHR's case law that inhuman treatment may arise, for example, from the suffering caused to relatives by the disappearance of their loved one,¹⁰⁵ or from child abuse.¹⁰⁶

Indeed, in *VK v Russia*¹⁰⁷ the ECtHR found that a young child had suffered inhuman treatment where at his nursery school:

on several occasions he had been locked into the dark in the toilets and told that he would be eaten by rats, had been forced to stand in the lobby in his underwear and with his arms up for prolonged periods of time and on one occasion had had his mouth and hands taped with sellotape. He had been told that if he complained to his parents he would be subjected to further punishment, which must have exacerbated his feelings of fear and vulnerability. The teachers had moreover used physical force (which had resulted in a bruise on his face) to administer eye drops to the applicant without his parents' consent and without any medical prescription having first been obtained or indeed any medical necessity having first been established by a medical professional... The Court... takes note of the fact that the applicant was subjected to such treatment for at least several weeks and that many years afterwards he continues to suffer from its consequences, in particular in the form of a post-traumatic neurological disorder. Moreover, the above acts were perpetrated by teachers in a position of authority and control over the applicant and some of them were aimed at educating him by humiliating and debasing him.¹⁰⁸

Degrading treatment or punishment has a particular connection with humiliation. The ECtHR commonly finds degrading treatment or punishment to have occurred where behaviour towards a person 'was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience'.¹⁰⁹

Evidence of malicious intent is not necessary for a finding of degrading treatment (just as it is not necessary for inhuman treatment, either). The ECtHR has held that in considering whether treatment is degrading, 'one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3'.¹¹⁰ In *Price v United Kingdom* the ECtHR found inadequate prison conditions to amount to degrading treatment despite there being 'no evidence... of any positive intention to humiliate or debase the applicant'.¹¹¹

Degrading treatment is also understood to be closely connected to the notion of dignity violations involving a person being treated as having lesser moral worth than others. In the 1973 case of *East African Asians v United Kingdom*, the European Commission of Human Rights (a precursor to today's ECtHR) found that racial discrimination in the UK's immigration law amounted to degrading treatment.¹¹² The 'requirement of respect for human freedom and

dignity, one of the fundamental principles on which the Convention is based', also means that non-consensual medical treatment which is not necessary by reason of emergency, as a general rule, amounts to ill-treatment.¹¹³

Violence against women has frequently been held to constitute degrading treatment, at least, if not also inhuman treatment or torture. In *Yazgul Yilmaz v Turkey*¹¹⁴ the ECtHR found degrading treatment to have occurred where a 16-year-old girl in police custody complained of being sexually harassed and was subjected to a gynaecological examination in response, without her or her legal representative's consent and while she was unaccompanied. Medical reports later concluded that she was suffering from post-traumatic stress and depression as a result of her ordeal. The fact that the girl had been under the total control of those subjecting her to the non-consensual procedure by virtue of her detention in custody was an important factor in the Court's decision. Similarly, in *Aydin v Turkey*, mentioned above, the ECtHR's finding of torture arising from the rape of a 17-year-old in police custody was influenced by the Court's recognition that such actions 'must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.¹¹⁵

A further instance of ill-treatment of a young woman in a position of vulnerability occurred in *VC v Slovakia*.¹¹⁶ Here, doctors in a public hospital sterilised a 20-year-old Roma woman immediately after she had given birth to her second child via Caesarean section. The ECtHR found that the procedure was not consensual because: 'she was asked to sign the typed words "Patient requests sterilisation" while she was in a supine position and in pain resulting from several hours' labour. She was prompted to sign the document after being told by medical staff that she or her baby would die in the event of a further pregnancy.'¹¹⁷ The Court noted that 'it does not appear from the documents submitted that the applicant was fully informed about her health status, the proposed procedure and the alternatives to it', and that 'asking the applicant to consent to such an intervention while she was in labour and shortly before performing a Caesarean section clearly did not permit her to take a decision of her own free will, after consideration of all the relevant issues and, as she may have wished, after having reflected on the implications and discussed the matter with her partner.'¹¹⁸ The Court concluded: 'The way in which the hospital staff acted was paternalistic, since, in practice, the applicant was not offered any option but to agree to the procedure which the doctors considered appropriate...'.¹¹⁹ In reaching its finding of ill-treatment in breach of Article 3 ECHR the Court recognised that the young woman's treatment 'was liable to arouse in her feelings of fear, anguish and inferiority and to entail lasting suffering'; indeed, the Court noted that 'the applicant experienced difficulties in her relationship with her partner and, later, husband as a result of her infertility', that 'the applicant suffered serious medical and psychological after-effects from the sterilisation procedure, which included the symptoms of a false pregnancy and required treatment by a psychiatrist', and that '[o]wing to her inability to have more children the applicant has been ostracised by the Roma community'.¹²⁰ Finding that such invasion of the woman's autonomy was 'incompatible with the requirement of respect for human freedom and dignity' the ECtHR acknowledged that sterilisation '[a]s it concerns one of the essential bodily functions of human beings... bears on manifold aspects of the individual's personal

integrity including his or her physical and mental well-being and emotional, spiritual and family life.’¹²¹

In *N v Sweden*¹²² the ECtHR recognised that widespread societal discrimination against girls and women in Afghanistan created a climate of ill-treatment such that Sweden could not lawfully return an asylum seeker who was in an extramarital relationship to the country. The Court relied on UN High Commissioner for Refugees reporting that ‘Afghan women, who have adopted a less culturally conservative lifestyle...continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment’ including if ‘accused of bringing shame to their families, communities or tribes’.¹²³ The ECtHR further acknowledged US State Department Human Rights reporting that ‘local officials occasionally imprisoned women at the request of family members for opposing the family’s choice of a marriage partner or being charged with adultery or bigamy...Local officials imprisoned women in place of a family member who had committed a crime but could not be located. Some women resided in detention facilities because they had run away from home due to domestic violence or the prospect of forced marriage.’¹²⁴ In conclusion, the Court held, ‘there are substantial grounds for believing that if deported to Afghanistan, the applicant faces various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society.’¹²⁵

According to the human rights treaty bodies, states have heightened positive obligations to protect girls and women from gender-based violence of which they know or ought to know. As the CAT’s General Comment No 2 states, ‘[t]he protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment’.¹²⁶ In *Opuz v Turkey*, the ECtHR acknowledged the ‘vulnerability’ of the applicant as a woman who had suffered violence in the past and lived in a part of Turkey where violence against women was tolerated.¹²⁷ The Court found that the State’s positive obligation to protect against gender-based violence included a specific obligation to ensure that the domestic legislative framework allowed for the prosecution of serious acts of violence even where the victim had withdrawn her complaints.¹²⁸

Children are also recognised by the human rights treaty bodies to be more vulnerable to torture and ill-treatment due to their dependence on others for care, their powerlessness to remove themselves from abusive situations and the psychological impact of abuse suffered while at a formative stage of life.¹²⁹ The ECtHR scrutinises intensely the measures which states take (or fail to take) to protect from torture and ill-treatment, including at the hands of private individuals, where the individuals concerned are considered ‘vulnerable’.¹³⁰ For example, in *O’Keeffe v Ireland*, on the basis that young children under the exclusive control of school authorities are ‘especially vulnerable’,¹³¹ the ECtHR held that the general ‘positive obligation to protect’ from torture or ill-treatment includes a specific obligation to establish ‘useful detection and reporting mechanisms’ to guard against child sexual abuse at school.¹³²

Individuals who are deprived of their liberty are also understood by the human rights treaty bodies to be particularly ‘vulnerable’ to suffering torture or ill-treatment because of the control that others exercise over them.¹³³ The international community’s recognition of detainees’ vulnerability is why Article 10 ICCPR states explicitly that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.¹³⁴

The ECtHR has held that ‘in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3’.¹³⁵ According to the ECtHR, where this occurs it is not necessary to show that the use of force caused injury.¹³⁶ Importantly, forced labour can be considered ‘violence’ as defined by the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence:

...“violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.¹³⁷

The treaty bodies’ jurisprudence makes clear that states’ omissions to provide basic resources to individuals in detention may amount directly to acts of ill-treatment.¹³⁸ States must ensure adequate sanitary facilities, clothing and food; minimum floor space, air and natural light; a separate bed; and opportunity for recreation and contact with the outside world.¹³⁹ States must also provide healthcare tailored to individual needs and provide for the needs of persons with disabilities.¹⁴⁰ Where children are detained, the positive obligation to ensure humane treatment requires states to provide them with resources tailored to their needs, including education.¹⁴¹

Deprivation of liberty, in and of itself, has been recognised as amounting to ill-treatment in certain circumstances. The Special Rapporteur on Torture has highlighted that torture or ill-treatment may occur in care settings in the form of ‘institutionalization of individuals who do not meet appropriate admission criteria, as is the case in most institutions which are off the monitoring radar and lack appropriate admission oversight’.¹⁴² According to the Special Rapporteur, ‘[i]nappropriate or unnecessary non-consensual institutionalization of individuals may amount to torture or ill-treatment as use of force beyond that which is strictly necessary’.¹⁴³ In *Mouisel v France*, the ECtHR held that the continued detention in prison of a 53-year-old man who was suffering from cancer amounted to inhuman and degrading treatment because it ‘undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer’.¹⁴⁴ In *C v Australia*, the HRC held that the arbitrary detention of an asylum seeker violated not only Article 9 ICCPR (the right to liberty) but also Article 7 ICCPR (the right to freedom from torture or ill-treatment) because of its psychological impact.¹⁴⁵

Investigating Article 4 ECHR violations

The ECtHR has held that ‘[l]ike arts 2 and 3, art.4 also entails a procedural obligation to investigate’¹⁴⁶ where the state is aware or ought to be aware of ‘circumstances giving rise to a credible suspicion’¹⁴⁷ of a violation of Article 4—whether the abuse has occurred at the hands of state or non-state actors. The case law under this Article of the Convention is sparse but to date this procedural obligation to investigate has been identified in cases involving human trafficking,¹⁴⁸ domestic servitude,¹⁴⁹ and forced prostitution.¹⁵⁰

The detail of the investigative obligation—discussed below—is similar to that arising under Articles 2 and 3 because ‘Article 4, together with Articles 2 and 3, enshrines one of the basic values of the democratic societies making up the Council of Europe’.¹⁵¹ As noted above, the international treaties specifically concerning slavery, servitude and forced labour were some of the earliest human rights law treaties, along with the ECHR.

The UK had a legal duty from 1932, when the Forced Labour Convention 1930 came into force, to ‘suppress the use of forced or compulsory labour in all its forms within the shortest possible period.’ The 1930 Convention obliged the State not to ‘impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations’¹⁵² and specified that ‘[n]o concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade.’¹⁵³ In addition, the 1930 Convention required that ‘[t]he illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.’¹⁵⁴

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 required the UK to ‘take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of...[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.’¹⁵⁵ The Abolition of Forced Labour Convention 1957, meanwhile, required the UK ‘to suppress and not to make any use of any form of forced or compulsory labour...as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system’ or ‘as a means of racial, social, national or religious discrimination’.¹⁵⁶

Article 4 ECHR contains an absolute prohibition of slavery, servitude and forced or compulsory labour. The ECtHR’s case law clarifies that not only must the state refrain from engaging in such acts but it must also take positive steps to put in place, among other things, a ‘legal and administrative framework’ to prohibit and punish violations of Article 4¹⁵⁷ as well as ‘adequate measures regulating businesses often used as a cover for human trafficking’.¹⁵⁸

In several cases the ECtHR has relied upon the 1930 Forced Labour Convention definition of ‘forced or compulsory labour’, which is: ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.¹⁵⁹ The Irish Human Rights Commission (IHRC), finding in 2013 that girls and women in Magdalene Laundries in ROI appear to have been subjected to forced or compulsory labour,¹⁶⁰ observed that: ‘it was made clear during the consideration of the draft 1930 Convention that the penalty in question need not be in the form of penal sanctions, but might take the form also of a loss of rights or privileges.’¹⁶¹

In *Siliadin v France*¹⁶² the ECtHR asserted that the concept of ‘forced or compulsory’ labour ‘brings to mind the idea of physical or mental constraint’.¹⁶³ The Court noted that in this case—which involved a 15-year-old who was kept as a housemaid, working seven days a week for no pay—there was in fact no legal penalty which threatened the girl. However, the Court held:

although the applicant was not threatened by a “penalty”, the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised. Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.¹⁶⁴

As to whether the girl performed the work of her own free will (which is the second aspect of the test for forced or compulsory labour under the 1930 Convention), the ECtHR in *Siliadin* found that ‘it is evident that she was not given any choice’.¹⁶⁵ Ms Siliadin had been sent to France by her father who had an arrangement with another person, and upon arrival in France her passport was taken from her, her immigration status was not regularised, and she was ‘lent’ to a family who paid her no money for the constant work they forced her to do and did not send her to school.

The ECtHR found that servitude had also taken place in *Siliadin*. Recalling the previous case law of the Commission, the Court held: ‘With regard to the concept of “servitude”, what is prohibited is a “particularly serious form of denial of freedom” which ‘includes, “in addition to the obligation to perform certain services for others...the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”’.¹⁶⁶ The Court further concluded that ‘for Convention purposes “servitude” means an obligation to provide one’s services that is imposed by the use of coercion’.¹⁶⁷ This test was met where Ms Siliadin ‘was required to perform forced labour [which] lasted almost fifteen hours a day, seven days a week’, had been ‘brought to France by a relative of her father’s, and had not chosen to work for Mr and Mrs B’, as a minor ‘had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children’s bedroom as no other accommodation had been offered’ and ‘was entirely at Mr and Mrs B.’s mercy, since her papers had been confiscated’.¹⁶⁸ The Court continued: ‘In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to

leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.¹⁶⁹

Investigating Article 5 and Article 8 ECHR violations

The ECtHR has held that an ‘effective investigation’ must also be carried out where there is an ‘arguable claim’ that a person has ‘disappeared’ in violation of Article 5 (right to liberty and security)¹⁷⁰ or Article 8 (right to respect for private and family life),¹⁷¹ or where another very serious violation of Article 8 has occurred.¹⁷²

Arbitrary detention: a violation of Article 5 ECHR

Not all deprivations of liberty are unlawful (in other words, ‘arbitrary’). Article 5 ECHR permits detention for a list of specified purposes including lawful arrest, the ‘detention of a minor by lawful order for the purpose of educational supervision’, and 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’.

If a detention happens for a reason other than one of those permitted under Article 5 ECHR, it will be arbitrary. Even where a deprivation of liberty occurs for a legitimate reason, in order to be lawful under the ECHR it must *still* have a ‘clear and precise legal basis in domestic law’ at all times during the detention,¹⁷³ the grounds and conditions for depriving people of their liberty under that domestic law must be clearly defined, and the law must be foreseeable in its application.¹⁷⁴ Furthermore, in order for detention to be lawful, the decision to detain a person must not be arbitrary, meaning for example that there must be no ‘bad faith’ element to the decision to detain, and domestic legislation allowing detention for a particular purpose must not be used as a smokescreen for detention serving another purpose.¹⁷⁵ Detention of a child purportedly for educational purposes will be unlawful if it does not actually involve their education,¹⁷⁶ and detention of a person ‘of unsound mind’ may only follow a finding based on ‘objective medical expertise’¹⁷⁷ that such confinement is actually ‘necessary in the circumstances’¹⁷⁸ for the whole period of confinement.¹⁷⁹ Where a person is arrested, their detention will also breach Article 5 ECHR if they are not informed promptly of the reasons for their detention,¹⁸⁰ and if they do not have access to a judge or other officer authorised by law to exercise judicial power.¹⁸¹ All persons who are detained, for any reason, are entitled under Article 5(4) ECHR 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.’ Where people are detained indefinitely or for a long period in health or social care settings, this means that they must be enabled ‘to take proceedings “at reasonable intervals” before a court’ to challenge the lawfulness of their detention.¹⁸²

Under Article 5 ECHR the State is obliged not only to refrain from perpetrating arbitrary detention but also to protect from such abuse in private settings.¹⁸³ In *Storck v Germany*, where the applicant was detained without any official authorisation in a private psychiatric clinic, the ECtHR held that the State is ‘obliged to take measures providing effective protection of

vulnerable persons, including reasonable steps to prevent a deprivation of liberty, of which the authorities have or ought to have knowledge'.¹⁸⁴ Without such a positive obligation, the Court contended, there would be 'a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society'.¹⁸⁵

A preliminary question that must be answered before determining whether a person has been subjected to an arbitrary or unlawful deprivation of liberty is whether they have been deprived of their liberty at all.

State custody in the form of arrest or detention by police or military or prison authorities is the most commonly recognised form of deprivation of liberty; however, the definition of deprivation of liberty under human rights instruments is broad and does not in principle exclude any particular setting. As the ECtHR has repeatedly found, 'the difference between deprivation of liberty and restrictions of liberty of movement...is merely one of degree or intensity, and not one of nature or substance...In order to determine whether someone has been deprived of his liberty, the starting-point must be his specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question.'¹⁸⁶ In social care contexts, the ECtHR has found a deprivation of liberty to exist where a person is 'under continuous supervision and control and not free to leave',¹⁸⁷ and they have 'not validly consented to the confinement in question'.¹⁸⁸ Having entered a place voluntarily does not mean that deprivation of liberty cannot then arise. The ECtHR has stated repeatedly that 'the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention'.¹⁸⁹

The ECtHR has found deprivations of liberty to exist in the social care context even where premises are unlocked¹⁹⁰ and where a person has previously gone on outings or visits away from the institution.¹⁹¹ Individuals have been found to be 'not free to leave' where permission to leave the premises is required,¹⁹² where a person's guardian is required to consent to the person leaving,¹⁹³ where there are restrictions as to the length of time and destination to which a person may go,¹⁹⁴ where an institution restricts access to a person's identity documents or finances, which would enable them to travel,¹⁹⁵ where a person is returned—for example, by the police—when they leave,¹⁹⁶ or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.¹⁹⁷

The IHRC noted of the experiences of girls and women in Magdalene Laundries in ROI that: 'While there were accounts of the women working outside one particular Laundry, and going on outings, such accounts would not necessarily refute the possibility that the girls and women were nonetheless under constant supervision and control while residing in the Laundries. Otherwise put, such outings could be regarded as a form of temporary release if the girls and women concerned were subject to recall to the Laundries.'¹⁹⁸ The IHRC continued:

there were certainly instances where Magdalen Laundries were providing an alternative to the prison system, and in this regard it was clearly understood that the girls and

women were to be maintained in conditions of detention...the direct testimony of the women who spoke to the IDC suggests a very restrictive regime, more in line with incarceration... these statements would at a minimum suggest that the women concerned understood they were not free to leave the Laundry at will. In addition with respect to the placements of girls and women in Magdalen Laundries by State agencies, the IDC Report notes a significant number of instances where girls and women had little, if any, knowledge about the reasons for which they were in Magdalen Laundries, and whether they were required to remain there.¹⁹⁹

The IHRC concluded: ‘While these are all clearly subjective accounts of the experiences of girls and women in the Laundries, when combined with the objective evidence in the IDC Report regarding the use of the Laundries for the purpose of detaining women and girls on behalf of the State, it is hard not to come to the conclusion that many, although certainly not all, of the women who entered the Laundries were deprived of their liberty. The question then becomes one of whether that deprivation of liberty was lawful.’²⁰⁰

The IHRC found arbitrary detention on account of the following:

- Where a Magdalen Laundry was operating as an informal remand facility, not being designated by legislation or regulation, this put the custody of the girls and women outside the effective regulation of the State;²⁰¹
- It is also clear that questions arise as to whether Magdalen Laundry residents were promptly released once the lawful basis for their detention ended or whether they over-stayed in conditions of *de-facto* detention;²⁰²
- There is no evidence in the IDC Report that the placement of minors in Magdalen Laundries that came through the route of industrial schools or health and social services was for the purpose of educational supervision or that they in fact received any form of education;²⁰³ and
- there was no legal basis for coercing a woman to enter a Magdalen Laundry under threat of withholding public assistance to her. However, the records show that in reality this may not have been the practice. Therefore, if a woman was under the apprehension that she did not have a choice as regards entering and remaining in a Laundry, then there may be instances where there was a breach of the constitutional right to liberty and its counterpart right under the ECHR.²⁰⁴

A very serious breach of Article 8 ECHR

As explained above, in *Jovanovic v Serbia* the ECtHR found a ‘disappearance’ to have occurred where a state-run hospital had taken a woman’s new-born son from her and still 33 years later she had not been informed of whether or how her son had died and where if at all he was buried.²⁰⁵ The state authorities’ ‘continuing failure to provide her with credible information as to the fate of her son’—in other words, the state’s failure to investigate—gave rise to a violation of Article 8 ECHR.²⁰⁶

In *Mentes and Others v Turkey*²⁰⁷ Kurdish villagers had suffered the destruction of their homes and expulsion from their village by state security forces.²⁰⁸ The ECtHR held that ‘the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case’ gave rise to ‘an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals.’²⁰⁹

Arguably, the unlawful separation of parent and child, and the unlawful denial of basic information about one’s own identity, are also Article 8 ECHR violations of sufficient seriousness to give rise to a similar investigative obligation. As the ECtHR has held: ‘There is no doubt that divesting a parent of his or her parental rights and putting a child up for adoption are both very restrictive measures, the latter of which results in the complete disruption of the relationship between a parent and child’²¹⁰ and ‘the fact that the decisions may well prove to be irreversible as in a case where a child has been taken away from his parents and freed for adoption [means that] [t]his is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.’²¹¹

The ECtHR has held that Article 8 ECHR protects the right to know and be cared for by one’s parents.²¹² This is not an absolute right; however, as per Article 8 ECHR, the state may only interfere with the right in a manner that is in accordance with the law, and is necessary in a democratic society and proportionate to achieving a legitimate aim.²¹³

The ECtHR’s case law demonstrates that Article 8 will be violated where the state separates a parent and child without parental consent in anything other than exceptional circumstances, where objective evidence shows it to be necessary in order to protect the best interests of the child and the separation is in accordance with the law.²¹⁴ (Similarly, as the ECtHR frequently notes, Article 9 UNCRC states that ‘a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child’.) The ECtHR has held that ‘where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child’s integration in his family’.²¹⁵ This includes where a child has been taken into care; a ‘guiding principle’ under Article 8 ECHR ‘is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and child’.²¹⁶ Total deprivation of parental responsibilities and authorisation of adoption against the parents’ wishes may only occur if ‘motivated by an overriding requirement pertaining to the child’s best interests’.²¹⁷

Article 8 will also be violated where parents are not sufficiently involved in the decision making process as to whether or not a child should be separated from them.²¹⁸ The 1994 case of *Keegan v Ireland*²¹⁹ demonstrates this; the Court found a violation of Article 8 because Irish legislation allowed for the adoption of a child without the knowledge or consent of the natural

father. In *AK and L v Croatia*,²²⁰ Article 8 was violated because the state authorities did not ensure that the mother's interests were adequately protected in child care proceedings which divested her of her parental rights following which her son was put up for adoption. The Court found that she was not legally represented, that '[t]he national authorities established that she had a mild mental disability and that despite the need for ongoing psychiatric treatment she was not receiving any such treatment', and that she 'could not properly understand the full legal effect of such proceedings and adequately argue her case'.²²¹

The question of what amounts to valid consent to adoption has not been explained by the ECtHR. It is perhaps useful to consider the cases where the Court has examined the question of consent to medical interventions—for example in *VC v Slovakia*, referred to above, and in *Juhnke v Turkey*, discussed directly below.

In *Juhnke v Turkey*²²² a woman arrested by Turkish soldiers was subjected to a medically unnecessary gynaecological examination by a doctor while in custody.²²³ The ECtHR found that the examination was non-consensual and thus in breach of Article 8 of the Convention. The Court recognised as evidence of the woman's non-consent 'that the applicant had resisted a gynaecological examination until persuaded to agree to it [and] that, in certain circumstances, a person in detention cannot be expected to continue to resist submitting to a gynaecological examination, given her vulnerability at the hands of the authorities, who exercise complete control over her throughout her detention.'²²⁴ Further, the Court noted, 'the applicant was detained *incommunicado* for at least nine days prior to the impugned medical intervention and that at the time of the examination, she appeared to be in a particularly vulnerable mental state'.²²⁵ The Court added: 'It is unclear from the material before the Court whether the applicant was adequately informed of the nature and the reasons for this examination. Moreover...the Court considers that the applicant might have been misled into believing that the examination was compulsory.'²²⁶

Notably, in Irish law, the leading authority on the meaning of valid consent to adoption is the 1980 Supreme Court judgment in *G v An Bord Uchtála*,²²⁷ in which Walsh J stated:

the consent, if given, must be such as to amount to a fully-informed, free and willing surrender or an abandonment of these rights. However, I am also of opinion that such a surrender or abandonment may be established by her conduct when it is such as to warrant the clear and unambiguous inference that such was her fully informed, free and willing intention. In my view, a consent motivated by fear, stress or anxiety, or a consent or conduct which is dictated by poverty or other deprivations does not constitute a valid consent.

In *DG v An Bord Uchtála*,²²⁸ in 1996, Laffoy J held that:

it is not sufficient merely to consider whether the relevant information was conveyed to the mother. It is necessary to consider also the ability of the mother to receive the information and to intellectually process it in such a way as to lead to an understanding

of the effect of an adoption order and the consequences of each step in the process leading to an adoption order.²²⁹

Other serious Article 8 violations arguably meeting the threshold of requiring an investigation, particularly where accompanied by any of the above-discussed human rights violations, include:

- Non-consensual gynecological examination;²³⁰
- Failure to return the remains of deceased family members to their relatives;²³¹
- The performance of medical procedures on children without parental consent;²³²
- Circumstances such as in *Marić v Croatia*, where Article 8 was violated because the parents of a stillborn child had not given their consent for their child's remains to be treated as clinical waste (which, through cremation, also deprived them of the ability to know the resting place);²³³
- Circumstances such as in *Petrova v Latvia*, where Article 8 was violated due to the absence of proper procedures to ensure parental consent prior to a hospital's removal of a deceased child's organs;²³⁴ and
- Failure to ensure the identification of graves: in its 2010 *Assessment of the Human Rights Issues Arising in relation to the 'Magdalen Laundries'*²³⁵ in ROI the IHRC contended that Article 8 ECHR was engaged by the State's failure to ensure the identification of the bodies of women who were buried in a communal grave and thereafter exhumed and cremated.²³⁶ The IHRC noted that 'respect for private and family life under Article 8 of the ECHR includes and encompasses the concept of personal integrity and that nothing can be more private, personal and integral to a human being than a person's identity including their name.'²³⁷

4. The elements of an 'effective investigation'

The ECtHR's case law contains a well-established list of elements that must be present in the state's investigative effort in order for it to be 'effective'—while noting that 'what form of investigation will achieve those purposes may vary in different circumstances.'²³⁸ These requirements are discussed below, alongside further investigative principles and standards set out in international human rights law documents concerning accountability and reparation for serious human rights violations and international crimes.

Where human rights violations are widespread and systematic, and where they involve the actions and culpable inaction of state authorities, one form of investigation alone is unlikely to be sufficient to meet human rights law requirements. In the cases of *O'Keeffe v Ireland*²³⁹ and *Keenan v United Kingdom*,²⁴⁰ for example, the ECtHR held that it was essential to provide victims of torture or ill-treatment and relatives of the deceased with access to accountability mechanisms that explicitly addressed the liability of the state for its human rights violations and not just the liability of individuals for criminal or civil law wrongs. The UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁴¹ state that in cases of an 'apparent existence of a pattern

of abuse’, the authorities shall ‘ensure that investigations are undertaken through an independent commission of inquiry or similar procedure’.²⁴²

The mechanism of a truth commission or commission of inquiry is connected to the idea of the ‘right to truth’—a concept utilised in the human rights field to emphasise the extra characteristics of the investigation, access to justice and other reparation measures that are required in contexts where human rights violations are particularly serious and/or systematic. In *El Masri v Macedonia*,²⁴³ which involved extraordinary rendition and inhuman and degrading treatment, three ECtHR judges in a concurring opinion contended that ‘the “right to the truth”, that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal’²⁴⁴ is both ‘broadly implicit’ in the investigative obligation and also, in itself, a requirement of the right to an ‘effective remedy’ where human rights violations are gross and systematic. The judges contended that the right to the truth includes ‘a right of access to the relevant information about alleged violations, both for the persons concerned *and for the general public*’²⁴⁵ (emphasis added). In this case, the right to the truth with its requirement of public information disclosure arose because of ‘[t]he scale and seriousness of the human rights violations in issue, committed in the context of the secret detentions and renditions system, together with the widespread impunity observed in multiple jurisdictions in respect of such practices’.²⁴⁶

The United Nations Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Orentlicher Principles) explain that the right to know can be facilitated by mechanisms that are additional to—and, importantly, that enhance the functioning of—the ordinary existing justice mechanisms of the state. Crucially, specialised truth-telling mechanisms are not a substitute for existing justice mechanisms, which must also operate in response to the state’s knowledge of gross human rights abuse. The Orentlicher Principles state that:

Appropriate measures to ensure this right [to truth] may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.²⁴⁷

The CAT’s General Comment No 3 on the right to redress for torture or ill-treatment, similarly, lists truth-telling mechanisms that may be required in addition to the ordinary civil and criminal investigation and justice procedures in the state. The investigative requirements discussed below may need to be met by a combination of existing civil and criminal justice mechanisms and a specialised truth-telling process.

Promptness

The ECtHR has repeatedly held that where an investigation is required, it should be undertaken in a prompt and timely fashion in order to maintain public confidence.²⁴⁸ The UN Principles on the Effective Investigation of Torture state, similarly, that: ‘States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred.’²⁴⁹ The Minnesota Protocol notes, however, that ‘The failure of the State promptly to investigate does not relieve it of its duty to investigate at a later time: the duty does not cease even with the passing of significant time.’²⁵⁰

ECtHR case law clearly establishes that the state authorities must undertake an investigation as soon as they know or ought to know of information indicating a serious human rights violation of the nature discussed above. The ECtHR has repeatedly held that the obligation to investigate ‘is not dependent upon the lodging of a formal complaint’ by the victim or next-of-kin ‘or their suggesting a particular line of inquiry or investigative procedure’.²⁵¹

Purposes of the investigation

Truth: As per the Orentlicher Principles, ‘[i]n recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied.’²⁵² The ECtHR commonly states that in order to be ‘effective’, an investigation ‘must be capable of leading to the establishment of the facts’.²⁵³ Regarding the thoroughness of the investigation, the ECtHR has held that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.²⁵⁴ They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence.²⁵⁵ Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.²⁵⁶

Investigation of human rights violations: The Orentlicher Principles state that commissions of inquiry ‘should focus as a matter of priority on violations constituting serious crimes under international law, including in particular violations of the fundamental rights of women and of other vulnerable groups’.²⁵⁷ State responsibility as well as individual responsibility must be addressed. The UN Principles on the Effective Investigation of Torture provide that ‘the purposes of an investigation must include clarification of the facts and establishment and acknowledgement of individual and State responsibility for the victims and their families.’²⁵⁸ According to the Minnesota Protocol concerning potentially unlawful deaths: ‘The investigation must determine whether or not there was a breach of the right to life. Investigations must seek to identify not only direct perpetrators but also all others who were responsible for the death, including, for example, officials in the chain of command who were complicit in the death. The investigation should seek to identify any failure to take reasonable

measures which could have had a real prospect of preventing the death. It should also seek to identify policies and systemic failures that may have contributed to a death, and identify patterns where they exist.²⁵⁹

Individualised investigation: The Minnesota Protocol concerning potentially unlawful deaths requires that ‘investigations must: at a minimum, take all reasonable steps to: (a) Identify the victim(s); (b) Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; (c) Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; (d) Determine the cause, manner, place and time of death, and all of the surrounding circumstances; and (e) Determine who was involved in the death and their individual responsibility for the death...In the case of an enforced disappearance, an investigation must seek to determine the fate of the disappeared and, if applicable, the location of their remains’.²⁶⁰ The ECtHR has held in the Article 2 context that ‘Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul’ of the Convention standard.²⁶¹

Archival access and preservation: The Orentlicher Principles state that ‘The terms of reference of commissions of inquiry should highlight the importance of preserving the commission’s archives. At the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.’²⁶² The Principles state further that: ‘Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights. Access shall be facilitated, as necessary, for persons implicated, who request it for their defence. Access to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals. Formal requirements governing access may not be used for the purposes of censorship.’²⁶³ The Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence has published a Set of General Recommendations for Truth Commissions and Archives; they state that truth commissions ‘are encouraged to’ make recommendations to the State ‘on archives and the establishment of national archival policies that concern records containing information on gross human rights violations and serious violations of international humanitarian law’ including recommendations that:

- (a) Encourage the establishment of modern, accessible, and reliable archives which are essential for the long-term preservation and use of records containing information on gross human rights violations and serious violations of international humanitarian law;
- (b) Recommend the creation of archival laws, freedom of information legislation, data protection legislation and transparency requirements within other laws, which take into account the right to information, the right to know the truth, and the specificity of the records dealing with human rights violations and violations of international humanitarian law; and

- (c) Promote the establishment of comprehensive National Archival systems, including non-governmental records, especially those that are relevant to gross human rights violations and serious violations of international humanitarian law.²⁶⁴

Contribution to other justice and redress mechanisms: The ECtHR has frequently held that an ‘effective’ investigation is one which is capable of leading to the establishment of the facts, of determining whether the elements of unlawful behaviour are present, and of identifying and – if appropriate—punishing those responsible.²⁶⁵ Failing to securing a punishment where one is not possible does not vitiate the investigation’s effectiveness; the ECtHR holds that the investigative obligation is ‘not an obligation of result, but of means’.²⁶⁶ According to the Orentlicher Principles, ‘Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice.’²⁶⁷ The Orentlicher Principles state that the relevant archives must be available to all justice mechanisms: ‘Courts and non-judicial commissions of inquiry, as well as investigators reporting to them, must have access to relevant archives’—a principle that ‘must be implemented in a manner that respects applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony.’²⁶⁸ As the UN Principles on the Effective Investigation of Torture state, the purposes of an investigation must include ‘facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation’.²⁶⁹

Recommendations for reforms to prevent future abuse: According to the UN Principles on the Effective Investigation of Torture, a key purpose of an effective investigation is the ‘identification of measures needed to prevent recurrence’.²⁷⁰ The Orentlicher Principles provide that a commission’s ‘terms of reference should include provisions calling for it to include in its final report recommendations concerning legislative and other action to combat impunity...When establishing a commission of inquiry, the Government should undertake to give due consideration to the commission’s recommendations.’²⁷¹

Characteristics and powers of the investigators

Independence and competence: The ECtHR has frequently stated that the investigation must be carried out by a body with both institutional and practical independence from those implicated in the events.²⁷² The UN Principles on the Effective Investigation of Torture state that the investigators ‘must be not just independent but also competent and impartial, and they must have access to impartial medical or other experts’.²⁷³ According to the Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), commission of investigation members ‘should be chosen for their recognised impartiality, competence and independence as individuals as defined as follows:

- (a) Impartiality. Commission members should not be closely associated with any individual, State entity, political party or other organization potentially implicated in the torture. They should not be too closely connected to an organization or group of which the victim is a member, as this may damage the commission's credibility. This should not, however, be an excuse for blanket exclusions from the commission, for instance, of members of large organizations of which the victim is also a member or of persons associated with organizations dedicated to the treatment and rehabilitation of torture victims;
- (b) Competence. Commission members must be capable of evaluating and weighing evidence and exercising sound judgement. If possible, commissions of inquiry should include individuals with expertise in law, medicine and other appropriate specialized fields;
- (c) Independence. Members of the commission should have a reputation in their community for honesty and fairness.²⁷⁴

The Istanbul Protocol adds that '[a] single commissioner should in general not conduct investigations into torture' and that '[t]he objectivity of the investigation and the commission's findings may, among other things, depend on whether it has three or more members rather than one or two.'²⁷⁵ The Protocol continues: 'The investigation will often require expert advisers. Technical expertise should be available to the commission in areas such as pathology, forensic science, psychiatry, psychology, gynaecology and paediatrics. To conduct a completely impartial and thorough investigation, the commission would almost always need its own investigators to pursue leads and develop evidence.'²⁷⁶

Gender balance: The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence contends that:

It is essential to achieve gender parity or balance among commission members. This: (a) brings greater visibility to the political decision to include a gender perspective in commission work, (b) ensures the presence of women at the highest decision-making levels of commissions; and (c) brings commissions closer to women victims. All commission staff should have sufficient knowledge of gender issues and receive ongoing training to raise awareness ... This training process is especially necessary for teams that collect statements because they are the first (and sometimes only) point of contact with victims... Interviewers should be trained in techniques to safely, confidentially and sensitively identify and record the experience of both male and female victims or survivors of sexual violence, or those who have been subjected to violence because of their actual or perceived sexual orientation or gender identity, and be trained to deal with reluctance, considering the therapeutic value of the interview.²⁷⁷

Powers to secure and compel the production of evidence: The ECtHR has held that the investigation should not be reliant solely on evidence or information from the source being investigated.²⁷⁸ It should have full investigatory powers to compel witnesses and it should be capable of securing evidence.²⁷⁹ In the Article 2 context, the ECtHR has held that 'The authorities must take whatever reasonable steps they can to secure the evidence concerning the

incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinic findings, including the cause of death.²⁸⁰ The UN Principles on the Effective Investigation of Torture state the requirement thus: ‘The investigation must have all necessary budgetary and technical resources for effective investigation and the authority to summons witnesses and demand the production of evidence’.²⁸¹ The Istanbul Protocol states that a commission of investigation ‘specifically needs the following:

- (a) Authority to obtain all information necessary to the inquiry including the authority to compel testimony under legal sanction, to order the production of documents including State and medical records, and to protect witnesses, families of the victim and other sources;
- (b) Authority to issue a public report;
- (c) Authority to conduct on-site visits, including at the location where the torture is suspected to have occurred;
- (d) Authority to receive evidence from witnesses and organizations located outside the country.²⁸²

The Istanbul Protocol notes that ‘Practically, this authority may involve the power to impose fines or sentences if government officials or other individuals refuse to comply.’²⁸³ Regarding the securing of archives, the Orentlicher Principles state that ‘Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.’²⁸⁴

Adequate resources: The Orentlicher Principles state that a commission ‘shall be provided with (a) Transparent funding to ensure that its independence is never in doubt; (b) Sufficient material and human resources to ensure that its credibility is never in doubt.’²⁸⁵

Responsiveness to those affected

Involvement of those affected: The Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, on reparations to women who have been subjected to violence, contends that: ‘Women-centred processes of reparations [including investigations] require participation of women in the process of shaping, implementing, monitoring and evaluating reparations programmes’.²⁸⁶

Gender-sensitivity: The Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, on the gender perspective in transitional justice processes²⁸⁷ states that the mandate of a truth commission ‘should comprehensively address the impact of gender, including sexual and other gender-based violence suffered by all persons, and consider the dimension of sexual orientation and gender identity.’²⁸⁸ The Special Rapporteur’s report adds that ‘[i]t is key to take into account, in all cases, an intersectional perspective’.²⁸⁹ The Report of the Special Rapporteur on Violence Against Women, its Causes

and Consequences, on reparations to women who have been subjected to violence, argues that a ‘women-centred’ process of investigating human rights violations must make sure ‘that those violations that target women and girls have been duly included’ and that determination of harms must include ‘those which are gender-specific or have a differential impact on women’.²⁹⁰ The Special Rapporteur continues by stating that recognition of wrongdoing ‘has to be underpinned by the notion that the same violations may entail different harms for men and women, but also for women and girls from cultural minorities.’ She explains: ‘For instance, harms emanating from sexual violence—including...undesired pregnancies...loss of reproductive capacity...vaginal injuries, and multiple psychological disorders—are always compounded with social stigmatization and ostracism by the family and/or community, subsequent emotional distress, loss of status and the possibility to marry...’²⁹¹

Flexibility: The Istanbul Protocol states that a commission of inquiry’s terms of reference must ‘provide flexibility in the scope of the inquiry to ensure that thorough investigation by the commission is not hampered by overly restrictive or overly broad terms of reference. The necessary flexibility may be accomplished, for example, by permitting the commission to amend its terms of reference.’²⁹²

Procedural fairness

Involvement of the victim and access to evidence: The ECtHR has held that ‘the victim must be involved to the extent necessary to safeguard their legitimate interests’.²⁹³ The UN Principles on the Effective Investigation of Torture specify that: ‘Alleged victims of torture or ill-treatment and their legal representatives must be informed of and have access to any hearing, have access to all information relevant to the investigation, and be entitled to present other evidence.’²⁹⁴ The Istanbul Protocol states, similarly, that: ‘Those alleging that they have been tortured and their legal representatives should be informed of and have access to any hearing and all information relevant to the investigation and must be entitled to present evidence. This particular emphasis on the role of the survivor as a party to the proceedings reflects the especially important role his/her interests play in the conduct of the investigation...Parties to the inquiry should be allowed to submit written questions to the commission.’²⁹⁵

In the case of *Edwards v United Kingdom*,²⁹⁶ the ECtHR found that the parents of a man killed in prison were denied their right to an effective investigation notwithstanding that an inquiry, chaired by independent experts and assisted by lawyers, was commissioned by the Prison Service, Essex County Council and North Essex Health Authority and sat for 10 months and heard from about 150 witnesses. The parents were not ‘involved to the extent necessary to safeguard their interests’ on the grounds that the inquiry was held in private and:

The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the Inquiry Panel. They had to wait until the publication of the

final version of the Inquiry Report to discover the substance of the evidence about what had occurred.²⁹⁷

Access to personal information: According to the Orentlicher Principles: ‘All persons shall be entitled to know whether their name appears in State archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. Access to the files of commissions of inquiry must be balanced against the legitimate expectations of confidentiality of victims and other witnesses testifying on their behalf’.²⁹⁸

Access to information about a deceased or disappeared family member: The Minnesota Protocol, which concerns potentially unlawful death, states that: ‘Family members have the right to seek and obtain information on the causes of a killing and to learn the truth about the circumstances, events and causes that led to it. In cases of potentially unlawful death, families have the right, at a minimum, to information about the circumstances, location and condition of the remains and, insofar as it has been determined, the cause and manner of death.’²⁹⁹

Archival access rules and procedures more generally: The Set of General Recommendations for Truth Commissions and Archives published by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence contends that truth commissions should, through their operations:

- (d) Build provision for the eventual disposition of their records, guaranteeing both their safety and accessibility;
- (e) Plan to deposit their archives, preferably in existing national archives, duly taking into account considerations of the security, integrity and accessibility of the archives;
- (f) Stipulate that the access policy of truth commission archives should maximise public accessibility, while respecting applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony;
- (g) Note that maximising future accessibility has an impact on many operations of a commission throughout its lifetime, including, for example, on the process of taking statements and other contact with victims and witnesses who should be advised that their contributions to the commissions may be accessible in the future under specified conditions; and
- (h) Establish guidelines for access to truth commission records, which shall take into account (among other things) general access rules, such as:
 - (i) What was previously public should remain public;
 - (ii) victims, families, investigative and prosecutorial authorities, as well as legal defence teams, should have unhindered access to information on their specific case;
 - (iii) there should be a presumption of public access to all State information with only limited exceptions;

- (iv) a procedure to make effective the right of access should be established; and
- (v) whatever access rules are determined for various categories of potential users (for example, victims, legal representatives, journalists, academics, and members of the general public) should apply to all members of the given category without discrimination.

Rights of alleged wrongdoers: According to the Istanbul Protocol, all ‘interested parties’ should have an opportunity to be heard by a commission of investigation. It continues: ‘All these witnesses should be permitted legal counsel if they are likely to be harmed by the inquiry, for example, when their testimony could expose them to criminal charges or civil liability. Witnesses may not be compelled to testify against themselves. There should be an opportunity for the effective questioning of witnesses by the commission. Parties to the inquiry should be allowed to submit written questions to the commission.’³⁰⁰ The Orentlicher Principles provide that ‘[b]efore a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.’³⁰¹

Framing of terms of reference: The Istanbul Protocol states that a commission of inquiry’s terms of reference must be ‘neutrally framed so that they do not suggest a predetermined outcome’ and that ‘[t]o be neutral, terms of reference must not limit investigations in areas that might uncover State responsibility for torture’.³⁰²

Evaluation of evidence: The Istanbul Protocol provides that: ‘The commission must assess all information and evidence it receives to determine reliability and probity. The commission should evaluate oral testimony, taking into account the demeanour and overall credibility of the witness. The commission must be sensitive to social, cultural and gender issues that affect demeanour. Corroboration of evidence from several sources will increase the probative value of such evidence and the reliability of hearsay evidence. The reliability of hearsay evidence must be considered carefully before the commission accepts it as fact. Testimony not tested by cross-examination must also be viewed with caution. In-camera testimony preserved in a closed record or not recorded at all is often not subject to cross-examination and, therefore, may be given less weight.’³⁰³ The ECtHR has held that: ‘the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation’s effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.’³⁰⁴

Protection of the rights of those affected: further requirements

Written statements: The Istanbul Protocol states that: ‘Commissions of inquiry should invite persons to testify or submit written statements as a first step in gathering evidence. Written statements may become an important source of evidence if their authors are afraid to testify, cannot travel to proceedings or are otherwise unavailable. Commissions of inquiry should review other proceedings that could provide relevant information.’³⁰⁵

Public v private proceedings: The Istanbul Protocol acknowledges that while the proceedings of a commission of inquiry should generally be conducted in public, ‘in-camera proceedings’ may be necessary ‘to protect the safety of a witness.’³⁰⁶ The Protocol continues: ‘In-camera proceedings should be recorded and the sealed, unpublished record kept in a known location. Occasionally, complete secrecy may be required to encourage testimony, and the commission may want to hear witnesses privately, informally or without recording testimony.’³⁰⁷ The Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the gender perspective in transitional justice processes contends in relation to the design of truth commission hearings that: ‘The risks of revictimization are high and must be taken into account when designing hearings. The informed consent of those who testify is essential.’³⁰⁸ The Special Rapporteur adds that there must be ‘protection and security measures in place to prevent the social exposure of victims and avoid inflicting further damage on them once they return to their communities.’³⁰⁹ The Orentlicher Principles state, meanwhile, that ‘[e]ffective measures shall be taken to ensure the security, physical and psychological well-being and, where requested, the privacy of victims and witnesses who provide information’ to a commission.³¹⁰ The Orentlicher Principles specify that ‘Victims and witnesses testifying on their behalf may be called upon to testify before the commission only on a strictly voluntary basis’ and that: ‘Information that might identify a witness who provided testimony pursuant to a promise of confidentiality must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.’³¹¹

Support to victims who testify: The Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the gender perspective in transitional justice processes states: ‘Psychosocial support must be guaranteed before, during and after the hearing. Those who testify must be in a decent and safe environment, have support to prepare their testimonies and anticipate questions’.³¹² The Orentlicher Principles specify that ‘Social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault’ and that ‘All expenses incurred by those giving testimony shall be borne by the State’.³¹³

Medical examinations: The UN Principles state that ‘Medical examinations conducted for investigative purposes must conform to established standards of medical practice and result in an accurate written report, communicated confidentially to the person affected.’³¹⁴

Public scrutiny

Transparency: According to the ECtHR, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.³¹⁵ Transparency also assists victims’ involvement as well as holding the investigation to account more broadly. As the Minnesota Protocol states:

The right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a state’s records that pertains to serious violations, even if those records are held by security agencies or military or police units.

Investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public and of victims’ families. Transparency promotes the rule of law and public accountability, and enables the efficacy of investigations to be monitored externally. It also enables the victims, defined broadly, to take part in the investigation ... Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. In no circumstances may a state restrict transparency in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or would result in impunity for those responsible.³¹⁶

Advertising, communication and partnerships: The Istanbul Protocol states that: ‘Wide notice of the establishment of a commission and the subject of the inquiry should be given. The notice should include an invitation to submit relevant information and written statements to the commission and instructions to persons willing to testify. Notice can be disseminated through newspapers, magazines, radio, television, leaflets and posters.’³¹⁷ Highlighting the importance of proactively encouraging those affected—particularly women—to participate in the investigation, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence contends that:

In cases of women victims of human rights violations in general, and sexual violence in particular, the problem of their self-identification as victims arises. Many women do not perceive the crimes committed against them as violations of their human rights or they diminish them by prioritizing the telling of the experiences of others, which entails making their own suffering invisible. In particular, in the case of sexual violence, silence prevails, not only because of feelings of guilt, shame or fear of being stigmatized

or ostracized by the community, but also because of the conviction that any complaint would be futile owing to the lack of institutional protection, which highlights the extent of sexist cultural patterns...In the face of this and the risk of a possible distortion of the historical record, a proactive strategy of support and confidence-building is required to motivate women, lesbian, gay, bisexual and transgender persons and victims of sexual violence in general to provide statements.³¹⁸

Cooperation of third countries

The Orentlicher Principles state that ‘Third countries shall be expected to cooperate with a view to communicating or restituting archives for the purpose of establishing the truth.’³¹⁹ The ECtHR has held, similarly, in the Article 2 ECHR context, at least, that ‘[w]here there are cross-border elements to an incident of unlawful violence leading to loss of life...the authorities of the State...in which evidence of the offence could be located may be required by Article 2 to take effective measures in that regard, if necessary of their own motion.’³²⁰

5. The right to a remedy for Convention violations

The 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) provide a framework that reflects and is reflected by Transitional Justice approaches and the position of the CAT regarding states’ multi-layered obligations where gross and/or systematic abuses appear to have occurred. The Basic Principles state that they are based on the:

right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child.³²¹

The right to an ‘effective remedy’ for breaches of ECHR rights is protected explicitly by Article 13 of the Convention.

According to the Basic Principles, in addition to meeting their investigative obligation states must provide the following remedies to victims of gross violations of international human rights law: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.

Access to justice

States must ensure that victims of gross human rights violations have access to judicial remedies as well as administrative and other bodies that can provide a remedy to them. Accessibility requires: dissemination of ‘information about all available remedies’; measures ‘to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation’; the provision of ‘proper assistance to victims seeking access to justice’; and procedures where possible ‘to allow groups of victims to present claims for reparation and to receive reparation, as appropriate’.³²²

Reparation

The Basic Principles state that reparation ‘should be proportional to the gravity of the violations and the harm suffered’,³²³ and furthermore: ‘States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.’³²⁴ Reparation for gross human rights violations has five elements, according to the Basic Principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.

Restitution includes, ‘as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.’³²⁵

Compensation should be provided, as appropriate and proportional to the gravity of the violation and the circumstances of each case, for any assessable damage including ‘physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.’³²⁶

Rehabilitation ‘should include medical and psychological care as well as legal and social services’.³²⁷

Satisfaction should include, where applicable:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery,

identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

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

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

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.³²⁸

Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

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

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

(c) Strengthening the independence of the judiciary;

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

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

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

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.³²⁹

Notably, archives are considered an important measure that can assist in meeting the requirements of satisfaction and guarantees of non-recurrence. In 2015, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated that:

Archives containing records of mass violations can contribute to prevention. Access to well-preserved and protected archives is an educational tool against denial and revisionism, ensuring that future generations have access to primary sources, which is of direct relevance to history teaching. One notable example in this regard are the Stasi files opened up by Germany after 1989. Opening files contributes directly to the process of societal reform.³³⁰

...archives are relevant and can make significant contributions to each of the pillars of transitional justice, not merely truth and justice...Beyond the fact that transitional justice measures generate records themselves, truth commissions, trials, reparations programs and other transitional justice initiatives can contribute to improving archival practice both by the way they implement relevant standards with respect to their own documents, and because some of them, particularly truth commissions, are in a good position to make comments and recommendations about archival reform in general.³³¹

In 2020, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence issued a report highlighting the obligation on states to protect and provide access to archives in order to ensure memorialisation of atrocities. The Special Rapporteur noted:

Memorialization is linked to the ability to obtain access to archives. The most obvious risk is that some warring groups might deliberately seek to destroy documents that may be compromising or be used as evidence of serious violations of human rights and international humanitarian law. This desire to hide is not new: more than a century ago, King Leopold II of Belgium ordered the destruction of archives documenting the terrible violence committed under his authority in the Congo Free State. Since then, many Governments have tried to eradicate the traces of their crimes. The Special Rapporteur considers the protection of archives to be essential for enabling societies to learn the truth and regain ownership of their history.

It is not enough to protect archives. All too often, State bodies linked to security structures refuse to cooperate fully with transitional justice mechanisms or to make their archives available. This has occurred in Morocco, where the Equity and Reconciliation Commission was denied access to certain archives belonging to the security services. In some countries, such as El Salvador, it is still practically impossible to obtain access

to military archives related to specific crimes, over 30 years after they occurred, owing to the lack of cooperation by the authorities who hold them. This contrasts with the exemplary attitude of the German authorities, who have opened the archives of the Stasi (the Ministry of State Security of the former German Democratic Republic).³³²

On the basis of international human rights law documents, the International Council on Archives' Human Rights Working Group has published Principles on the Role of Archivists and Records Managers in Support of Human Rights: A working document of the International Council on Archives.³³³ The Principles recognise that:

the enforcement of human rights and fundamental freedoms to which all persons are entitled under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its two Optional Protocols, the International Covenant of Economic, Social and Cultural Rights and other international treaties and legal instruments is strengthened by the preservation of archives and the ability of individuals to gain access to them;

...governments have the responsibility to promote and protect the right to seek and receive information as a fundamental prerequisite to ensuring public participation in governance;

...adequate protection of the human rights and fundamental freedom to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to archival services provided by independent archival professionals; and

...professional associations of archivists and records managers have a vital role to play in upholding professional standards and ethics, providing archival services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and the public interest.³³⁴

Among the particular obligations established by the Principles are the following:

- Institutions, archivists and records managers should ensure that the management of archives documenting human rights violations preserves the integrity of the archives and their value as evidence. This means that archive management systems need to ensure that the archives can be proven to be genuine, are accurate and can be trusted, are complete and unaltered, secure from unauthorised access, alteration and deletion, can be found when needed, and are related to other relevant archives;³³⁵
- Governments and private institutions should ensure the provision of sufficient funding and other resources for the professional management of human rights archives;³³⁶

- Archivists should describe archival holdings in ways that enable users to understand whether the archives might contain information that would be useful in exercising a human rights claim, with particular regard to information concerning gross human rights violations, information that would help resolve the fate of missing persons, or information that may enable individuals to seek compensation for past violations;³³⁷
- Archivists and records managers should advocate for and support the right of access to government archives and encourage non-governmental institutions to provide similar access to their archives;³³⁸
- Institutions, archivists and records managers should ensure that safeguards are in place to protect personal information from unauthorised access, in order to ensure respect for rights, fundamental freedoms and the dignity of persons to whom the information relates;³³⁹
- Archivists should provide services without discrimination; all persons are entitled to call upon the assistance of an archivist to help them locate and retrieve archives that may enable them to establish their rights;³⁴⁰
- Archivists or records managers who, in the course of their professional activity, discover archives that they in good faith and on reasonable grounds believe contain evidence of gross violations of internationally recognized human rights that (a) are ongoing or (b) for which victims might seek compensation, should inform pertinent authorities about the existence of such archives;³⁴¹ and
- Where there exist groups or communities whose needs for archival services are not met, particularly where such groups have been the victims of discrimination, governments, professional associations of archivists and records managers, archival and educational institutions and individual professionals should take special measures to provide opportunities for persons from these groups to enter the archival profession and should ensure that they receive training appropriate to the needs of their groups.³⁴²

¹ International Labour Organization (ILO), *Forced Labour Convention, C29*, 28 June 1930 (entered into force 1 May 1932).

² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15*, 4 November 1950, ETS 5 (entered into force 3 September 1953).

³ ILO, *Convention Concerning the Abolition of Forced Labour*, 25 June 1959 (entered into force 17 January 1959).

⁴ UN Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956 (entered into force 30 April 1957).

⁵ UN General Assembly (UNGA), *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 (entered into force 3 September 1981).

⁶ UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 (entered into force 26 June 1987).

- ⁷ UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (entered into force 2 September 1990).
- ⁸ UNGA, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 (entered into force 3 May 2008)
- ⁹ *Kotov v Russia* App no 54522/00 (ECtHR, 3 April 2012) para 92, citing *Costello-Roberts v United Kingdom* App no 13134/87 (ECtHR 25 March 1993) para 27.
- ¹⁰ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, Chapter II).
- ¹¹ In *O’Keeffe v Ireland* (2014) 59 EHRR 15 the ECtHR noted that ‘this Court’s case-law confirmed, as early as its fifth judgment, that the Convention could impose positive obligations on States’ (para 147).
- ¹² UN Human Rights Committee (HRC), *Jegatheeswara Sarma v Sri Lanka*, Communication No. 950/2000 (16 July 2003), UN Doc. CCPR/C/78/D/950/2000 para 9.4.
- ¹³ *Jovanowicz and Others v Russia*, Apps nos 55508/07 and 29520/08 (ECtHR, 21 October 2013) paras 146-147; see also *Silih v Slovenia* App no 71463/01 (ECtHR, 9 April 2009) para 163.
- ¹⁴ UN Committee Against Torture (CAT), General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties, 13 December 2012 para 40.
- ¹⁵ The CAT’s multiple Concluding Observations directed at the UK and Ireland in relation to the Magdalene and Mother and Baby institutions, and its admissibility decision in *Elizabeth Coppin v Ireland* (UN Doc CAT/C/68/D/879/2018, 14 January 2020), demonstrate that as of the date of the UNCAT’s coming into force, those who have suffered in the past are included in the obligations under articles 12, 13 and 14.
- ¹⁶ CAT, General comment no. 3, 2012 : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties, 13 December 2012 para 3.
- ¹⁷ *Mocanu v Romania* (2015) 60 EHRR 19 para 261.
- ¹⁸ *O’Keeffe v Ireland* (2014) 59 EHRR 15; *Mocanu v Romania* (2015) 60 EHRR 19.
- ¹⁹ *Mocanu v Romania* (2015) 60 EHRR 19 para 265.
- ²⁰ *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* (2011) UKSC 20, Phillips LJ paras 50-51, 59, 62.
- ²¹ United Nations Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Res 47/133 (1 December 1992) UN Doc A/RES/47/133.
- ²² *Zorica Jovanovic v Serbia* App no 21794/08 (ECtHR, 26 March 2013) para 47.
- ²³ *Ibid* para 71 (references within the paragraph to earlier paragraphs in the judgment which establish these facts are omitted).
- ²⁴ United Nations Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Res 47/133 (1 December 1992) UN Doc A/RES/47/133, Article 17(1).
- ²⁵ *Varnava and others v Turkey* App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) [GC] para 148.
- ²⁶ *Janowicz v Russia* (2014) 58 EHRR 30 para 178.
- ²⁷ *Varnava and others v Turkey* App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 200.
- ²⁸ *Zorica Jovanovic v Serbia* App no 21794/08 (ECtHR, 26 March 2013) para 70. Note that the unmarried mother’s constitutional right to the custody of her child has been recognised by the Irish courts as an unenumerated right: *G v An Bord Uachtala* [1980] IR 32. See also *I.O’T v. B* [1998] 2 IR 321. The ECtHR has also held that Article 8 protects the right to know and be cared for by one’s parents: *B v United Kingdom* (1987) 10 EHRR. 87.
- ²⁹ *Custafa and Armagan Akin v Turkey* App no 4694/03 (ECtHR, 6 July 2010), para 19; *Boughanemi v France* App no 22070/93 (ECtHR, 24 April 1996) para 35.
- ³⁰ *Butt v Norway* App no 47017/09 (ECtHR, 4 March 2013) paras 4, 76; *Jucius and Juciuviene v Lithuania* App no 14414/03 (ECtHR, 25 February 2009) para 27.
- ³¹ However the ECtHR frequently notes that ‘the existence or non-existence of “family life” is essentially a question of fact depending upon the real existence in practice of close personal ties’: deriving from *K and T v Finland* App no 25702/94 (ECtHR, 12 July 2001) para 150.
- ³² Council of Europe: Commissioner for Human Rights, *Missing persons and victims of enforced disappearance in Europe*, March 2016, 17-18: ‘Enforced disappearance is a crime under international law and a violation of multiple human rights, including the right to personal liberty and security, the right to recognition as a person before the law, the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment, the right to a fair trial, and the right to life. Enforced disappearance also violates the economic, social and cultural rights of the disappeared person and his or her family.’ See also Working Group on Enforced

or Involuntary Disappearances (WGEID), ‘Study on enforced or involuntary disappearances and economic, social and cultural rights’, UN Doc A/HRC/30/38/Add.5 (9 July 2015).

³³ *Kurt v Turkey* (1999) 27 EHRR 373; *Bazorkina v Russia* (2008) 46 EHRR 15; HRC, *María del Carmen Almeida de Quinteros et al v Uruguay*, Communication No 107/1981 (21 July 1983) UN Doc CCPR/C/OP/2.

³⁴ *Gasin v UK* (1989) 12 EHRR 36; *Odievre v. France* App No 42326/98 (ECtHR, 13th February 2003) and *Godelli v Italy* App No 33783/09 (ECtHR, 25 September 2012); Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in relation to the “Magdalen Laundries”* November 2010.

³⁵ *SH v Austria* (2011) 52 EHRR 6 para 83.

³⁶ *Gaskin v United Kingdom* (1990) 12 EHRR 36.

³⁷ *Ibid* para 36.

³⁸ *Barthold v Germany* A 90 (1985); 7 EHRR 383 para 46.

³⁹ *Sunday Times v United Kingdom (No 1)* A 30 (1979); 2 EHRR 245 para 49.

⁴⁰ *Silver and Others v UK* A 61 (1983); 5 EHRR 347 paras 87-88.

⁴¹ *Sunday Times v United Kingdom (No 1)* A 30 (1979); 2 EHRR 245 para 49.

⁴² *Silver and Others v United Kingdom* A 61 (1983); 5 EHRR 347 para 80.

⁴³ *Al-Nashif v Bulgaria* Hudoc (2002); 36 EHRR 655 paras 119-123.

⁴⁴ *Handyside v UK* A 24 (1976) para 49; 1 EHRR 737.

⁴⁵ *Hirst v United Kingdom (No 2)* App no 74025/01 (ECtHR, 6 October 2005) para 79.

⁴⁶ *Mouvement Raelien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) para 75.

⁴⁷ *Soering v United Kingdom* (1989) 11 EHRR 439 para 89; *N v United Kingdom* (2008) 47 EHRR 39.

⁴⁸ *Marckx v Belgium* (1980) 2 EHRR 330.

⁴⁹ *Gaskin v United Kingdom* (1990) 12 EHRR 36.

⁵⁰ *Mikulic v Croatia* App no 53176/99 (ECtHR, 7 February 2002).

⁵¹ *Ibid* para 65.

⁵² *Jäggi v. Switzerland* App no. 58757/00 (ECtHR, 13th October 2006).

⁵³ *Ibid* para 38.

⁵⁴ *Ibid* para 40.

⁵⁵ *Ibid* para 38.

⁵⁶ *Ibid* para 41.

⁵⁷ *Ibid* para 42.

⁵⁸ *Mahelet Getye Habte v Minister for Justice and Equality* [2020] IECA 22 (Power J) para 31.

⁵⁹ *Pannullo and Forte v France* App no 37794/97 (ECtHR, 30 October 2001), *Girard v France* App no 22590/04 (ECtHR, 30 June 2011). See for discussion of these cases, Geoffrey Shannon, *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co Galway* (Department of Children, Equality, Disability, Integration and Youth, 2018) 32-33. See also the discussion in Maeve O'Rourke, Claire McGettrick, Rod Baker, Raymond Hill et al., *CLANN: Ireland's Unmarried Mothers and their Children: Gathering the Data: Principal Submission to the Commission of Investigation into Mother and Baby Homes* (Justice For Magdalenes Research, Adoption Rights Alliance, Hogan Lovells, 15 October 2018) 114 of the following cases: *Hadri-Vionnet v Switzerland*, App No 55525/20 (ECtHR, 14 February 2008); *Sabanchiyeva and Others v. Russia* App no 38450/05 (ECtHR, 6 June 2013); *Maskhadova and Others v Russia* App no 18071 (ECtHR, 6 June 2013).

⁶⁰ *Hadri-Vionnet v Switzerland* App no 55525/00 (ECtHR, 14 February 2008).

⁶¹ *Znamenskaya v. Russia* App no. 77785/01 (ECtHR, 2nd June 2005).

⁶² *Ibid* para 29.

⁶³ *Ibid* para 30.

⁶⁴ *Fatullayev v. Azerbaijan* App No 40984/07 (ECtHR, 22 April 2010) para 87; *Monnat v Switzerland* App No 73604/01 (ECtHR, 21 September 2006) para 57.

⁶⁵ *Kenedi v Hungary* App no 31475/05 (ECtHR, 26 August 2009).

⁶⁶ *Ibid* para 43.

⁶⁷ *Dink v Turkey* Apps Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR, 14 September 2010) para 137, translated and summarised in Council of Europe/European Court of Human Rights, Research Report: Positive obligations on member States under Article 10 to protect journalists and prevent impunity, December 2011, 5.

⁶⁸ *Mazurek v France* (2006) 42 EHRR 9; *Marckx v Belgium*, Series A, No. 31 (1979) 2 EHRR 330.

⁶⁹ *Johnston v Ireland* (1986) 9 EHRR 203.

⁷⁰ *Quinn's Supermarket v. Attorney General* [1972] IR 1 p13.

⁷¹ Council of Europe, *Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013)* (2013) 31.

⁷² *Nuri Kurt v Turkey* (2007) 44 EHRR 36, para 117.

- ⁷³ HRC, General Comment No. 36: Article 6 (Right to Life), UN Doc CCPR/C/GC/35 (3 September 2019) paras 21, 17.
- ⁷⁴ *Fernandes v Portugal* App No 43098/09 (ECtHR, 15 December 2015) para 70. See also *Tunç v Turkey* App no 24014/05, (ECtHR, 25 June 2013) para 171; *McCaughey v United Kingdom* App No 43098/09 (ECtHR, 15 December 2015).
- ⁷⁵ *Salman v Turkey* (2002) 34 EHRR 425 para 99.
- ⁷⁶ *Musayeva v Russia* (2008) 47 EHRR 25 para 77.
- ⁷⁷ *Oneryildiz v Turkey* (2005) 41 EHRR 20 para 93
- ⁷⁸ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, p1.
- ⁷⁹ *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002) para 137.
- ⁸⁰ *Makaratzis v Greece* (2005) 41 EHRR 49 para 57 .
- ⁸¹ See for example *Oneryildiz v Turkey* (2005) 41 EHRR 20; *Osman v United Kingdom* (2000) 29 EHRR 245; *Opuz v Turkey* (2010) 50 EHRR 28.
- ⁸² *Nencheva and Others v Bulgaria* App no 48609/06 (ECtHR, 18 June 2013).
- ⁸³ *Aksoy v Turkey* (1997) 23 EHRR 553 para 98; *Assenov and Others v Bulgaria* (1999) 28 EHRR 652 para 98; *Kaya v Turkey* (1999) 28 EHRR 1 para 107.
- ⁸⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), Article 1.
- ⁸⁵ CAT, General Comment no 2, *Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2, 24 January 2008, para 18.
- ⁸⁶ *Ibid.*
- ⁸⁷ *Ibid* para 19.
- ⁸⁸ *Ibid* para 3.
- ⁸⁹ *Ibid* para 18.
- ⁹⁰ HRC, General Comment No 31, *'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'* UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 8.
- ⁹¹ *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* (2008) 46 EHRR 30.
- ⁹² *Ibid* para 96, citing *Pretty v United Kingdom* (2002) 35 EHRR 1 paras 50–51; *Okkali v Turkey* App no 52067/99 (ECtHR, 17 October 2006) para 70; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23 para 53.
- ⁹³ *Kudla v Poland* (2002) 35 EHRR 11 para 9.
- ⁹⁴ See, for example, HRC General Comment No 20, *'Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)'* UN Doc HRI/GEN/1/Rev 9 (Vol I) (10 March 1992) paras 2, 5. See also David Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 238, citing *Ireland v United Kingdom* [1978] 2 EHRR 25 para 167; *Tyrer v United Kingdom* (1979–80) 2 EHRR 1; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293; *Soering v United Kingdom* (1989) 11 EHRR 439.
- ⁹⁵ See, for example, HRC, *Sarma, Jegatheeswara v Sri Lanka*, Communication No 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000 para 9.5; HRC, *Natalia Schedko v Belarus*, Communication No 886/1999 (3 April 2004) UN Doc CCPR/C/77/D/886/1999; HRC, *Mariam Sankara et al v Burkina Faso*, Communication No 1159/2003 (28 March 2006) UN Doc CCPR/C/86/D/1159/2003.
- ⁹⁶ See, for example, *Kurt v Turkey* (1999) 27 EHRR 373; *Gongadze v Ukraine* (2006) 43 EHRR 967; *Bazorkina v Russia* (2008) 46 EHRR 15; *Yandiyev and others v Russia* App nos 34541/06, 43811/06 and 1578/07 (ECtHR, 10 October 2013). In *Çakici v Turkey* (2001) 31 EHRR 5, however, the ECtHR held (at para 98) that an Article 3 violation in respect of a relative of a 'disappeared' person 'will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.'
- ⁹⁷ *Aydin v Turkey* (1998) 25 EHRR 251 para 83.
- ⁹⁸ *Aksoy v Turkey*, App No 21987/93 (ECtHR, 18 December 1996) para 63.
- ⁹⁹ UNCAT Article 1; see also CAT, *General Comment No 2, Implementation of article 2 by State parties*, UN Doc CAT/C/GC/2 (24 January 2008) para 10.
- ¹⁰⁰ CAT, *General Comment No. 2*, *ibid* para 9.
- ¹⁰¹ *Ibid* para 20.
- ¹⁰² UNHRC, *'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez'* (1 February 2013) UN Doc A/HRC/22/53 para 20.
- ¹⁰³ *Fedotov v Russia* (2007) 44 EHRR 26.
- ¹⁰⁴ David Harris and others, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 244.
- ¹⁰⁵ Harris and others, *ibid* 256-7.

- ¹⁰⁶ Ibid 257.
- ¹⁰⁷ *VK v Russia* App no 68059/13 (ECtHR, 7 March 2017).
- ¹⁰⁸ Ibid para 172. See also *Z and Others v United Kingdom*, (2002) 34 EHRR 3; *M and M v Croatia*, App no. 10161/13 (ECtHR, 3 September 2015) paras 131-135.
- ¹⁰⁹ *Jalloh v Germany* (2007) 44 EHRR 32 para 68.
- ¹¹⁰ *Price v United Kingdom* (2002) 34 EHRR 53 para 24; *Peers v Greece* (2001) 33 EHRR 51 paras 67, 68, 74.
- ¹¹¹ *Price v United Kingdom* (2002) 34 EHRR 53 para 30.
- ¹¹² *East African Asians v United Kingdom* (1973) 3 EHRR 76. See also *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471.
- ¹¹³ *VC v Slovakia* Application no. 18968/07 (ECtHR, 8 November 2011) para 106-7.
- ¹¹⁴ *Yazgul Yilmaz v Turkey* App no 36369/06 (ECtHR 1 February 2011); see ECtHR's Information Note on the Court's case-law No. 138 February 2011.
- ¹¹⁵ *Aydin v Turkey* App No 23178/94 (ECtHR, 25th September 1997) para 83.
- ¹¹⁶ *VC v Slovakia* (2014) 59 EHRR 29.
- ¹¹⁷ Ibid para 117.
- ¹¹⁸ Ibid para 112.
- ¹¹⁹ Ibid para 114.
- ¹²⁰ Ibid para 118.
- ¹²¹ Ibid para 106.
- ¹²² *N v Sweden* App no 23505/09 (ECtHR, 20 July 2010).
- ¹²³ Ibid para 55.
- ¹²⁴ Ibid para 59.
- ¹²⁵ Ibid para 62.
- ¹²⁶ CAT, *General Comment No. 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) para 21.
- ¹²⁷ *Opuz v Turkey* (2010) 50 EHRR 28 para 160.
- ¹²⁸ Ibid para 168.
- ¹²⁹ See for example *O'Keefe v Ireland* (2014) 59 EHRR 15; *Z and Others v United Kingdom* (2002) 34 EHRR 3; *Tarakhel v Switzerland* (2015) 60 EHRR 28 para 119; IACtHR, '*Juvenile Reeducation Institute v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 paras 163, 212; *Aydin v Turkey* (1998) 25 EHRR 251 para 84; *Rahimi v Greece*, App no 8687/08 (ECtHR, 5 July 2011).
- ¹³⁰ In *O'Keefe v Ireland* (2014) 59 EHRR 15 the ECtHR explained at para 144: 'This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.' See also *Opuz v Turkey* (2010) 50 EHRR 28 para 159 and *A v United Kingdom* (1999) 27 EHRR 611 para 22.
- ¹³¹ *O'Keefe v Ireland* (2014) 59 EHRR 15 para 145.
- ¹³² *O'Keefe v Ireland* (2014) 59 EHRR 15 paras 144-148, 168-169.
- ¹³³ See, for example, HRC General Comment No 21, '*Article 10 (Humane treatment of persons deprived of their liberty)*' UN Doc HRI/GEN/1/Rev 9 (Vol 1) (10 April 1992) para 3; *MS v United Kingdom* (2012) 55 EHRR 23; *Bouyid v Belgium* (2016) 62 EHRR 32 para 107; IACtHR, '*Street Children (Villagran Morales et al) v Guatemala*, Judgment of 19 November 1999 (Merits) Series C No 63 para 166; IACtHR, *Laoyza Tamayo v Peru* para 57.
- ¹³⁴ See HRC General Comment No 21, '*Article 10 (Humane treatment of persons deprived of their liberty)*' UN Doc HRI/GEN/1/Rev 9 (Vol 1) (10 April 1992) para 3.
- ¹³⁵ *Ribitsch v Austria*, App no 18896/91 (ECtHR, 4 December 1995) para 38.
- ¹³⁶ *Bures v Czech Republic*, App no 37679/08 (ECtHR, 18 October 2012) paras 78, 80.
- ¹³⁷ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul 11.V. 2011, Article 3.
- ¹³⁸ See, for example, IACmHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (n 22) para 433; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 paras 86-87.
- ¹³⁹ See, for example, *Nevmerzhitsky v Ukraine* App no 54825/00 (ECtHR, 5th April 2005) paras 86-87; APT and CEJIL, *Association for the Prevention of Torture and Center for Justice and International Law, 'Torture in International Law: A Guide to Jurisprudence' (2008)* 185; HRC, *Womah Mukong v Cameroon*, Communication No 458/1991 (21 July 1994) UN Doc CCPR/C/51/D/458/1991 para 9.

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- ¹⁴⁰ For example, *Renolde v France* (2009) 48 EHRR 42 para 128; *MS v United Kingdom* (2012) 55 EHRR 23 para 44; *Grimailovs v Latvia* App no 6087/03 (ECtHR, 25 June 2013) para 161.
- ¹⁴¹ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) paras 50–59.
- ¹⁴² UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013) para 70.
- ¹⁴³ UN Human Rights Council, *Report of the Special Rapporteur on torture*, *ibid* para 70, citing *Mouisel v France*, App no. 67263/01 (ECtHR 14 November 2002), and Nell Monroe, ‘Define acceptable: how can we ensure that treatment for mental disorder in detention is consistent with the UN Convention on the Rights of Persons with Disabilities?’ (2012) 16(6) *The International Journal of Human Rights* 902.
- ¹⁴⁴ *Mouisel v France*, App no. 67263/01 (ECtHR 14 November 2002), para 48.
- ¹⁴⁵ HRC, *C v Australia*, no 900/1999 (28 October 2002) UN Doc CCPR/C/76/D/900/1999 para 8.4.
- ¹⁴⁶ *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 288.
- ¹⁴⁷ *Ibid* para 286, 296.
- ¹⁴⁸ *Ibid*.
- ¹⁴⁹ *CN v United Kingdom* (2013) 56 EHRR 24 para 7.
- ¹⁵⁰ *SM v Croatia* App no 60561/14 (ECtHR, 25 June 2020).
- ¹⁵¹ *Ibid* para 310.
- ¹⁵² ILO, *Forced Labour Convention, C29*, 28 June 1930 (entered into force 1 May 1932), Article 4.
- ¹⁵³ *Ibid*, Article 5.
- ¹⁵⁴ *Ibid*, Article 25.
- ¹⁵⁵ ECOSOC, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956 (entered into force 30 April 1957), Article 1.
- ¹⁵⁶ ILO, *Convention Concerning the Abolition of Forced Labour*, 25 June 1959 (entered into force 17 January 1959), Article 1.
- ¹⁵⁷ *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 284.
- ¹⁵⁸ *Ibid* para 287.
- ¹⁵⁹ ILO, *Forced Labour Convention, C29*, 28 June 1930 (entered into force 1 May 1932), Article 2.
- ¹⁶⁰ Irish Human Rights Commission, *Follow Up Report on State Involvement with Magdalen Laundries* (June 2013) 77-91.
- ¹⁶¹ *Ibid* 78.
- ¹⁶² *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005).
- ¹⁶³ *Ibid* para 117.
- ¹⁶⁴ *Ibid* para 118.
- ¹⁶⁵ *Ibid* para 119.
- ¹⁶⁶ *Ibid* para 123 citing *Van Droogenbroeck v Belgium*, Commission’s report of 9 July 1980, Series B no. 44, p. 30, paras 78-80.
- ¹⁶⁷ *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005) para 124.
- ¹⁶⁸ *Ibid* para 126.
- ¹⁶⁹ *Ibid* paras 126-127.
- ¹⁷⁰ *Kurt v Turkey* (1999) 27 EHRR 373 para 104.
- ¹⁷¹ *Zorica Jovanovic v Serbia* App no 21794/08 (ECtHR, 26 March 2013).
- ¹⁷² *Mentes and Others v Turkey* (1998) 26 EHRR 595 para 89.
- ¹⁷³ See for example *Quinn v France* App No 18580/91 (ECtHR, 22 March 1995); *Labita v Italy* App No 26772/95 (ECtHR, 6 April 2000); Irish Human Rights Commission, *Follow-Up Report on State Involvement with Magdalen Laundries* (June 2013), Chapter 3.
- ¹⁷⁴ See for example, *Creanga v Romania* App No 29226/03 (ECtHR, 23 February 2012); *Medvedyev and Others v France* App No 3394/03 (ECtHR, 29 March 2010).
- ¹⁷⁵ *Saadi v United Kingdom* (2008) 47 EHRR 17 paras 67-74; *Khodorkovskiy v Russia* (2011) 53 EHRR 1103 para 142.
- ¹⁷⁶ *Bouamar v Belgium* 129 (1988) 11 EHRR 1.
- ¹⁷⁷ *Wassink v Netherlands* App no 12535/86 (ECtHR, 27 September 1990) paras 33 and 34.
- ¹⁷⁸ *Varbanov v Bulgaria* App no 31365/96 (ECtHR, 5 October 2000) paras 46-49.
- ¹⁷⁹ *Mihailovs v Latvia* App no 35939/10 (ECtHR, 22 January 2013) paras 149-150.
- ¹⁸⁰ ECHR Article 5(2). Those reasons must clarify for the person concerned the legal and factual grounds for the deprivation of liberty, so that the person can apply to a court to challenge the lawfulness of the arrest or detention. See *Fox, Campbell and Hartley v United Kingdom* App Nos 12244/86; 12245/86; 12383/86 (ECtHR, 30 August 1990); see also IHRC *Follow-Up Report on Magdalen Laundries* Chapter 3; see also *M v Ukraine* App no 2452/04 (ECtHR, 19 April 2012) paras 55-67.
- ¹⁸¹ ECHR Article 5(3).

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- ¹⁸² *Stanev v Bulgaria* App no 36760/06 (ECtHR, 17 January 2012) para 171.
- ¹⁸³ *Ibid* para 120.
- ¹⁸⁴ *Storck v Germany* (2005) 43 EHRR 96 para 102.
- ¹⁸⁵ *Ibid*.
- ¹⁸⁶ *Stanev v Bulgaria* (2012) 55 EHRR 22 para 115.
- ¹⁸⁷ See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146.
- ¹⁸⁸ *Stanev v Bulgaria* App no 36760/06 (ECtHR, 17 January 2012) para 117.
- ¹⁸⁹ *Ibid* para 119 citing *De Wilde, Ooms and Versyp v Belgium* 18 June 1971 paras 64-65, Series A no. 12.
- ¹⁹⁰ *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.
- ¹⁹¹ *Stanev v Bulgaria* (2012) 55 EHRR 22.
- ¹⁹² *Ibid* paras 124- 126.
- ¹⁹³ *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (2012) 55 EHRR 22 para 128.
- ¹⁹⁴ *Stanev v Bulgaria* (2012) 55 EHRR 22 para 124.
- ¹⁹⁵ *Ibid* para 125–26.
- ¹⁹⁶ *Ibid* para 127; *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 146.
- ¹⁹⁷ *HL v United Kingdom* (2005) 40 EHRR 32.
- ¹⁹⁸ Irish Human Rights Commission, *Follow Up Report on State Involvement with Magdalen Laundries* (June 2013) 46.
- ¹⁹⁹ *Ibid* 46-47.
- ²⁰⁰ *Ibid* 47.
- ²⁰¹ *Ibid* 51.
- ²⁰² *Ibid* 51.
- ²⁰³ *Ibid* 60.
- ²⁰⁴ *Ibid* 66.
- ²⁰⁵ *Zorica Jovanovic v Serbia* App no 21794/08 (ECtHR, 26 March 2013) para 71 (references within the paragraph to earlier paragraphs in the judgment which establish these facts are omitted).
- ²⁰⁶ *Ibid* para 74.
- ²⁰⁷ *Mentes and Others v Turkey* App no 23186/94 (ECtHR, 28 November 1997).
- ²⁰⁸ *Ibid* para 70-74.
- ²⁰⁹ *Ibid* para 89.
- ²¹⁰ *AK and L v Croatia* App no 37956/11 (ECtHR, 8 January 2013) para 60.
- ²¹¹ *Ibid* para 62.
- ²¹² *B v United Kingdom* (1987) 10 EHRR 87.
- ²¹³ ECHR Article 8.
- ²¹⁴ See *Gnahoré v France* (2002) 34 EHRR 38, at 59; *Johansen v. Norway* (1997) 23 EHRR 33; *Strand Lobben and Others v Norway* App no 38283/13 (ECtHR, 10 September 2019) para 207.
- ²¹⁵ *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994) para 50.
- ²¹⁶ *Strand Lobben and Others v Norway* App no 37283/13 (ECtHR, 10 September 2019).
- ²¹⁷ *Ibid* para 209.
- ²¹⁸ *W v United Kingdom* (1987) 10 EHRR 313.
- ²¹⁹ *Keegan v Ireland*, App No 16969/90 (ECtHR, 26 May 1994).
- ²²⁰ *AK and L v Croatia* App no 37956/11 (ECtHR, 8 January 2013).
- ²²¹ *Ibid* para 72.
- ²²² *Juhnke v Turkey* App no 52515/99 (ECtHR, 13 May 2008).
- ²²³ *Ibid* para 77.
- ²²⁴ *Ibid* para 76.
- ²²⁵ *Ibid* para 77.
- ²²⁶ *Ibid*.
- ²²⁷ *G v An Bord Uchtála* [1980] IR 32.
- ²²⁸ *DG v An Bord Uchtála* [1996] ILFR 263. Subsequently affirmed in an *ex tempore* SC judgment delivered on 11th July 1996.
- ²²⁹ *DG v An Bord Uchtála* [1996] ILFR 263.
- ²³⁰ *Juhnke v Turkey* App no 52515/99 (ECtHR, 13 May 2008).
- ²³¹ See for example *Hadri-Vionnet v Switzerland*, App No 55525/20 (ECtHR, 14 February 2008); *Girard v France*, App No 22590/04 (ECtHR, 20 June 2011); *Pannullo and Forte v France*, App no 37794/97 (ECtHR, 30 October 2001); *Sabanchiyeva and Others v. Russia* App no 38450/05, (ECtHR, 6 June 2013); *Maskhadova and Others v. Russia* no. 18071, (ECtHR, 6 June 2013).

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- ²³² See *M.A.K. and R.K. v. the United Kingdom* (2010) ECHR 363; *Glass v. the United Kingdom* App no 61827/00 (ECtHR, 9 March 2004).
- ²³³ *Maric v Croatia* App no 50132/12 (ECtHR, 12 June 2014).
- ²³⁴ *Petrova v Latvia* App no 4605/05 (ECtHR, 24 June 2014). Discussed in Geoffrey Shannon, *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co Galway* (Department of Children, Equality, Disability, Integration and Youth, Shannon, 2018) 39.
- ²³⁵ Irish Human Rights Commission (ICHR), *Assessment of the Human Rights Issues Arising in relation to the "Magdalen Laundries"*, November 2010.
- ²³⁶ *Ibid* paras 101-102.
- ²³⁷ *Ibid* para 102.
- ²³⁸ *Cummins and Others v United Kingdom* App no 27306/05 (ECtHR, 13 December 2005).
- ²³⁹ *O'Keefe v Ireland* App no 35810/09 (ECtHR, 28 January 2014).
- ²⁴⁰ *Keenan v United Kingdom* (2001) 33 EHRR 38
- ²⁴¹ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000.
- ²⁴² *Ibid*, Principle 5 (a)
- ²⁴³ *El Masi v 'The Former Yugoslav Republic of Macedonia'* app no 39630/09 ECtHR 13 December 2012
- ²⁴⁴ *Ibid* para 1.
- ²⁴⁵ *Ibid* para 4.
- ²⁴⁶ *Ibid*.
- ²⁴⁷ UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 5.
- ²⁴⁸ See *Gulec v. Turkey* (1999) 28 EHRR 121; *McKerr v United Kingdom* (2002) 34 EHRR 20.
- ²⁴⁹ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 2.
- ²⁵⁰ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, 7.
- ²⁵¹ *Nachova v Bulgaria* 2005-VII; 42 EHRR 933 GC; see also *Finucane v United Kingdom* (2003) 37 EHRR 29. See also *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 288 and *Edwards v United Kingdom* (2002) 35 EHRR 19 para 69.
- ²⁵² UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), 8.
- ²⁵³ *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) para 233.
- ²⁵⁴ *El Masri v Macedonia* (2013) 57 EHRR 25, paras 183-185; See also *Assenov v Bulgaria* (1999) 28 EHRR 652 para 103 ; and *Batu v Turkey* (2006) 42 EHRR37 para 136 (extracts).
- ²⁵⁵ See *Tanrikulu v Turkey* (2000) 30 EHRR950 para 104; and *Gül v Turkey* (2002) 34 EHRR28 para 89.
- ²⁵⁶ See *Boicenco v Moldova* App no 41088/05 (ECtHR, 11 July 2006) para 123.
- ²⁵⁷ UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 8(d).
- ²⁵⁸ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 1.
- ²⁵⁹ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, para 26, 7.
- ²⁶⁰ *Ibid* para 25.
- ²⁶¹ *Armani Da Silva v UK* App no 5878/08 (ECtHR, 7 July 2012) para 233.
- ²⁶² UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 8(f).
- ²⁶³ *Ibid*, Principle 15.
- ²⁶⁴ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo Greiff*, (28 August 2013) UN Doc A/HRC/24/42.
- ²⁶⁵ *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) para 233.
- ²⁶⁶ *Ibid* para 233, citing *Nachova and Others v Bulgaria* (2006) 42 EHRR 43 para 160 and others.
- ²⁶⁷ UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 8(e).
- ²⁶⁸ *Ibid*, Principle 16.
- ²⁶⁹ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 1.

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- ²⁷⁰ Ibid.
- ²⁷¹ UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 12.
- ²⁷² See for example *McKerr v United Kingdom* (2002) 34 EHRR20; *Ergi v. Turkey* (2001) 32 EHRR 388.
- ²⁷³ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 2.
- ²⁷⁴ OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1 para 109.
- ²⁷⁵ Ibid para 110.
- ²⁷⁶ Ibid para 111.
- ²⁷⁷ UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: the gender perspective in transitional justice processes, 17 July 2020, A/75/174 para 14.
- ²⁷⁸ See for example *Keenan v. United Kingdom* (2001) 33 EHRR 913.
- ²⁷⁹ See for example *Khan v. United Kingdom* (2001) EHRR 1016.
- ²⁸⁰ *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) para 233.
- ²⁸¹ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 3(a).
- ²⁸² OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, HR/P/PT/8/Rev.1 para 108.
- ²⁸³ Ibid para 115.
- ²⁸⁴ UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 14.
- ²⁸⁵ Ibid, Principle 11.
- ²⁸⁶ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc A/HRC/14/22 (23 April 2010) para 32.
- ²⁸⁷ UN General Assembly, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: the gender perspective in transitional justice processes, 17 July 2020, A/75/174.
- ²⁸⁸ Ibid para 10.
- ²⁸⁹ Ibid.
- ²⁹⁰ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc A/HRC/14/22 (23 April 2010) para 32.
- ²⁹¹ Ibid para 45.
- ²⁹² UN Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1 para 107
- ²⁹³ See for example *Güleç v Turkey* (1999) 28 EHRR 121; see also *El Masri v Macedonia* (2013) 57 EHRR 25 para 185.
- ²⁹⁴ OHCHR, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by UNGA Resolution 55/89 of 4 December 2000, Principle 4.
- ²⁹⁵ OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, HR/P/PT/8/Rev.1 para 116.
- ²⁹⁶ *Paul and Audrey Edwards v the United Kingdom* App No 46477/99 (ECtHR, 14 March 2002).
- ²⁹⁷ Ibid para 84.
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