**Combating Transnational Organised Crime through International Human Rights Law**

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**Introduction**

Transnational organised crime is a global problem. Every single State is affected one way or another as the origin, transit or destination for illicit proceeds, goods and even people. Wherever crimes are committed, the involvement of highly sophisticated organised criminal groups is recognised. The known groups in the world include the Italian Mafia,[[1]](#footnote-1) Triad (Hong Kong),[[2]](#footnote-2) Yakuza (Japan),[[3]](#footnote-3) Sinaloa Cartel (Mexico),[[4]](#footnote-4) as well as criminal syndicates in Russia[[5]](#footnote-5) and West Africa.[[6]](#footnote-6) Due to their well-established experiences and expertise in committing a variety of crimes at national and international levels, it has become increasingly difficult for States to detect and prevent transnational organised crime. In recognising the need to promote a more effective action, the international community adopted the United Nations Convention against Transnational Organised Crime (UNTOC)[[7]](#footnote-7) in 2000. In addition to providing certain legal definitions[[8]](#footnote-8) for States to follow, this instrument is designed to strengthen individual and collective action through the adoption of more robust criminal justice responses. While this may be regarded an important step forward, transnational organised crime not only is a crime, but also affects a wide variety of human rights. This means that international human rights law has a role to play in supplementing the current action against transnational organised crime facilitated through the UNTOC and other relevant instruments on the subject.

The purpose of this article is to explore the key obligations imposed upon States under international human rights law to combat transnational organised crime and to elucidate the extent to which this branch of law can assist the ongoing actions against it. It begins by highlighting a number of human rights which are affected by various forms of organised crime, such as the rights to life, liberty and security, health, property, culture, as well as the prohibition on slavery/forced labour and other inhuman or degrading treatments. The article then analyses the key obligations imposed upon States under international human rights law, with particular reference to 1) investigation, prosecution and punishment, 2) protection of victims and 3) prevention. The main conclusion reached is that international human rights law is indeed useful as it encourages States to adopt a holistic approach capable of addressing the complex and multi-faceted nature of transnational organised crime beyond simple criminal justice responses. However, a degree of uncertainty and concerns remains in some areas and States and the human rights community must do more to develop concrete norms and principles and implement them proactively in order to promote more effective responses.

**Human Rights Issues Arising from Organised Crime**

A wide variety of human rights are affected by transnational organised crime. Slavery, forced labour and human trafficking are prominent examples in modern times. According to the International Labour Organisation, approximately 21 million people are said to be the victims of forced labour globally.[[9]](#footnote-9) Of these, 4.5 million victims are subjected to sexual exploitation, while others are exploited in other sectors such as agriculture, shellfish industry, construction, and domestic work.[[10]](#footnote-10) International human rights law has long placed a clear obligation to prohibit slavery and forced labour,[[11]](#footnote-11) which has also been regarded as part of customary law and *jus cogens*,[[12]](#footnote-12) as well as the *erga omnes* obligation,[[13]](#footnote-13) thereby enjoying the higher status in the international legal order.

Another right which is pertinent is liberty and security of person. Maritime piracy is a case in point. According to the International Maritime Organisation, there were 221 reported instances of piracy in 2016.[[14]](#footnote-14) The affected areas include the South China Sea, the Indian Ocean, the Persian Gulf, and the Caribbean, indicating that piracy is a widespread practice across the globe. From a human rights perspective, the Inter-American Court of Human Rights has clearly recognised that abduction constitutes a violation of the right to personal liberty.[[15]](#footnote-15) The UN Working Group on Arbitrary Detention has also observed that taking of hostages is “undoubtedly a particularly serious form of arbitrary deprivation of liberty.”[[16]](#footnote-16) States are under obligation to protect individuals against these practices even when they are committed by non-State actors such as criminals and irregular groups.[[17]](#footnote-17)

In more serious cases, the right to life is also violated. For instance, the recent extrajudicial killings not only of criminals involved in the drug trade, but also those addicted to drugs in the Philippines have been widely criticised by human rights NGOs[[18]](#footnote-18) and a number of States.[[19]](#footnote-19) The violence caused by criminal groups in a variety of organised crime has also threatens the lives innocent citizens around the world. Similar to the right to liberty and security, it has long been established that States must protect the right to life from non-State actors,[[20]](#footnote-20) and this should include organised criminal groups.

In addition to these rights which fall under the category of civil and political rights, economic, social and cultural rights are affected by transnational organised crime. For instance, labour and sexual exploitation have a negative impact on one’s right to work as well as to the enjoyment of just and favourable conditions of work which are guaranteed by the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).[[21]](#footnote-21) Another obvious example is the right to the highest attainable standard of health[[22]](#footnote-22) which is affected by the prolonged captivity as part of maritime piracy, drug use/misuse[[23]](#footnote-23) (including addiction and transmission of diseases like Hepatitis and HIV/AIDS) resulting from illegal production and trafficking, as well as dumping of toxic and hazardous wastes [[24]](#footnote-24) which has become more organised and sophisticated in modern times.[[25]](#footnote-25)

There are other less explored economic, social and cultural rights which are disturbed by transnational organised crime. A good example is the right to property. [[26]](#footnote-26) Organised property crime (e.g. theft of vehicles, gold, metals, and a range of other commodities) is said to be as serious as other forms of organised crime such as drug and human trafficking[[27]](#footnote-27) and with advancement of technology, online fraud including phishing has become more prominent in modern time.[[28]](#footnote-28) Another important dimension of fraud is so-called organised excise fraud (illegal smuggling, sale or even manufacturing of highly taxed goods such as alcohol, tobacco and fuel) which is committed in order to avoid paying relevant taxes. From a human rights perspective, it has been argued that tax avoidance or abuse deprive States of valuable resources to progressively realise economic, social and cultural rights including education, health, and social protection.[[29]](#footnote-29)

Moreover, the right to culture is engaged for some types of organised crime. A good example is illegal trafficking and sale of cultural property or heritage. These activities have been reported widely in many parts of the world, including war torn States such as Afghanistan,[[30]](#footnote-30) Iraq and Syria,[[31]](#footnote-31) and the annual profits generated from these acts are estimated to be $1.2-1.6 billion.[[32]](#footnote-32) The involvement of organised criminal groups has been recognised,[[33]](#footnote-33) and this is one of the crimes where an explicit link with terrorism is evident.[[34]](#footnote-34) Article 15 of the ICESCR guarantees the right to take part in cultural life, and the Special Rapporteur in the Field of Cultural Rights has stressed that illicit trafficking in cultural property adversely affects this right.[[35]](#footnote-35)

Another example is trafficking and exploitation of wildlife. In many indigenous societies in Asia and Africa, hunting, sale and consumption of wildlife are important part of their economic, social and cultural life. The Expert Mechanism on the Rights of Indigenous Peoples has expressed an opinion in this regard that the term “cultural heritage” includes activities such as hunting, gathering, fishing,[[36]](#footnote-36) a point also endorsed by other human rights bodies.[[37]](#footnote-37) In addition to the right to culture, the use of wildlife and natural resources has been linked to the right to property.[[38]](#footnote-38) Unfortunately, the exercise of these rights has been overshadowed by the involvement of criminals, some of them more sophisticated criminal groups, who facilitate illegal poaching, trafficking and sale of wildlife for the sole purpose of making illegal profits[[39]](#footnote-39) and directly deprive the rights of those who rely on wildlife for their survival. In order to tackle exploitation and trafficking of wildlife, States have moved towards tighter regulation of wildlife through criminal prohibition and establishment of wildlife or nature reserves among other things. While no one would dispute the legitimacy of wildlife protection, the rights of local or indigenous populations have simultaneously been violated. So for instance, they have been relocated from their traditional lands and their access to the natural resources has been severely restricted,[[40]](#footnote-40) which in turn have led to other undesirable consequences such as “marginalization, poverty, loss of livelihoods, food insecurity, extrajudicial killings, and disrupted links with spiritual sites and denial of access to justice and remedy.”[[41]](#footnote-41)

Finally, an overarching issue applicable to various forms of organised crime explored above is corruption. Pubic and law enforcement officials sometimes turn a blind eye on organised crime or actively take part in it in exchange for monetary and other benefits.[[42]](#footnote-42) It has widely been accepted that corruption has an adverse impact on the enjoyment of human rights.[[43]](#footnote-43) In relation to organised crime, unwillingness to investigate, prosecute and punish as a result of corruption leads to violations of a range of human rights explored above. At a wider level, corruption threatens the rule of law and democracy,[[44]](#footnote-44) which are essential in promoting the full realisation of human rights. In summary, it is clear that transnational organised crime affects a number of human rights. This means that certain human rights obligations can be established in addition to the ones already articulated by the existing instruments,[[45]](#footnote-45) the most important one in modern times being the UNTOC. This article now analyses the nature and extent of these obligations with particular reference to 1) investigation, prosecution and punishment of transnational organised crime, 2) protection of victims, and 3) prevention of transnational organised crime.

**Human Rights Obligations in Relation to Transnational Organised Crime**

***Obligations to Investigate, Prosecute and Punish Transnational Organised Crime***

 In relation to the obligations to investigate, prosecute and punish transnational organised crime, while this is already imposed by the UNTOC and other relevant instruments, it is further strengthened by international human rights law. It is now settled that States must investigate human rights abuses committed by non-State actors generally,[[46]](#footnote-46) and the present analysis confirms that the same principle equally applies to various forms of organised crime. In relation to human trafficking and slavery/forced labour, for instance, the European[[47]](#footnote-47) and Inter-American[[48]](#footnote-48) Courts of Human Rights have recognised a positive (or due diligence) obligation to investigate, prosecute and punish these practices, and the Special Rapporteurs on Trafficking of Human Beings and on Contemporary Forms of Slavery have similarly asserted that the ‘due diligence’ obligation applies, among others, to investigation and prosecution.[[49]](#footnote-49) It seems reasonable to assume that the same reasoning would apply to other crimes which violate human rights, and the human rights bodies have started recognising this obligation for child labour and sexual exploitation,[[50]](#footnote-50) trafficking of drug[[51]](#footnote-51) and cultural property,[[52]](#footnote-52) tax evasion,[[53]](#footnote-53) dumping of toxic or hazardous wastes[[54]](#footnote-54) and corruption.[[55]](#footnote-55)

 However, the present analysis also highlights a gap in international human rights law. As noted above, the obligation to investigate is firmly established in relation to civil and political rights as can be seen by the abundance of jurisprudence and opinions by the relevant regional and international human rights bodies. Although the same obligation has been highlighted in relation to the violations of economic, social and cultural rights in the past,[[56]](#footnote-56) it has not been articulated rigorously in practice compared civil and political rights. In this regard, the majority of General Comments issued by the Committee on Economic Social and Cultural Right,[[57]](#footnote-57) as well as reports published by the Special Procedures dealing with economic, social and cultural rights[[58]](#footnote-58) do not comment or elaborate on the obligation to investigate violations of these rights. This discrepancy is difficult to justify as the resources and efforts needed to investigate violations are arguably the same for all human rights, and there does not seem to be any good reason why economic, social and cultural rights should be treated differently in this regard. It is submitted here that the obligation to investigate all human rights should be regarded as an obligation of conduct or immediate effect,[[59]](#footnote-59) and the relevant human rights bodies should start emphasising this in the future.

Given the clandestine and sophisticated nature of transnational organised crime, proactive intelligence-led law enforcement is needed. In this regard, States are encouraged to deploy measures such as surveillance, interception of communications and undercover operations.[[60]](#footnote-60) However, these techniques clearly have human rights implications, the right to privacy in particular. It should be highlighted here that international human rights law does not strictly prohibit the use of these special investigative techniques. Article 17 of the ICCPR, for instance, obliges States not to subject individuals to “arbitrary and unlawful interference” with privacy,[[61]](#footnote-61) meaning that lawful and non-arbitrary interference is permitted. Article 8(2) of the ECHR states further that the right to privacy can be restricted in the name of, among others, national security, the economic well-being of the country and prevention of disorder and crime. Indeed, the European Court of Human Rights accepted the need for special investigative measures over transnational organised crime.[[62]](#footnote-62)

 This does not mean, however, that the powers of States in facilitating intelligence-led law enforcement are unlimited, and international human rights law has been playing an important role in delineating their limits. For instance, States must specify in detail the circumstances under which such interferences may be permitted in their national legislation.[[63]](#footnote-63) Such legislation must be accessible[[64]](#footnote-64) and foreseeable, not in a sense that people should be able to know when the authorities will use those measures against them so that they can adapt their conduct accordingly, but rather that States must stipulate clear circumstances under which they can be applied.[[65]](#footnote-65) These include the types of offences which may give rise to the use of these measures, the duration of their use,[[66]](#footnote-66) the procedures for retention, access and destruction of obtained evidence,[[67]](#footnote-67) and the scope of any discretionary powers.[[68]](#footnote-68) Further, as part of remedy, anyone who believes that his/her right to privacy was breached should be able to bring a claim before the court of law, and this may require States to notify him/her the types of measures used.[[69]](#footnote-69) Finally, in order to prevent the abuse of special investigative techniques, supervisory control should generally be entrusted to the judiciary[[70]](#footnote-70) and not by political figures such as the Ministers of Justice or Interior.[[71]](#footnote-71) While these principles have emerged principally in Europe, the Human Rights Committee established by the ICCPR has also affirmed many of these on various occasions,[[72]](#footnote-72) thereby augmenting their applicability globally.

 The point about the involvement of judiciary is worth expanding. An analysis of the existing human rights jurisprudence reveals that it is a sufficient, but not a necessary, condition. In other words, judicial intervention is desirable, but not mandatory.[[73]](#footnote-73) In this regard, it has been held that authorisation or supervision can be given by a non-judicial authority,[[74]](#footnote-74) provided that the authority in question is ‘sufficiently independent’ from the executive branch of the government.[[75]](#footnote-75) It is easy to understand that the high-ranking government officials such as the Ministers of Interior or Justice are to be excluded from authorising or supervising special investigative techniques.[[76]](#footnote-76) However, uncertainty remains as to other authorities. As these techniques are usually employed by the police, internal authorisation or supervision would presumably be contrary to the notion of independence. Public prosecution (both high and lower ranking prosecutors) may come to one’s mind next, but it has been held that the independence requirement would not always be met.[[77]](#footnote-77) Interestingly, bodies consisting of parliamentarians (e.g. Parliamentary Justice Committee and Parliamentary Ombudsman) were considered as being sufficiently independent.[[78]](#footnote-78) However, such bodies are not equipped well to provide effective supervision before or during these measures are being used, as parliamentarians do not normally possess sufficient legal understanding of the key principles such as reasonable suspicion, necessity or proportionality as well as technical expertise on the use of special investigative techniques.

 All of these point to a conclusion that the judiciary is best placed to authorise and supervise independently and impartially, and therefore that their involvement should be made mandatory. In addition to maintaining the integrity of special investigative techniques, judicial authorisation and supervision from the beginning can prevent human rights violations from occurring in the first place. The European Court has opined in the past that prior or initial judicial authorisation is not an absolute requirement where there is judicial oversight afterwards as this would counterbalance the shortcomings of the authorisation.[[79]](#footnote-79) This argument, however, is not convincing as it still leaves a possibility of human rights violations occurring beforehand and dealing with them afterwards may not always restore the violated rights on the part of the victims fully. Another benefit of mandatory judicial involvement would be that it would naturally encourage the relevant law enforcement authorities to consider issues like reasonableness, necessity and proportionality more rigorously, further reducing the possibilities of human rights abuses. This in turn can enhance public confidence in law enforcement. In addition, when human rights are protected throughout the process, there will be no need for victims to seek redress and compensation, saving a good amount of money which can be channelled into meaningful purposes such as investment in technology and training of law enforcement officials. Mandatory judicial scrutiny is not totally out of line with the current trend in State practice, as a number of States, including Australia,[[80]](#footnote-80) Canada,[[81]](#footnote-81) Germany,[[82]](#footnote-82) the Netherlands,[[83]](#footnote-83) Poland,[[84]](#footnote-84) South Africa,[[85]](#footnote-85) Spain,[[86]](#footnote-86) Switzerland[[87]](#footnote-87) and the United Kingdom[[88]](#footnote-88) already require prior judicial authorisation and/or oversight one way or another. The Human Rights Committee also has used a stronger language by urging States to ensure that the judiciary is involved in all cases of special investigative techniques, including authorisation and oversight,[[89]](#footnote-89) and scholars support such a move as well.[[90]](#footnote-90)

 In terms of the punishment for transnational organised crime, the human rights bodies generally support effective and appropriate penalties which reflect the gravity of offences in question.[[91]](#footnote-91) A wide margin of appreciation is naturally granted to States in determining the levels of punishment, as the perceptions on the seriousness of organised crime are influenced by their political, social, moral, and cultural underpinnings, making it impossible agree on uniform rules. Having said this, there is a consensus that the death penalty should not be imposed for transnational organised crime. The ICCPR does not strictly prohibit this punishment as it is allowed for “most serious crime.”[[92]](#footnote-92) The fact that only 85 States have ratified the Second Optional Protocol to the ICCPR Abolishing the Death Penalty (out of 169 Parties to the ICCPR)[[93]](#footnote-93) demonstrates a strong support for the death penalty. However, there is now a widespread recognition that organised crime does not constitute “most serious crime.” The Human Rights Committee has consistently maintained that this punishment should not be applied to drug offences,[[94]](#footnote-94) a position supported by others like the Special Rapporteurs on Torture[[95]](#footnote-95) and on Extrajudicial Executions.[[96]](#footnote-96) The same opinion has gradually been applied to other crimes including corruption/bribery,[[97]](#footnote-97) organisation of prostitution,[[98]](#footnote-98) economic crimes,[[99]](#footnote-99) and abduction not resulting in death (which can be applied to human trafficking and maritime piracy).[[100]](#footnote-100) More recently, the UN Secretary-General has stated that the phrase “most serious crime” should be restricted to murder or intentional killings.[[101]](#footnote-101) For those which still retain this punishment for transnational organised crime, an immediate step which should be considered and taken is to establish a moratorium on executions[[102]](#footnote-102) with a view to abolishing it altogether in the future.

Another obligation relevant to investigation, prosecution and punishment of transnational organised crime is asset recovery or confiscation of criminal proceeds. An effective regime of asset recovery can send a strong message to criminals that they are not able to benefit from their criminal activities, and this may have a degree of deterrent effect. More importantly, it allows States to return stolen money and other assets to the victims, thereby contributing to restoration of their right to property, among others. While Article 12 of the UNTOC already requires States to take necessary measures to confiscate criminal proceeds, it has been argued that the same obligation arises from international human rights law, particularly the devotion of States’ maximum available resources to the fulfilment of economic, social and cultural rights under Article 2(1) of the ICESCR.[[103]](#footnote-103) This is based on the recognition that illicit financial flows facilitated by crimes such as corruption, tax evasion, organised fraud and money laundering deprive States of their ability to mobilise resources to seek full realisation of human rights.[[104]](#footnote-104) While this obligation may arise from the ICESCR, its relevance to civil and political rights has also been recognised.[[105]](#footnote-105) In addition to establishing a robust asset recovery regime through national legislation, enhancing the capability of the relevant law enforcement authorities and the judiciary is also important in fulfilling this obligation. The need for effective asset recovery was stressed previously by the Special Rapporteur on Human Trafficking,[[106]](#footnote-106) and the same obligation should apply to all forms of organised crime.

Confiscation of criminal proceeds can be divided roughly into two categories. The first is conviction based confiscation. As the name suggests, a confiscation order is issued after conviction. In this sense, such confiscation can be seen as an additional form of punishment. In addition, some States, including Australia, Canada, Colombia, Ireland, Italy, the Netherlands, United Kingdom and United States, also rely on non-conviction based confiscation. This is facilitated through civil proceedings, using ‘balance of probabilities’ as the standard of proof, without one being convicted. For this reason, non-conviction based confiscation is sometimes referred to as ‘civil asset recovery’ in some jurisdictions such as the United Kingdom and the Republic of Ireland. This regime has been regarded as a useful tool to combat organised crime[[107]](#footnote-107) as it allows the law enforcement authorities to act sooner rather than later before criminal proceeds disappear through money laundering, for instance.

 Although there is no major issue in confiscating criminal proceeds after criminals are properly prosecuted and punished, non-convicted based confiscation has raised some human rights concerns. Many States have a problem with this type of confiscation as the lower burden of proof (i.e. balance of probabilities) is used and in some jurisdictions, it is up to those affected, not prosecution, to prove that the property was not obtained as a result of criminal activities.[[108]](#footnote-108) Under the principle of criminal law, therefore, non-conviction based confiscation can be regarded as a clear breach of the presumption of innocence. Indeed, human rights complaints on this basis have been lodged against various States, particularly in Europe. Interestingly, it has been held that the purpose of non-conviction based confiscation is to recover assets illegally possessed and not to determine one’s guilt,[[109]](#footnote-109) and that it is a “preventive measure” which is separate from a criminal sanction.[[110]](#footnote-110) Consequently, civil asset recovery has not been held to result in a breach of the presumption of innocence automatically.

This position, however, does not sit well with the previous ruling that confiscation can also pursue the aim of punishing an offender.[[111]](#footnote-111) Indeed, scholars support a view that the regime amounts to punishment, and therefore that it should be regarded as a criminal justice mechanism.[[112]](#footnote-112) Campbell further opines that “moral responsibility and social blame” are present in civil asset proceedings, placing “the label of criminal on the person without due process protections.”[[113]](#footnote-113) Consequently, it has been argued that the presumption of innocence should apply to civil asset recovery.[[114]](#footnote-114) Strangely, it has been held that other procedural safeguards (e.g. public/open hearing, disclosure of the prosecution’s case, and an opportunity to rebut such an assumption on the balance of probabilities)[[115]](#footnote-115) were applicable even for civil proceedings. Here, a question can be asked as to whether the presumption of innocence, which is also an integral and interlinked part of the overall procedural guarantees,[[116]](#footnote-116) should be treated differently. In reality, some civil law States have the tradition of applying this principle even for civil proceedings,[[117]](#footnote-117) and there is no reason why the same cannot apply to non-conviction based confiscation. In summary, international human rights law complements the existing instruments relating to organised crime by encouraging States to ensure that investigation, prosecution and punishment for transnational organised crime are conducted appropriately. However, it is also evident that uncertainty remains in some areas.

***Obligation to Protect the Victims of Transnational Organised Crime***

International human rights law is particularly important in asserting the obligation to protect as it promotes a victim-centred approach as opposed to a purely criminal justice one promoted by the UNTOC and other instruments which does not always take their plight into consideration. The actual protection measures depend on the types of crime committed, the degree of victimisation, as well as the rights which are affected. There are therefore no concrete, uniform rules applicable to every single situation. In general terms, the obligation to protect victims of transnational organised crime can be established from a duty to secure, ensure or restore rights, and to provide remedies.[[118]](#footnote-118) This has been regarded as having an *erga omnes* character by the Inter-American Court of Human Rights in the past,[[119]](#footnote-119) underscoring its importance under international law. While this obligation has been established for civil and political rights, its relevance to economic, social and cultural rights has increasingly been acknowledged[[120]](#footnote-120) although not as strong as it can be.

A closer examination of the development of international human rights law reveals that the existing norms and principles are applicable to the protection of victims of transnational organised crime. In relation to the right to life, for instance, it has been recognised that it must be protected from all forms of threats perpetrated by both States agents and non-State actors.[[121]](#footnote-121) An important first step in this regard is to establish and maintain effective criminal prohibitions and sanctions on all forms of arbitrary deprivations of life resulting from transnational organised crime.[[122]](#footnote-122) This obligation is therefore closely interlinked with the obligations to investigate, prosecute and punish explained earlier. It has been established further that States must take steps to safeguard the lives of those within its jurisdiction.[[123]](#footnote-123) In this regard, they must take operational measures to protect “an individual whose life is at risk from the criminal acts of another individual.”[[124]](#footnote-124) In addition to the right to life, this reasoning has been applied to the prohibition on torture, inhuman or degrading treatment, slavery and forced labour.[[125]](#footnote-125) In principle, then, this obligation should apply to other forms of organised crime which result in violations of these rights at the very minimum.

However, there is a limitation to the provision of operational measures to protect. According to the European Court of Human Rights, “it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.”[[126]](#footnote-126) This takes into account the difficulties arising from the limited resources on the part of law enforcement agencies in properly identifying victims and taking appropriate actions.[[127]](#footnote-127) This reasoning, unfortunately, is problematic because protection is primarily given to the victims coming forward to provide intelligence or evidence. In practice, this might not happen often. In relation to human trafficking, for instance, many victims are often afraid of approaching the law enforcement authorities due to the fear of law enforcement action or reprisal by traffickers.[[128]](#footnote-128) The clandestine and dangerous nature of organised crime also makes it difficult for others to detect and report. Under these circumstances, it becomes unlikely for the authorities to be able to identify the real or immediate risks to victims’ human rights. Consequently, this limitation undermines the positive (or due diligence) obligations to investigate human rights violations, and more importantly, to provide sufficient protection to victims. The best approach is to implement appropriate protection measures regardless of whether States should/ought to have known the existence of risks previously.

In terms of specific protection measures, they depend on the types of crime in question. For instance, provision of shelter, medical/psychological assistance, as well as consular/legal assistance has been regarded as crucial for the victims of slavery, forced labour and human trafficking.[[129]](#footnote-129) The Committee on Economic, Social and Cultural Rights has interpreted protection from social and economic exploitation to include these measures,[[130]](#footnote-130) and other human rights bodies such as the Committee on Migrant Workers[[131]](#footnote-131) and the Committee on the Elimination of Discrimination against Women[[132]](#footnote-132) have also endorsed them. In addition, the European Court of Human Rights recently held that the positive obligations in relation to slavery must be interpreted in light of the Council of Europe Convention on the Action against Trafficking in Human Beings 2005.[[133]](#footnote-133) This means that States are obliged to provide others measures stipulated in this instrument, such as translation and interpretation (for foreign victims), access to education, vocational training, and labour market.[[134]](#footnote-134)

One caveat, however, is that some of these measures are to be given to the victims who are lawful residents in a State.[[135]](#footnote-135) This is problematic as many victims of slavery, forced labour and human trafficking are foreign nationals. In this regard, States should legalise or regularise the status of the victims of trafficking.[[136]](#footnote-136) This is strengthened by the principle of *non-refoulement* which can apply to cases where victims face the risk of re-trafficking, or other inhuman or degrading treatment upon return.[[137]](#footnote-137) Further, protection measures should not be conditional upon victims’ participation in criminal proceedings against traffickers,[[138]](#footnote-138) and they should not be penalised when they are forced to commit criminal offences as part of the trafficking process.[[139]](#footnote-139) While these are positive developments, the same norms and principles are yet to be applied rigorously to other forms of organised crime. It is therefore essential that the human rights bodies start doing so in order to widen the scope of protection to all victims of organised crime, particularly where their physical and mental well-beings are severally affected.

The obligation to protect also arises from economic, social and cultural rights. In relation to drug use and misuse, Article 33 of the Convention on the Rights of the Child 1989[[140]](#footnote-140) obliges States to “take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances.” In examining this Article, the Committee on the Rights of the Child has urged States to increase the availability of prevention, treatment and rehabilitation services for substance abuse,[[141]](#footnote-141) clearly linking to the protection of health. While this instrument is limited to children, the principle of non-discrimination, an overarching principle for all human rights, means that the same should apply to all drug users. In this regard, the Committee on Economic, Social and Cultural Rights stressed the need to ensure access to healthcare (including dependency/substitution treatments and harm reduction),[[142]](#footnote-142) psychological support and rehabilitation under the right to health[[143]](#footnote-143) without making any distinction as to who should be entitled to them.

Another issue related to health is the adverse impact caused by dumping of hazardous wastes. To begin with, States are required to prevent non-State actors from polluting the environment,[[144]](#footnote-144) and this applies to waste management.[[145]](#footnote-145) Linking this specifically to the right to health, States should protect those within their jurisdictions from toxic chemicals, pollution and contamination.[[146]](#footnote-146) The same obligation can be placed under the prohibition on inhuman or degrading treatment provided for by international and regional instruments,[[147]](#footnote-147) thereby underscoring the principle of interdependence and indivisibility of human rights. An essential starting point, then, is to establish a legislative framework to criminalise dumping of hazardous wastes with sufficient penalties in line with the obligations to investigate, prosecute and punish noted above. States also have a duty to “assist individuals whose human rights have been impacted by environmental harms,” and measures in this regard may include, but are not limited to, special assistance and medical care, as well as disposal of contaminated products.[[148]](#footnote-148) Further, they should provide sufficient awareness-raising and information on the presence and risks of toxic substances.[[149]](#footnote-149) Finally, victims should be granted effective remedies and restitution[[150]](#footnote-150) in the same way as other instances of human rights violations.

Moreover, States must protect cultural property and heritage from being destroyed and/or stolen. The Committee on Economic, Social and Cultural Rights has made it clear that States are obliged to protect cultural heritage in all its forms, in times of war and peace and natural disasters.[[151]](#footnote-151) In addition to enacting legislation prohibiting illegal exploitation and trafficking of cultural heritage, additional measures to be taken here include preservation and/or restoration of cultural property and heritage.[[152]](#footnote-152) The establishment of independent mechanisms to deal with illegal practices was also regarded as beneficial.[[153]](#footnote-153) Moreover, States must “take effective steps to ensure that there is appropriate education and awareness-raising concerning the right to take part in cultural life” which would also focus on “the need to respect cultural heritage.”[[154]](#footnote-154) It is important to highlight here that the human rights obligation extends beyond protection of physical and mental well-being of people affected.

A more complex dimension is protection of wildlife. It has been recognised, for instance, that States must respect the special relationship between the indigenous peoples/communities and their land “in the way that guarantee their social, cultural and economic survival.”[[155]](#footnote-155) In reading the right to property in conjunction with the right to self-determination (ICCPR/ICESER) and the rights of minority (ICCPR), the Inter-American Court of Human Rights held that indigenous peoples must be able to enjoy their right to property in accordance with their tradition, including “natural resources that lie on or within their land through agricultural, hunting and fishing activities.”[[156]](#footnote-156) The same reasoning has been endorsed by the Expert Mechanism on the Rights of Indigenous People in the context of cultural heritage.[[157]](#footnote-157) All of these would mean that States should generally allow indigenous peoples to hunt, consume or sell wildlife in accordance with their traditional ways of life. Further, they should prevent non-State actors such as organised criminal groups from exploiting wildlife. This can be established from a general duty, among others, to protect against environmental harms caused by private actors[[158]](#footnote-158) and to prevent them from interfering with the right to culture.[[159]](#footnote-159)

It is important to recognise, however, that these rights are not absolute, as they can be limited in the interest of society as a whole.[[160]](#footnote-160) So for instance, it has been held that States can restrict the exercise of right to property when such restriction has a legal basis and legitimate objective(s), and is necessary and proportionate.[[161]](#footnote-161) The same reasoning has been extended to the right to culture.[[162]](#footnote-162) Prohibition of wildlife exploitation and trafficking as well as its preservation or conservation would certainly satisfy these requirements. Indeed, establishment of game/wildlife reserves has been regarded as legitimate.[[163]](#footnote-163) It should also be highlighted here that preservation of wildlife can secure the rights of indigenous populations in the long run, as they can continue to benefit from it generation after generation. All of these are in conformity with the general obligation to protect biodiversity through legislative and institutional frameworks in order to support full realisation of human rights which depend on them.[[164]](#footnote-164)

Having said this, there are simultaneously a number of obligations designed to ensure that any restrictions imposed are not disproportionate. For instance, those affected should be able to participate in a decision-making process[[165]](#footnote-165) and States must obtain their free, prior and informed consent if large scale development or investment projects are planned[[166]](#footnote-166) as these may result in loss of their land, eviction, migration and resettlement.[[167]](#footnote-167) The development of game/wildlife reserves in the areas traditionally used and habituated by indigenous populations certainly falls under this. States must also secure access to these reserves or provide alternatives for them to enjoy their culture,[[168]](#footnote-168) while simultaneously preventing other non-State actors (e.g. criminals) from interfering with their right to enjoy wildlife and natural resources.[[169]](#footnote-169) Further, those who are forced to relocate to other areas should also be entitled to sufficient compensation. To be specific, they should be:

i) compensated for their losses at full replacement cost prior to the actual move

ii) assisted with the move and supported during the transition period in the resettlement site; and

iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them[[170]](#footnote-170)

While these developments are not specifically directed towards trafficking and exploitation of wildlife *per se*, there is no reason why the relevant norms and principles should not be applied to this issue.

It is clear that much of the above discussions apply to indigenous peoples, but a question to be asked is whether the same human rights norms and principles can be extended to others who may not be regarded as indigenous peoples strictly speaking but still rely on wildlife for their economic, social or cultural development and survival. The answer seems that they should. For one, Article 27 of the ICCPR guarantees the rights of minority groups, who are not necessarily the same as indigenous peoples, to enjoy their own culture, including the use of land resources and traditional activities like hunting and fishing.[[171]](#footnote-171) In addition, the right to take part in cultural life under Article 15 of the ICESCR is a right of “everyone” and should not be limited to certain groups of people. Indeed, the Committee Economic, Social and Cultural Rights has stressed that cultural rights can be exercised by “a person a) as an individual, b) in association with others, or c) within a community or group.”[[172]](#footnote-172) Further, the Special Rapporteur on the Environment has argued that local populations should be protected similarly to indigenous people based on the principle of non-discrimination.[[173]](#footnote-173) Therefore, it seems reasonable to conclude that the ambit of the right to enjoy wildlife is much wider.

What becomes evident in looking at the protection obligations is that they arise from a range of rights guaranteed by relevant international instruments. It has long been established that the nature of obligations is different for civil and political rights on the one hand, and economic, social and cultural rights on the other. In particular, the obligations of the former are of immediate effect, while those of the latter are based on progressive realisation given that they are generally more resource intensive.[[174]](#footnote-174) The present discussions, however, show that this distinction should not serve as hinderance to the protection of the victims of transnational organised crime because the relevant human rights explored earlier are interdependent and indivisible. States therefore cannot rely on a lack of resources not to protect economic, social and cultural rights as the obligation also arises from civil and political rights. Indeed, it has been cogently argued that it should be possible to talk about economic, social and cultural rights under the instruments on civil and political rights,[[175]](#footnote-175) a point also acknowledged by the European Court of Human Rights.[[176]](#footnote-176) In practical terms, they must implement appropriate budget allocation and confiscate criminal proceeds effectively as a starting point so that there will be enough resources to fulfil the obligation to protect the victims of transnational organised crime.

***Obligation to Prevent Transnational Organised Crime***

In accordance with Article 31 of the UNTOC, States are to implement measures, through active co-operation between the law enforcement/public authorities and private entities, such as prevention of the manipulation of legal markets by organised criminal groups, reintegration of criminals and awareness-raising for the general public. While these undoubtedly are useful, a major drawback of the UNTOC is that it is silent on the need to tackle the supply-demand dynamics through which organised crime thrives.[[177]](#footnote-177) Criminals will continue to create and operate in the markets for illegal goods and services such as drugs, wildlife and human beings as long as there is strong global demand for them. Any prevention strategy should therefore pay sufficient attention to the supply-demand dynamics, and international human rights law can fill some gaps created by the UNTOC.

 It should be stated from the outset that it is not as simple as criminalising the production or consumption of various goods and services as there are many complex issues surrounding the supply-demand dynamics. In relation to drug production, for instance, it has been argued that a prohibitionist strategy of forcible crop eradication (e.g. aerial fumigation), prevalent particularly in Latin America, has actually led to violations of the rights to health and adequate standards of living of local populations.[[178]](#footnote-178) It has also resulted in other undesirable consequences such as reduced investments in public health, education, infrastructure[[179]](#footnote-179) and environmental damages[[180]](#footnote-180) all of which undoubtedly have had negative impacts on full realisation of human rights. In the end, such an approach has not lead to the reduction of drug supply as it has driven the illegal production and trafficking further underground and increased other problems such as violence and corruption.[[181]](#footnote-181) It should also be stressed here that the most of illegal profits generated from drug production and trade are retained by criminals who traffic and sell drugs, but not the producers/farmers.[[182]](#footnote-182) Although many would agree that the prosecution and punishment of criminals who accumulate wealth by exploiting vulnerable producers is reasonable, a question should be asked whether the strict prohibitionist approach against these producers is appropriate and/or effective. However, many States are likely to maintain this position for political, social and cultural reasons.

For other goods and services, decriminalisation is being advocated proactively. Provision of sexual services is a case in point. The human rights bodies are increasingly showing their support for its decriminalisation[[183]](#footnote-183) as they acknowledge that the opposite can result in further stigmatisation and discrimination,[[184]](#footnote-184) while maintaining a tough stance against violence and exploitation arising from sex work.[[185]](#footnote-185) It has been argued that decriminalisation would reduce the need for sex workers to rely on these exploiters and allow them to seek protection directly from the State, including access to justice, health care and social services.[[186]](#footnote-186) Equally important is the finding that decriminalisation has not increased the demand for sexual services,[[187]](#footnote-187) and even those States which have criminalised the purchase of sexual services (e.g. Sweden, Iceland and Norway)[[188]](#footnote-188) already have adopted this approach. Decriminalisation also finds some support within the feminism discourse on prostitution on the basis, among others, that criminalisation only serves to prejudice the society’s view of women[[189]](#footnote-189) and therefore does more harm than good.[[190]](#footnote-190) A note of caution here is that this support for decriminalisation does not mean that the human rights bodies recognise prostitution as a legitimate or desirable form of employment. The fact that alternative income generating opportunities are encouraged,[[191]](#footnote-191) as well as the recognition that prostitution is a harmful practice,[[192]](#footnote-192) point to this conclusion. Interestingly, however, they simultaneously recognise women’s right to choose to an extent, as prostitution exit programmes are to be promoted for those “wishing to leave,”[[193]](#footnote-193) thereby respecting those who continue to remain in prostitution. Their position therefore seems to sit somewhere between liberal and radical feminist views on prostitution (the former recognising prostitution as a choice and the latter regarding it as a form of coercion and not a true choice).[[194]](#footnote-194) In reality, such an ambivalent stance by the human rights bodies is not uncommon for controversial topics such as prostitution as the State practice varies, making it impossible to provide a definitive opinion. However, it is not out of line with the spirit of the CEDAW, as the instrument does not oblige States to prohibit prostitution itself, but exploitation of it.[[195]](#footnote-195)

Regardless of which approaches States may take, what is important from a human rights perspective is the empowerment of vulnerable producers and providers who are exploited by criminals. A crucial first step for States is to understand why they are encouraged or compelled to engage in these activities in the first place and address the root causes. This is where international human law can play a significant role as it allows all of those concerned to treat these individuals as the potential or actual victims of human rights violations and find appropriate solutions beyond criminal justice responses. Undoubtedly poverty and economic hardship are among the key reasons. In poorer regions of the world, many do not have other viable economic opportunities to sustain themselves.[[196]](#footnote-196) This is exacerbated by other factors such as discrimination on accounts of gender, ethnicity, and other distinctions[[197]](#footnote-197) as well as other violations of human rights which make certain groups of people more vulnerable to exploitation and victimisation. In looking at the development of international human rights law surrounding transnational organised crime, the obligation to address poverty by providing alternative gainful opportunities[[198]](#footnote-198) and securing access to education and training have been identified[[199]](#footnote-199) as steps which should be taken by States.

The progressive realisation of economic, social and cultural rights means that these measures may not be implemented overnight, particularly because many States in the supply side of the chain are developing ones which lack adequate financial, human and other resources. However, this lack of resources cannot serve as an excuse not to take any action. Similar to protection measures explored above, the proceeds generated from criminal activities can/should be confiscated and utilised more effectively in order to reduce some burdens. In addition, Article 2(1) of the ICESCR places a clear duty on other States, particularly those where illicit goods and services are consumed due to the existence of strong demand, as well as the international community as a whole, to assist those in need to realise economic, social and cultural rights.[[200]](#footnote-200) Indeed, this obligation has been recognised in relation to the rights to work,[[201]](#footnote-201) education[[202]](#footnote-202) and adequate standards of living[[203]](#footnote-203) among other rights. When these root causes are dealt with effectively, there would be no need for vulnerable people to rely on criminal and dangerous activities to sustain their living, and this can gradually reduce exploitation by organised criminal groups.

 As to the demand for illicit goods and services, a similar picture emerges for the prohibition of possession and/or consumption. While it may seem sensible to criminalise the possession of illicit goods such as child pornography, cultural/art products and wildlife, the same is not true for others from a human rights perspective. With regards to illicit drugs, for instance, the human rights bodies are advocating non-criminalisation/decriminalisation. The Special Rapporteur on the Right to Health has pointed out that criminalisation could lead to risky forms of drug use, such as sharing of needles, using drugs in unsafe places, overdose and infection, thereby increasing the threats to health.[[204]](#footnote-204) It can also lead to further marginalisation or alienation of drug users, particularly vulnerable groups such as minors and ethnic minorities. In order to tackle these, the Special Rapporteur has encouraged States to consider decriminalisation (removal of criminal punishment) or depenalisation (removal of custodial sentences) of possession and use of drugs, while simultaneously being cautious not to endorse their legalisation.[[205]](#footnote-205) In his view, this could enhance the participation of drug users in appropriate treatments[[206]](#footnote-206) instead of stigmatisation, thereby reducing the demand for drugs in the long run. Decriminalisation has also been endorsed by the World Health Organisation,[[207]](#footnote-207) the United Nations Joint Programme on HIV/AIDS (UNAIDS),[[208]](#footnote-208) the Working Group on Arbitrary Detention, Special Rapporteurs on Extrajudicial Killings and on Torture, Inhuman or Degrading Treatment or Punishment,[[209]](#footnote-209) and the human rights treaty bodies.[[210]](#footnote-210) It is also interesting to note that States are being urged to stop human rights violations such as arbitrary detention,[[211]](#footnote-211) extrajudicial killings and other forms of violence[[212]](#footnote-212) and compulsory labour[[213]](#footnote-213) against drug users. In summary, there seems to be a consensus within the human right community that drug users are not to be regarded as criminals, but rather as victims of human rights violations who deserve protection from States, and this is indeed a positive development.

While decriminalisation of drug use and possession may seem reasonable, a careful consideration must be given to its effectiveness globally. In advocating decriminalisation, the Special Rapporteur on the Right to Health cited the Portuguese system as an example of good practice.[[214]](#footnote-214) Instead of imposing criminal penalties against drug users, the Portuguese government has established so-called “Dissuasion Commissions,” consisting of psychologists, sociologists, and jurists and being supported by social workers and doctors, in order to deal with drug users.[[215]](#footnote-215) Those caught in possession are required to appear before the Commission and, depending on the level of addiction, it may take further action, such as by issuing a warning or ordering rehabilitation treatment. It has been noted that Portugal’s emphasis on treatment instead of penalisation has dramatically reduced drug use domestically[[216]](#footnote-216) as this has led to more people participating in treatment.[[217]](#footnote-217)

Although the efforts of Portugal are noteworthy, there is no guarantee that it will work in other States. The Portuguese system has been working well as a good amount of human, financial and other resources has been invested into it. Without such commitment, therefore, decriminalisation may not work well. Also, there is an issue of social and cultural attitudes towards drug use in a given State. The success of the Portuguese model has partly to do with the fact that the general public has been able to accept the idea that drug users should not be criminalised/marginalised, without the government forcing to change the public opinion.[[218]](#footnote-218) This means that decriminalisation may not be accepted or work in States where the attitudes of the general public are different.[[219]](#footnote-219) Consequently, a more thorough analysis on the impact of decriminalisation from a cross-cultural, social and political perspectives must be conducted in order for decriminalisation to work properly. From a human rights perspective, it is essential for States to provide accurate information regarding drug use and facilitate education/awareness-raising,[[220]](#footnote-220) particularly among young people[[221]](#footnote-221) as these may contribute to the reduction of demand in the long run.

 Equally complex is the criminalisation of purchasing sexual services. There may be a strong support for punishing those who purchase sexual services from children or others forced to provide them, such as the victims of human trafficking. However, a degree of uncertainty remains in relation to adults voluntarily providing these services. On the one hand, it has been argued that decriminalisation or legalisation creates a stronger demand, which in turn can lead to undesirable consequences such as an increase in human trafficking.[[222]](#footnote-222) This enhances the argument for criminalisation of the purchase in order to maximise the deterrent effect.[[223]](#footnote-223) When there is less demand, the argument goes, there will be less supply, resulting in a fewer victims.[[224]](#footnote-224) On the other hand, others, including entities representing sex workers, have maintained that criminalisation can drive sex work underground, making it difficult for workers to, among other things, negotiate for safe activities in the safe environment.[[225]](#footnote-225) This polarisation in criminalisation/decriminalisation debates is also evident in State practice. Certain jurisdictions such as Canada,[[226]](#footnote-226) Iceland,[[227]](#footnote-227) Ireland,[[228]](#footnote-228) Norway,[[229]](#footnote-229) South Africa[[230]](#footnote-230) and Sweden[[231]](#footnote-231) have criminalised the purchase of sexual services altogether, while other including the Netherlands and Germany have adopted non-criminalisation and regulation.[[232]](#footnote-232) While both sides sound equally convincing, the available research and evidence are not entirely conclusive as to which is right.[[233]](#footnote-233) What is clear, however, is that criminalisation or decriminalisation/legalisation on their own are not capable of addressing the demand as there are deeper social, cultural and political factors which fuel it.[[234]](#footnote-234) Once again, States must put in place relevant awareness-raising and education[[235]](#footnote-235) so that the mindset of the people likely to purchase sexual services can be altered, leading to gradual reduction in the demand in the future.

 As to the demand for labour other than sexual services, although the prohibition of slavery and forced labour may deter some employers from exploiting vulnerable people, the fact that these practices still exist globally means that simple criminalisation is not adequate. Therefore, more robust regulations and inspection of labour practices have been recommended in order to enhance the protection of labour rights.[[236]](#footnote-236) In addition, the importance of transparency and accountability in business practices has been regarded as crucial in recent times,[[237]](#footnote-237) and measures such as imposition of a reporting obligation on businesses to disclose their effort in eradicating slavery, forced labour and human trafficking have been regarded as good practices.[[238]](#footnote-238) This is in line with the general obligation to impose due diligence requirements on businesses to prevent abuses of human rights.[[239]](#footnote-239) A more complex issue is how to reduce the demand on the part of consumers. As they do not directly engage in exploitation of labour, it is impracticable to criminalise purchasing of goods produced by those in slavery or forced labour. The significance of education and awareness-raising once again should be stressed here. Once the members of the general public become more aware of issues surrounding labour exploitation, they may be encouraged to support initiatives such as Fair Trade or actively lobby the businesses to correct their behaviour, which can in turn prevent future exploitation. The same argument also applies to the demand for other illicit goods and services such as cultural products and wildlife. In summary, international human rights law is also useful in encouraging States to implement more long term preventive measures to address the complex supply-demand dynamics of transnational organised crime.

**Conclusion**

This article has explored human rights dimensions of national and international responses to transnational organised crime. It is evident that it affects a wide variety of human rights, and this means that additional legal obligations can be established under relevant instruments. This article has explored three key obligations 1) investigation, prosecution and punishment, 2) protect victims, and 3) prevention, and it has been demonstrated that international human rights law, through the existing and emerging norms and principles, can play an important role in combating transnational organised crime by strengthening the existing instruments such as the UNTOC. In particular, it allows all of those concerns to understand its complex and multi-faceted nature and propose short, medium and long-term solutions beyond criminal justice responses.

However, the present analysis also reveals some shortcomings inherent in international human rights law simultaneously. For one, while the human norms and principles have been clearly established for some crimes such as human trafficking, slavery and forced labour, the same is not true for others as yet. This shows that the human rights community does not yet explicitly treat various forms of organised crime as human rights issues. It has also been shown that uncertainty and concerns exit in some aspects of key obligations explored in this article. At a more general level, the present analysis highlights the difficulty in fulfilling the obligations relating to economic, social and cultural rights due to the failure of States to allocate the maximum available resources to these rights. All of these present an important opportunity to analyse the human rights issues relating to transnational organised crime more systematically and develop concrete norms and principles further. In addition, States as well as the international community cannot remain passive as international human rights law imposes individual and collective obligations to address transnational organised crime, bearing in mind the indivisibility and interdependence of all rights affected by it. While there is still a long way to go, it is hoped that the present analysis has shed some light on the development of a more comprehensive action against transnational organised crime, and how international human rights law can assist this process.

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2. Yiu-Kong Chu, *The Triads as Business* (Routledge 2008). [↑](#footnote-ref-2)
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10. *Ibid.* [↑](#footnote-ref-10)
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21. Arts 6 and 7, 993 UNTS 3. [↑](#footnote-ref-21)
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23. Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4(2000), paras 15 and 36; Committee on the Rights of the Child*, General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence,* CRC/C/GC/20(2016), paras 62 and 64; and *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, A/HRC/32/32 (2016), paras 95-105. [↑](#footnote-ref-23)
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40. *Roy Sesana v Attorney General*, 2006 African Human Rights Report 183, para 55. See also cases before the UN Human Rights Committee, Ivan Kitok v Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1998); Lubicon Lake Band v Canada, Communication No.167/1984, CCPR/C/38/D/167/1984 (1990); and Hopu and Bessert v France, Communication No. 549/1993, **CCPR/C/60/D/549/1993/Rev.1** (1997). [↑](#footnote-ref-40)
41. *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, A/71/229 (2016), para. 51; Amanda Barratt and Ashimizo Afadameh-Adeyemi, ‘Indigenous Peoples and the Right to Culture: The Potential Significance for African Indigenous Communities of the Committee on Economic, Social and Cultural Rights’ General Comment No. 21’ (2011) 11 *African Human Rights Law Journal* 560, 568-569. [↑](#footnote-ref-41)
42. *Report of the Special Rapporterur on the Issue of Human Rights Relating to the Enjoyment of Safe, Clean Healthy and Sustainable Environment, On His Visit to Madagascar*, A/HRC/34/49 (2017), para 65. [↑](#footnote-ref-42)
43. *Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights*, A/HRC/C/28/73 (2015), paras 11-23. [↑](#footnote-ref-43)
44. *Ibid*, para 19. [↑](#footnote-ref-44)
45. See for instance, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 28 ILM 493; UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, 11 ILM 1358; Convention on the International Trade in Endangered Species of Wild Fauna and Flora 1973, 993 UNTS 243; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 823 UNTS 231; International Convention for the Suppression of Counterfeiting Currency 1925, 112 LNTS 371; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, 2237 UNTS 319; Protocol against Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507; Protocol against Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition 2001, 2326 UNTS 208; and United Nations Convention against Corruption 2003, 2349 UNTS 41. [↑](#footnote-ref-45)
46. ##  See, for instance, *Velasquez Rodriguez v Honduras*, (n 15), para 176; *Ergi v Turkey*, App no 40/1993/435/514 (1998), para 82; and General Comment No. 31, (n 20), para 8.

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48. *Hacienda Brasil Verde Workers v. Brasil* (2016), Ser. C, No. 318, para 319. [↑](#footnote-ref-48)
49. *Trafficking in Persons, Especially Women and Children: A Note by the Secretary General*, A/70/260 (2015), para 29; and *Report of the Special Rapporteur on Contemporary Forms of Slavery*, A/HRC/36/43 (2017), para 15. See also *Concluding Observations on the Sixth and Seventh Reports of Togo*, CEDAW/C/TGO/CO/6-7 (2012), para 25; *Concluding Observations on the Seventh Periodic Report of Colombia*, CCPR/C/COL/7 (2016), para 27; and *Concluding Observations of the Committee on the Protection of the Rights of Migrant Workers and Members of Their Families on Guatemala*, CMW/C/GTM/1 (2011), para 44. [↑](#footnote-ref-49)
50. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/31/58 (2015), para 15; *Concluding Observations on the Third Periodic Report of Bolivia,* CCPR/C/BOL/CO/3 (2013), para 23; and Concluding Observations Afghanistan, (n 30), para 29. [↑](#footnote-ref-50)
51. *Concluding Observations on the Combined Second and Third Periodic Reports of Tajikistan*, E/C.12/TJK/CO/2-3 (2015), para 33; and *Report of the Working Group on the Universal Periodic Review: Kyrgyzstan*, A/HRC/29/4 (2013), para 117.19. [↑](#footnote-ref-51)
52. Report of the Independent International Commission on Syria, (n 31), para 155; Report of the Special Rapporteur on Cultural Rights (2016), (n 35), para 78; and *Concluding Observations on the Fourth Periodic Report of Iraq*, E/C.12/IRQ/4 (2015), para 58. [↑](#footnote-ref-52)
53. Final Study on Illicit Financial Flows*,* (n 29), para 57; *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, A/HRC/26/28 (2014), para 60; and *Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, E/C.12/GBR/6 (2016), para 17. [↑](#footnote-ref-53)
54. *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes: Mission to Hungary*, A/HRC/24/39/Add.1 (2013), para 58; and Special Rapporteur on Toxic and Dangerous Products and Wastes (2011),(n 24), para 86. [↑](#footnote-ref-54)
55. Concluding Observations Bolivia, (n 50), para 22; *Concluding Observations on the Sixth Periodic Report of Colombia*, E/C.12/COL/6 (2016), paras 19 and 22; *Concluding Observations on the Third Periodic Report of Mexico*, CMW/C/MEX/CO/3 (2017), paras 24 and 34; and *Concluding Observations on the Seventh Periodic Report of Paraguay*, CEDAW/C/PRY/7 (2017), para 13. [↑](#footnote-ref-55)
56. *Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights 1997*, para 16. [↑](#footnote-ref-56)
57. The only General Comments which mentions investigation are: *General Comment No. 16 (The Equal Rights of Men and Women)*, E/C.12/2005/4 (2005); *General Comment No. 20 (Non-Discrimination)*, E/C.12/GC/20 (2009); General Comment No. 21, (n 37); *General Comment No 22 (Right to Sexual and Reproductive Health)*, E/C.12/GC/22 (2016); *General Comment No. 23 (****Right to Just and Favourable Conditions of Work)*,** E/C.12/GC/23 (2016); and *General Comment No. 24 State Obligations in the Context of Business Activities)*, E/C.12/GC/24 (2017). [↑](#footnote-ref-57)
58. Based on the author’s analysis of reports published by the Special Rapporteurs on the Rights to Culture, Development, Education, Environment, Extreme Poverty, Food, Foreign Debts, Hazardous Substances, Health, Housing, and Water & Sanitation, as well as the Working Group/Special Representative on Transnational Corporations. [↑](#footnote-ref-58)
59. Committee on Economic, Social and Cultural Rights, *General Comment No. 3 (The Nature of State Party Obligations)*, E/1991/23 (1990), para 1. [↑](#footnote-ref-59)
60. Art 20 UNTOC. [↑](#footnote-ref-60)
61. The same language is found in Art 11 ACHR. [↑](#footnote-ref-61)
62. *Malone v United Kingdom*, App no 8691/79 (1984), para 81; and *Bannikova v Russia*, App no 18757/06 (2011), para 33. [↑](#footnote-ref-62)
63. Human Rights Committee, *General Comment No. 16 (Right to Privacy)*, **HRI/GEN/1/Rev.1 (1988), para 8; and *Concluding Observations on the Fourth Periodic Report of the United States of America*, CCPR/C/USA/CO/4 (2014), para 22.**  [↑](#footnote-ref-63)
64. *Rotaru v Romania*, App no 28341/95 (2000), para 52; and *Kennedy v United Kingdom*, App no 26839/05 (2010), para 151. [↑](#footnote-ref-64)
65. *Malone*, (n 62), para 67; and *Zakharov v Russia*, App no 47143/06 (2015), para 229. [↑](#footnote-ref-65)
66. *Zakharov*, *ibid*. [↑](#footnote-ref-66)
67. *Kennedy*, (n 64), paras 162 and 163. [↑](#footnote-ref-67)
68. *Leander v Sweden*, App no 9248/81 (1987), para 51. [↑](#footnote-ref-68)
69. *Weber and Saravia v Germany*, App no 54934/00 (2006), para 135. [↑](#footnote-ref-69)
70. *Klass and Others v Germany*, App no 5029/71 (1978) paras 55-56; *Zakharov*, (n 65), para 233; and *Szabo and Vissy v Hungary*, App no 37138/14 (2016), para 77. [↑](#footnote-ref-70)
71. *Szabo and Vissy*, *ibid*. [↑](#footnote-ref-71)
72. See for instance, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7 (2015), para 24; *Concluding Observation on the Fifth Periodic Report of France*, CCPR/C/FRA/CO/5 (2016), para 12; *Concluding Observations on the Second Periodic Report of Honduras*, CCPR/C/HND/2 (2017), para 39; and *Concluding Observations on the Initial Report of Pakistan*, CCPR/C/PAK/1 (2017), para 36. [↑](#footnote-ref-72)
73. Eliza Watt, ‘The Right to Privacy and the Future of Mass Surveillance’ (2017) 21 *International Journal of Human Rights* 773, 789. [↑](#footnote-ref-73)
74. *Weber and Saravia*, (n 69), para 115. [↑](#footnote-ref-74)
75. *Dumitru Popescu v. Romania (No. 2)*, App no 71525/01 (2007), para 71; *Szabo and Vissy*, (n 70), para 77; and *Zakharov*, (n 65), paras 257 and 275. [↑](#footnote-ref-75)
76. *Association for European Integration and Human Rights and Ekimdzhiev* *v. Bulgaria*, App no 62540/00 (2008), paras 85 and 87. [↑](#footnote-ref-76)
77. *Zakharov*, (n 65), paras 278 and 279. [↑](#footnote-ref-77)
78. *Klass and Others*, (n 70), paras 21 and 56; *Weber and Saravia*, (n 69), paras 24, 25 and 117; and *Leander*, (n 68), para 65. [↑](#footnote-ref-78)
79. *Szabo and Vissy*, (n 70), para 77. [↑](#footnote-ref-79)
80. Telecommunications (Interception and Access) Act 1979 as amended. [↑](#footnote-ref-80)
81. Part VI of the Canadian Criminal Code. [↑](#footnote-ref-81)
82. Criminal Procedure Code 2009 as amended, s 100b. [↑](#footnote-ref-82)
83. Special Powers of Investigation Act 2000. [↑](#footnote-ref-83)
84. Criminal Procedure Code 1997, as amended, Ch. 26. [↑](#footnote-ref-84)
85. Regulation of Interception of Communications and Provision of Communication Related Information Act 2002. [↑](#footnote-ref-85)
86. Spanish Criminal Procedure Code, ss 197-199. [↑](#footnote-ref-86)
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88. Regulation of Investigatory Powers Act 2000 and Investigatory Powers Act 2016. [↑](#footnote-ref-88)
89. *Concluding Observations on the Sixth Periodic Report of Italy*, CCPR/C/ITA/6 (2017), para 37; and Concluding Observations the UK, (n 72), para 24. [↑](#footnote-ref-89)
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91. *Concluding Observations on the Combined Fourth and Fifth Reports of Jordan*, CRC/C/JOR/4-5 (2014), para 62; *Concluding Observations on the Fifth Periodic Report of Kuwait*, CEDAW/C/KWT/5 (2017), para 29; *Concluding Observations on the Initial Report of Burkina Faso*, CCPR/C/BFA/1 (2016), para 36; and *Concluding Observations on Swaziland in the Absence of a Report*, CCPR/C/SZW/CO/1 (2017), para 43. [↑](#footnote-ref-91)
92. Art 6(2). [↑](#footnote-ref-92)
93. 1641 UNTS 141. See Status of Ratification at <[www.indicators.ohchr.org](http://www.indicators.ohchr.org)> accessed 1 April 2019. [↑](#footnote-ref-93)
94. *Concluding Observations on the Third Periodic Report of Sudan*, CCPR/C/SDN/CO/3 (2007), para 19; *Concluding Observations on the Initial Report of Indonesia*, CCPR/C/IDN/1 (2013), para 10;

*Concluding Observations on the Third Periodic Report of Kuwait*, CCPR/C/KWT/3 (2016), para 22; and Concluding Observations Pakistan*,* (n 72), para 17. [↑](#footnote-ref-94)
95. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/10/44 (2009), para 66. [↑](#footnote-ref-95)
96. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, A/HRC/4/20 (2007), para 53. [↑](#footnote-ref-96)
97. *Concluding Observations on the Second Periodic Report of Thailand*, CCPR/C/THA/2 (2017), para 17. [↑](#footnote-ref-97)
98. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2000/3/Add.1 (2000), para 110. [↑](#footnote-ref-98)
99. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2002/74, para 114. [↑](#footnote-ref-99)
100. *Concluding Observations on the Second Periodic Report of Guatemala*, CCPR/CO/72/GTM (2001), para 17. [↑](#footnote-ref-100)
101. *Question of the Death Penalty: Report of the Secretary-General*, A/HRC/24/18 (2013), para 24. [↑](#footnote-ref-101)
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104. *Ibid*, paras 24 and 25. [↑](#footnote-ref-104)
105. *Ibid*, paras 24 and 50; and Sigrun Skogly, ‘The Requirement of Using the Maximum of Available Resources for Human Rights Realisation: A Question of Quality as well as Quantity’ (2012) 12 *Human Rights Law Review* 393, 395-396. [↑](#footnote-ref-105)
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109. See for example, *Engel v the Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (1976); *Air Canada v United Kingdom*, App no 9/1994/456/537 (1995); and *Walsh v United Kingdom*, App no 33744/96 (2000). [↑](#footnote-ref-109)
110. *Butler v. United Kingdom*, App no 4161/98 (2002). [↑](#footnote-ref-110)
111. *Welch* *v United Kingdom*, App no 17440/90 (1995), para 30. [↑](#footnote-ref-111)
112. See Michelle Gallant, ‘Civil Processes and Tainted Assets: Exploring Canadian Models of Forfeiture’, in Colin King and Clive Walker (eds), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets (Ashgate 2014),165-181; Andrew Ashworth & Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21, 45-48; and Anthony Gray, ‘Forfeiture Provisions and the Civil/Criminal Divide’ (2012) 15 *New Criminal Law Review* 32, 60. [↑](#footnote-ref-112)
113. Liz Campbell, ‘Criminal Label, the European Convention on Human Rights, and the Presumption of Innocence’ (2013) 76 *Modern Law Review* 681, 705. [↑](#footnote-ref-113)
114. Gray, (n 112), 43, 63-65; and Johan Boucht, ‘Civil Asset Forfeiture and the Presumption of Innocence’ under Article 6(2) ECHR’ (2014) 5 *New Journal of European Criminal Law* 221, 242. [↑](#footnote-ref-114)
115. *Phillips v United Kingdom*, App no 41087/98 (2001), paras 43-47. [↑](#footnote-ref-115)
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120. See, for instance, *Awas Tingani*, (n 38), and *Massacres of Ituango v Colombia* (2006), Ser. C, No. 148, both of which dealt with the right to property. For a comparative analysis of regional jurisprudence on protecting economic, social and cultural rights, see Aoife Nolan, ‘Addressing Economic and Social Rights Violations by Non-State Actors through the Role of State: A Comparison of Regional Approaches to the Obligation to Protect’ (2009) 9 *Human Rights Law Review* 225. [↑](#footnote-ref-120)
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123. *L.C.B. v United Kingdom*, App no 14/1997/798/1001 (1998), para 36. [↑](#footnote-ref-123)
124. *Osman v. the United Kingdom*, App no 87/1997/871/1083 (1998), para 115; and *Opuz v Turkey*, App no 33401/02 (2009), para 128. [↑](#footnote-ref-124)
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127. *Rantsev*, (n 47), para 287. [↑](#footnote-ref-127)
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133. *Chowdury and Others v Greece*, App no 21884/15 (2017), para 104. [↑](#footnote-ref-133)
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140. 1577 UNTS 3. [↑](#footnote-ref-140)
141. *General Comment No. 21 on Children in Street Situations*, CRC/C/GC/21 (2017), para 53; General Comment No.20, (n 23), para 64; and *Concluding Observations on the Combined Second and Third Periodic Reports of Haiti,* CRC/C/HIT/CO/2-3(2016), para 51. [↑](#footnote-ref-141)
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144. Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (Right to Water),* E/C.12/2002/11(2002), para 23. [↑](#footnote-ref-144)
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