YOUTH ASSOCIATED WITH NON-STATE ARMED GROUPS

Legal protections and vulnerabilities under international law

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EXECUTIVE SUMMARY

1. Accept International, an NGO focused on the rehabilitation and reintegration of disengaged combatants from **Non-State Armed Groups** (NSAG), sought assistance in developing a report on how international law can be used to promote the rights and empowerment of **Youth Associated with Non-State Armed Groups** (YANSAG). The purpose of the project is to analyse which standards of International Human Rights Law and International Criminal Law can be used for the protection of YANSAG. This report seeks to assist Accept International in its short-term objective of pushing for an UN Human Rights Council Resolution on YANSAG's rights, as well as its broader goal of establishing international norms for the rights, protection, and empowerment of YANSAG.

2. This report examines the international legal protections available to YANSAG, which are defined as 'individuals aged 18-35 who are or who have been recruited or used by a violent extremist or NSAG in any capacity'.[1] The report evaluates how key international legal frameworks apply to YANSAG, who may be part of a NSAG as victims, or voluntarily associated with a NSAG as perpetrators.

3. The analysis draws on a broad range of international legal instruments, including the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention for the Protections of All Persons from Enforced Disappearances (CED); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of Persons with Disabilities (CRPD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OP-CRC-AC); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Rome Statute of the International Criminal Court (Rome Statute).

[1] Yosuke Nagai and Erica Harper, 'Research Brief: Youth Associated with Non-State Armed Groups: Building an Evidence Base on Disengagement Pathways and Reintegration Challenges' (Geneva Academy, June 2023) < https://www.geneva-academy.ch/joomlatools-files/docman-files/Youth%20Associated%20with%20Non-State%20Armed%20Groups.pdf> accessed 4 June 2025.

4. The key findings of this research are the following:
    a. **General finding**: No international convention or treaty examined explicitly refers to YANSAG. However, existing protections under international law apply to YANSAG because YANSAG fall within the relevant scope of the provisions. It is the obligation of states parties to implement these international treaties and conventions and the protections they provide in their domestic jurisdictions. Thus, the effectiveness of these legal norms is dependent on their domestic implementation. Where states fail to incorporate these standards into their domestic laws and practices, such inaction may amount to a violation of the states' international legal obligations.
    b. **ICCPR**: YANSAG retain all rights under the ICCPR, irrespective of their affiliation with NSAGs. In cases of derogations under the ICCPR due to a threat to the life of the nation, YANSAG cannot be disproportionately targeted on the basis of their affiliation with a NSAG.
    c. **CAT**: The prohibition of torture and cruel, inhuman or degrading treatment is absolute. Further, YANSAG must not be returned to any jurisdiction where they are at risk of facing torture or cruel, inhuman or degrading treatment.
    d. **CED**: states are to prevent the enforced disappearance of YANSAG, and to ensure access to legal representation for YANSAG. This also entails prohibiting incommunicado or secret detention.
    e. **ICESCR**: states are obligated to fulfil their minimum core obligations to ensure YANSAG's access to work, education, housing and healthcare, which are also key elements for their reintegration.
    f. **CRPD**: YANSAG with disabilities are entitled to services that meet the needs of their disability.
    g. **CEDAW**: states are obligated to provide protection to women YANSAG (W-YANSAG) from gender-based and sexual violence. Should women have been part of a NSAG (voluntarily or involuntarily), the state is to undertake measures to meet the needs of these W-YANSAG.
    h. **CRC and OP-CRC-AC**: The Convention and its Optional Protocol prohibit the recruitment of children (individuals under the age of 18) into armed groups. States are

obligated to undertake measures to reintegrate and rehabilitate children who have experienced armed conflict or were part of a NSAG.

i. **CERD**: YANSAG of a racial or ethnic-minority group are to be protected from discriminatory treatment, including in instances of detention, arrest, and trial.

j. **Rome Statute**: Under the Rome Statute, individuals who were under the age of 18 at the time of the alleged crime cannot be held criminally responsible. YANSAG over the age of 18 may be entitled to mitigating defences, depending on the circumstances of their participation in a NSAG and the crimes they are alleged to have committed.

1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

ARTICLE 2: OBLIGATIONS TO RESPECT RIGHTS IN THE ICCPR WITHOUT DISCRIMINATION [2]

5. Article 2 of the ICCPR, at its core, provides that the rights recognised in the ICCPR are to be applied without discrimination, and on occasion even in an extraterritorial manner. This means that the rights within the ICCPR apply to all individuals within the state's territory, but also to those subject to its jurisdiction. This entails that non-nationals, marginalised groups, or asylum seekers are encompassed within the protections of the ICCPR. These protections are to be provided to individuals by the state in whose territory they find themselves. In the case of YANSAG, the application of the ICCPR applies to them irrespective of whether they find themselves in a territory they are not nationals of. The manner in which this obligation is imposed on states is to be implemented subject to the discretion of the respective state itself.[3] Importantly, as a party to the ICCPR, states are obligated to implement the Covenant into their domestic law and practice, and where alignment with the ICCPR does not exist, states are to amend that to the standards the ICCPR requires.[4]

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[2] '*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.' International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.
[3] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020), 59 and 65-66; Under the Optional Protocol to the ICCPR, if an individual claims that they have exhausted all domestic remedial actions after they allege their right has been violated, the individual can submit a communication asking for their case to be considered by the Human Rights Committee. Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (OP-ICCPR), Article 2.
[4] Paul M Taylor (n 3), 70.

6. For YANSAG, this entails that even if they are affiliated with a NSAG, these individuals are still entitled to equal protection under the ICCPR. States can therefore not deny them access to domestic legal remedies for violations of their rights under the ICCPR on the basis of their (perceived) allegiance to a NSAG. The reference to non-discrimination is particularly relevant in this respect, as it precludes the application of the ICCPR from the differentiation between access to rights based on, for instance, political or religious opinions.

ARTICLE 4: DEROGATIONS IN EMERGENCIES [5]

7. Article 4 provides state parties to the ICCPR with the ability to derogate from their obligations under the Covenant. However, this is restricted to 'exceptional and temporary' circumstances. Derogations are only permitted once two conditions are met: the situation has to constitute a public emergency that is deemed to threaten the 'life of the nation', and secondly, the state has to have 'officially proclaimed a state of emergency.'[6] If these two conditions are met, states can derogate from their obligations, so long as the derogation measures are not in contravention to the state's other obligations under international law (Art. 4(1)), and so long as these measures do not constitute a violation of the articles outlined in Article 4(2), from which no derogation is permitted.

8. These Articles from which no derogation is permitted are Article 6 on the right to life, Article 7 on the prohibition of torture or cruel, unhuman or degrading punishment, Article 8(1)and (2) on the prohibition of slavery, servitude and slave-trade, Article 11 on the prohibition of imprisonment because of the inability to fulfil a contractual obligation, Article 15 on the principle of legality in criminal law, Article 16 on the recognition of everyone as a person before the law and Article 18 on the freedom of thought, conscience and religion.

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[5] '*1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.' ICCPR, Article 4.

[6] UN Human Rights Committee (CCPR), 'General Comment No. 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 2.

9. Importantly, the categorisation of these articles as non-derogatory does not entail that there are no justifiable limitations or restrictions to these articles.[7] This means that limitations to these articles can be made, so long as the justification for the limitation is not grounded in 'race, colour, sex, language, religion or social origin.'[8] This itself is, however, subject to further specification. The **Human Rights Committee** (CCPR) provided, for example, that Article 10 of the Covenant on treating persons with humanity and dignity, whilst not explicitly mentioned in Article 4(2) as a non-derogable right, reflects a 'norm of general international law not subject to derogation.'[9] Thus, each article must be assessed on a case-by-case basis.

10. Further, the specification of articles in Article 4(2) does not entail that the remaining articles in the Covenant are subject to derogation at the discretion of the state, even if the two conditions introduced above are met. Rather, the requirement that derogation measures are specific to the situation at hand entails that states must justify carefully how derogation from their obligations under the ICCPR is necessary in a situation threatening the life of the nation.[10] Importantly, not every situation amounts to a public emergency threatening the nation's life. In such cases, where the threat to a nation's life involves armed conflict (both international and non-international), the rules of international humanitarian law also apply alongside Article 4 of the ICCPR to restrict the abuse of power by the state.[11]

11. For YANSAG, this article is, therefore, of key relevance. In situations involving national security concerns, emergencies, armed conflict and counterterrorism operations, derogation from the ICCPR can be used as justification to mitigate the threat to the life of the nation. However, Article 4 provides protections to persons and groups, including YANSAG, from unjustifiable derogation of their rights under the ICCPR. This protection arises through Article 4's safeguard from unjustifiable derogation, and limitations on which derogation measures are permitted. This means that states cannot use emergency declarations to justify differential treatment of YANSAG or deny them their rights under the ICCPR.

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[7] cf Article 18(3) ICCPR, which provides for restrictions on Art. 18, independent of the concept of derogability. ICCPR, Article 18(3).
[8] ICCPR, Article 4(1).
[9] CCPR, General Comment No. 29 (n 6), para 13(a).
[10] CCPR, General Comment No. 29 (n 6), 3, para 6.
[11] The consideration of international humanitarian law is, however, beyond the scope of this project.

ARTICLE 6: THE RIGHT TO LIFE [12]

12. Article 6 of the ICCPR protects the right to life of all human beings. As outlined in Article 4, no derogation is permitted from Article 6, even in situations of armed conflict[13] or state emergencies threatening the life of the nation. According to General Comment No. 36, the right to life should be interpreted broadly to entail 'the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'[14] For instance, this entails that the state should implement measures to prevent suicides, particularly among persons in vulnerable situations or those deprived of their liberty.[15] For YANSAG, this means that the ICCPR obliges state parties to protect their life and dignity by preventing the taking of one's own life. This reflects the acknowledgement of the importance of human dignity and is central to the re-integration of YANSAG into the community after armed conflict, who, due to their association with NSAGs, may be ostracised from their community. Further, part of ensuring respect for human dignity, the termination of life using medical treatment should also be supported.[16]

13. In relation to the arbitrary deprivation of life, this refers to deprivation of life that is inconsistent with domestic and international law. However, in some states, the death penalty is still permitted.[17] The authorisation of the death penalty domestically does not entail that the deprivation of life in this case is, thus, not arbitrary. Rather, arbitrariness is to refer broadly to 'elements of

[12] '*1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.' ICCPR, Article 6.
[13] CCPR, 'General Comment no. 36, Article 6 (Right to Life)' (3 September 2019) UN Doc CCPR/C/GC/35, para 64.
[14] ibid, para 3.
[15] ibid, para 9.
[16] ibid.
[17] For information on which states permit the death penalty, see Center on the Death Penalty Worldwide, Death Penalty (Cornell Law School) <https://dpw.lawschool.cornell.edu/> accessed 15 June 2025.

inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.'[18] Further, in cases involving the death penalty, Article 6 provides that death sentences shall not be issued 'except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits.'[19] For instance, such serious crimes involve 'intentional killing.' Other crimes that do not amount to serious crimes, i.e. those crimes that do not result in intentional or direct death and, therefore, do not give rise to the death penalty under Article 6, are for example 'attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences.'[20] In the case of YANSAG, differentiation must thus be made between serious and non-serious crimes YANSAG might have committed when the death penalty is being considered by a state that permits it.

14. However, in line with Article 6(4) of ICCPR, state parties to the ICCPR are to permit individuals who were sentenced to death 'the right to seek pardon or commutation of the sentence.'[21] General Comment No. 36 specifies that no categories can be imposed on this right that could exclude sentenced persons from seeking pardon or commutation of the sentence.[22] This means that YANSAG, on the basis of their association with a NSAG, cannot be treated differently from other groups or persons when seeking a death sentence pardon.

15. Importantly, the death sentence for crimes committed below the age of 18 cannot be applied, even if the sentencing of the individual takes place after the age of 18. Should there be any doubt in relation to whether the individual was 18 at the time the crime was committed, then the individual should benefit from the doubt, such that no death penalty for that particular crime can be applied.[23] This is important for YANSAG, who may have joined a NSAG as a minor, and they are alleged to have committed a crime then, but there is no sufficient proof to support this claim.

[18] CCPR, General Comment no. 36 (n 13), para 12.
[19] ibid, para 5.
[20] ibid, para 35.
[21] ICCPR, Article 6(4).
[22] CCPR, General Comment no. 36 (n 13), para 47.
[23] ibid, para 48.

ARTICLE 7: PROHIBITION OF TORTURE AND INHUMAN TREATMENT [24]

16. Article 7 ICCPR protects the 'dignity and the physical and mental integrity of the individual' and should be read in conjunction with Article 10(1) of ICCPR, expanded on below.[25] As stated in Article 4, no derogation of Article 7 is permitted, even in situations of emergencies or threats to the life of the nation.

17. The protection from torture and inhuman treatment encompasses both physical pain and mental suffering of the victim. It extends to incorporate corporal punishment and 'prolonged solitary confinement.'[26] In the case of YANSAG, if they are subject to any such treatment or are imprisoned solitarily, this can amount to a violation of Article 7 under the ICCPR.[27]

18. Article 7 of the ICCPR must also be read in conjunction with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which provides more specific obligations in relation to the prohibition of such acts. Given the overlap, the CAT is examined separately from the ICCPR in section 2.

ARTICLE 9: LIBERTY AND SECURITY OF PERSON [28]

19. Article 9(1) recognises two independent rights: the right to liberty and the right to personal security. The right to liberty is a negative right with Article 9(1) establishing that no person shall be deprived of their liberty except for the reasons and in accordance with the procedure established by law and that no one will be subject to an 'arbitrary' arrest or detention. Any failure

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[24] '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*.' ICCPR, Article 7.
[25] CCPR, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc CCPR/C/GC/20, para 2.
[26] ibid, paras 5-6.
[27] CCPR, General Comment No. 20 (n 25), paras 5-6.
[28] '*1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' ICCPR, Article 9.

by a state party to comply with its own law regarding deprivation of liberty would result in a violation of both the lawfulness requirement as well as the 'arbitrary' bar. General Comment No. 35, however, specifies that 'arbitrariness' should not be likened to 'against the law'. Instead, it is seen as a broader requirement which includes considerations of injustice, reasonableness, necessity and proportionality. For instance, while a judicially imposed sentence might be in accordance with the procedure established by law, the law might nonetheless fail to allow for a periodic re-evaluation of the justification for the detention, which would fail the 'arbitrariness' bar. The wide interpretation of 'arbitrary' is particularly relevant in the context of YANSAG who are often detained in accordance with draconian provisions of domestic national security law.[29]

20. In furtherance of this, Articles 9(2), 9(3) and 9(4) provide for procedural safeguards, including the right to be 'promptly' informed of the reasons for arrest, to be 'promptly' brought before a judge, and to be tried within a 'reasonable' time or released. These temporal requirements are crucial to prevent prolonged or arbitrary detention, particularly in cases involving YANSAG, who may be prosecuted on national security or counter-terrorism claims, the law of which often sidesteps standard protections, leaving YANSAG vulnerable to excessive pre-trial detention or incommunicado detention.

21. The purpose of these safeguards is to ensure that detainees have the earliest opportunity to challenge the legality of their detention. This applies regardless of the severity of the charges. To be effective, these provisions must be read in conjunction with Article 14(1) and 3(c), which also address unreasonable delay in judicial proceedings.

22. As for the right to personal security, the ICCPR does not define this explicitly. However, jurisprudence suggests that this right protects individuals' physical and mental integrity, particularly against threats, intimidation and excessive use of force.[30] In *Lalith Rajapakse v Sri Lanka*, the CCPR found that personal security is especially vulnerable during detention.[31] This is

[29] CCPR, 'General comment no. 35, Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35, para 12.
[30] *Delgado Paez v Colombia* (Decision on merits) UN Doc CCPR/C/39/D/195/1985 (12 July 1990); Paul M Taylor (n 3), 240-280.
[31] *Lalith Rajapakse v Sri Lanka* (Views) UN Doc CCPR/C/87/D/1250/2004 (14 July 2006).

highly relevant for YANSAG, given their potential exposure to punishment or coercion during custody due to their past association with harmed groups.

23. Moreover, states have a positive obligation to take appropriate protective measures where there is a serious risk or threat to an individual's personal security, even if that threat originates from private actors.[32] This is especially relevant for disengaged YANSAG seeking to reintegrate into society, who may face threats or retaliation from local communities or former affiliates. A state's failure to act – whether through unwillingness or inability – does not absolve it of its responsibility under Article 9(1).

ARTICLE 10: TREATMENT OF PERSONS DEPRIVED OF LIBERTY [33]

24. Article 10 of the ICCPR relates to the treatment of persons deprived of liberty by a state party. Some provisions refer to juveniles, such as Article 10(2)(b) and the latter part of Article 10(3). Importantly, the ICCPR does not define the age of a juvenile. Nonetheless, the CCPR is of the view that while this is to be determined by state parties in accordance with their social, cultural, and other conditions, persons under the age of 18 should be considered juveniles in matters relating to criminal justice.[34] The Committee did not expand on what constitutes the '*social, cultural, and other conditions*'. As such, it could be recommended to state parties that certain conditions of YANSAG – such as cases where they were recruited to these NSAG as juveniles – should be given weight in extending the age limit to who is considered a 'juvenile.'

25. However, absent of that, the protections in Article 10(2)(b) and the latter part of Article 10(3) would not normally be applicable to YANSAG, who are defined to be between ages 18-35, unless the specific state party defines 'juvenile' as persons exceeding the age of 18 – for example as persons below age 21. In view of that, this analysis focuses specifically on Article 10(1), 10(2)(a) and the first part of 10(3).

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[32] *Marcellana and Gumanoy v. Philippines* (Views) UN Doc CCPR/C/94/D/1560/2007 (30 October 2008).

[33] '*1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.' ICCPR, Article 10.

[34] CCPR, 'General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)' (7 April 1992) UN Doc HRI/GEN/1/Rev.1 at 33, [13].

26. In general, the purpose of Article 10 is to establish minimum standards for the treatment of detainees, a function that is related to but not provided for in Articles 7 and 9 of the ICCPR.[35] These minimum standards have been developed further in the 1957 Standard Minimum Rules for the Treatment for Prisoners and the 2016 Nelson Mandela Rules. It is also worth noting that the Committee has asserted that it is a '*fundamental and universally applicable rule*' to treat all persons deprived of liberty '*with humanity and respect for their dignity*', and that this minimum standard cannot be dependent on a state party's material resources nor can it be applied with any kind of distinction.[36] This statement implies that obligations under Article 10(1) at least cannot be derogated by state parties.

27. Article 10(1) of the ICCPR provides that states have a positive obligation to ensure the humane treatment of persons whose liberty is deprived within their jurisdictions. This paragraph encompasses institutions beyond prisons and detention centres. As explained in General Comment 21, this paragraph applies to '*any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held*.'[37] In the context of YANSAG, Article 10(1) will be considered in cases where their liberty is deprived by a state party.

28. In many of the communications, there is a clear overlap between Article 10(1) on humane treatment of persons deprived of their liberty and Article 7 prohibiting torture, or cruel, inhuman or degrading treatment or punishment in general. While the Committee has not neatly delineated which types of conduct fall under which specific provision, it is important to note that YANSAG may claim for protections under Article 10(1) where Article 7 is not engaged or cannot be proven, especially in matters concerning primarily the conditions of their detention.

29. There is a range of conduct that can be considered to be breaching Article 10(1). This includes unsanitary detention conditions, overcrowding, lack of medical care, denial of access to legal

[35] Paul M Taylor (n 3), 282.
[36] CCPR, General Comment No. 21 (n 34), [4].
[37] ibid (emphasis added).

counsel or family members, and deprivation of food and water. For YANSAG, such conditions may be compounded by prior trauma or mental health vulnerabilities, making humane treatment especially critical.

30. One of the key issues under Article 10(1) is solitary confinement, used as a disciplinary measure. In *Kang v Korea*, the Committee held that prolonged solitary confinement was a violation of Article 10(1), which protects the inherent dignity of the author.[38] Importantly, the Committee found in *Brought v Australia* that, while there should be a minimum level of severity to come within the scope of 'inhuman treatment' within Article 10, this test must take into consideration all circumstances of the case:

> The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects, and in some instances, the sex, age, state of health or other status of the victim.[39]

31. This understanding is crucial as it obliges states to take into consideration the experiences and circumstances specific to the case of YANSAG. For example, some YANSAG may have post-traumatic stress disorder or certain mental and physical disabilities[40] due to their experiences in combat zones and being involved in a NSAG. As a result, solitary confinement and extreme conditions, such as exposure to artificial lights and removal of clothes and blankets, may be manifestly incompatible with their conditions.[41] This is in line with the Committee's principle that persons should not be subjected to hardship or constraint beyond that which is inherent to confinement.

32. In relation to YANSAG who are charged with an alleged crime but yet to be convicted, Article 10(2)(a) provides that they should be segregated from convicted persons, save in exceptional circumstances. This provision has been linked to a person's right to be presumed innocent as

[38] *Kang v Korea* (Views) UN Doc CCPR/C/78/D/878/1999, (15 July 2003), [7.3].
[39] *Brough v Australia* (Views) UN Doc CCPR/C/86/D/1184/2003 (17 March 2006), [9.2].
[40] On considerations relating to physical disabilities, see eg *Suleimenov v Kazakhstan* (Views) UN Doc CCPR/C/119/D/2146/2012 (21 March 2017).
[41] *Brough v Australia* (Views) UN Doc CCPR/C/86/D/1184/2003 (17 March 2006), [9.2]. See also the Concluding Observation on the Fourth Periodic Report of the USA, in which the Committee also expressed concern about holding juveniles and persons with mental disabilities in prolonged solitary confinement. CCPR, 'Concluding observations on the fourth periodic report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4, 20.

provided for in Article 14(2).[42] In *Wolf v Panama*, the Committee found a violation of Article 10(2)(a) where the author was detained with convicted offenders for more than a year while waiting for his trial.[43] As such, YANSAG may claim protection under this provision if they are detained with convicted persons during their pre-trial period.

33. Finally, Article 10(3) states that the purpose of a penitentiary system should not be solely retributory but should seek to reform and socially rehabilitate the prisoner.[44] A violation of Article 10(3) has been found in the aforementioned case of *Kang v Korea* where it was held that the extensive length of the author's solitary confinement was a measure of such gravity and resulted in such a fundamental impact of the individual that it required the most serious and detailed justification, which the state party failed to meet.

34. On the outset, Article 10(3) aligns with the objectives of Accept International, namely in facilitating YANSAG's '*rehabilitation and reintegration to society*'.[45] However, this provision has been proven difficult to apply in practice as the Committee has avoided finding a violation of Article 10(3) based on these aims if the violations could be subsumed in less contentious provisions.[46] Furthermore, it should be noted that where the penitentiary system does encompass the aim to reform and rehabilitate, a prisoner who succeeds in meeting these aims but continues to be imprisoned is unlikely to violate Article 10(3).[47]

ARTICLE 12: FREEDOM OF MOVEMENT [48]

35. Article 12 of the ICCPR establishes the right to freedom of movement of the individual. This right is especially important for YANSAG, not just because it overlaps with other rights in the

[42] CCPR, General Comment No. 21 (n 34), [9].
[43] *Wolf v Panama* (Views) UN Doc CCPR/C/44/D/289/1988 (26 March 1992), [6.8].
[44] CCPR, General Comment No. 21 (n 34), [10].
[45] Accept International Information Pack, page 1.
[46] See *Guliyev v Azerbaijan* (Views) UN Doc CCPR/C/123/D/2407/2014 (23 July 2018).
[47] *Jensen v Australia* (Views) UN Doc CCPR/C/71/D/762/1997 (22 March 2001), [6.4].
[48] '*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.' ICCPR, Article 12.

Covenant, such as Article 9 discussed above, but also because states may limit these rights in response to post-conflict.

36. There are two components to Article 12(1) of the ICCPR: (i) the right to liberty of movement; and (ii) the freedom to choose a place of residence. In principle, this provision is applicable to both citizens and aliens who are 'lawfully within the territory' of the state party. Importantly, the Committee clarified what constitutes lawful presence in General Comment 27:

> In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purpose of art 12.[49]

37. The broad applicability of this provision is important in the context of YANSAG, whose status might not be clear. Having experienced conflict and involvement with NSAGs, there is a high possibility that many YANSAG may be stateless or undocumented. This question of status plays a key role in the application of the rights under Article 12 in general. Nonetheless, for the purposes of Article 12(1), YANSAG may claim for the protection of these rights so long as their status in the state has been proved to be regularised and subjected to the limitation provision of Article 12(3).

38. The Committee has found a breach of Article 12(1) in a range of cases, including internal political exile, internal resettlement, and forced displacement. In this way, this provision may be helpful in cases where the right of liberty of movement of YANSAG is restricted or where states attempt to settle YANSAG in a certain territory, thus impeding their right to choose where to reside. As clearly articulated by the Committee, '*Subject to provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement.*'[50]

[49] CCPR, 'General Comment No. 27: Freedom of movement (article 12)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, [4]. On that final point, the Committee cites *Celepli v Sweden* (Views) UN Doc CCPR/C/51/D/456/1991 (18 July 1994), [9.2].
[50] CCPR, General Comment No. 27 (n 49), [7]

This right is applicable to the whole territory of the state, including the constituent parts of federal states.[51]

39. Article 12(2) provides a person's right to leave any country, including their own. General Comment 27 provides that these obligations are imposed on the individuals' State of residence and their State of nationality.[52] In practice, this could mean that the State of nationality would have to issue appropriate travel documents, such as a passport, to individuals. In contrast with Article 12(1), the scope of this provision is also not limited to persons lawfully within the territory of a State. As such, an undocumented person that is being expelled or deported would be entitled to elect the State of destination, subject to the agreement of that State.[53] For YANSAG who are not citizens of the specific States they are in and are subjected to deportation, this provision thus protects them from being deported to a State that they have no links with.

40. Furthermore, the freedom to leave under Article 12(2) cannot be made contingent on a specific purpose or a period of time.[54] This provision would thus also include departure for the purposes of permanent emigration.[55] In the context of YANSAG, this provision would be particularly useful where they would want to leave a country – whether for purpose of visiting or immigrating to another country, subjected to Article 12(3).

41. As indicated previously, Article 12(3) is a limitation which provides for '*exceptional circumstances*' where rights under Article 12(1) and 12(2) may be restricted.[56] In order for a State to successfully apply this provision, it must establish three main components. First, the restrictions must be '*provided by law*.' The Committee has opined that where States choose to adopt laws restricting this right, it is essential that the essence of the right is not lost.[57] Additionally, the laws that would qualify under Article 12(3) must have precise criteria and may not extend unfettered discretion to

[51] ibid, [5]
[52] ibid, [9]
[53] ibid, [8]
[54] ibid.
[55] ibid.
[56] ibid, [11].
[57] ibid, [13].

those charged with their execution.[58] Therefore, laws restricting the movement and residence of YANSAG, as well as their right to leave a State, must contain precise criteria at the outset.

42. Secondly, a State may restrict rights under Articles 12(1) and 12(2) where necessary to protect the following purposes: national security, public order, public health or morals, or the rights and freedom of others. On the element of necessity, the Committee made it clear that it is not enough for the restrictions to serve the permissible purpose, but that it must be *necessary* to protect them:

> Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst which might achieve the desired result; and they must be proportionate to the interest to be protected.[59]

43. The most likely purposes that will be used to restrict the Articles 12(1) and 12(2) rights of YANSAG are related to national security and public order. In *Gonzalez del Rio v Peru*, the Committee considers that pending judicial proceedings may justify the restriction of an individual's right to leave the country, though not in this case, where the proceedings were unduly delayed.[60] In view of this application, there may be restrictions on YANSAG's freedom of movement if they have a pending case against them.

44. Interestingly, the Committee allowed the State to apply Article 12(3) in *Karker v France,* where the author's residence in France was restricted as his expulsion could not be enforced.[61] It was found that the State had produced evidence in the domestic courts of his involvement in a movement that advocates violent action and, as a result, it was necessary to restrict his movement for reasons of national security.[62] In cases of YANSAG, their movement could potentially be restricted following a similar finding, though, there could be a case to argue where they can prove to have been rehabilitated – thus rendering such restrictions unnecessary and redundant.

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[58] ibid.
[59] ibid, [14].
[60] *Gonzalez Del Rio v Peru* (Views) UN Doc CCPR/C/46/D/263/1987 (28 October 1992), [5.3].
[61] *Karker v France* (Views) UN Doc CCPR/C/70/D/833/1998 (26 Oct 2000), [9.2].
[62] ibid.

45. Finally, the restrictions must be consistent with the other rights in the Covenant. The Committee has further stated that they will also have to be in line with the fundamental principles of equality and non-discrimination.[63] Therefore, the restriction of these rights cannot be made based on any kind of distinction, including race, colour, sex, religion, political or other opinion.[64]

46. Article 12(4) provides the right of a person to enter their own country. This includes the right to remain, to return having left, and to enter for the first time, even if one has not been there before.[65] It is important to note that this right does not distinguish between citizens and undocumented persons. Thus, the scope of this provision is broader than merely the country of which a person is a national.[66] In General Comment 27, the Committee stated that the concept of 'his own country' is '*not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral' it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a non-alien*.'[67]

47. In *Nystrom v Australia*, the Committee provided greater clarity on the term 'his own country', stating that the formal link to a state is irrelevant, and that the provision was concerned with '*strong personal and emotional links an individual may have with the territory where he lives and the social circumstances obtaining in it*' and that factors other than nationality may establish these close and enduring connections.[68] This broad understanding of the term 'his own country' is useful for YANSAG who are stateless or undocumented, as it will ensure they have the right to enter or remain in a country with which they have close links.

ARTICLE 14: RIGHT TO A FAIR TRIAL

48. Article 14 of the ICCPR is the longest article of the Covenant as it contains detailed particularisation of procedural fairness rules related to criminal proceedings. The Committee has also deemed it particularly complex in nature as it combines various guarantees with different

[63] CCPR, General Comment No. 27 (n 49), [18].
[64] ibid.
[65] ibid, [19].
[66] ibid, [20].
[67] ibid.
[68] *Nystrom v Australia* (Views) UN Doc CCPR/C/102/D/1557/2007 (18 Jul 2011), [7.4]-[7.5]. This approach was also followed in the later cases of *Warsame v Canada* (Views) UN Doc CCPR/C/102/D/1959/2010 (21 Jul 2011), and *Budlakotiv v Canada* (Views) UN Doc CCPR/C/122/D/2264/2013 (6 April 2018).

scopes of application.[69] In the following analysis, the specific paragraphs of Article 14 will be analysed in relation to YANSAG. Only Article 14(4) will be excluded from the analysis as it relates to juveniles, which is not applicable to YANSAG.[70]

a) Article 14(1)

49. Article 14(1) provides two essential guarantees: (i) the first sentence guarantees in general terms the right to equality before courts and tribunals; and (ii) the second sentence provides the right to a fair and public hearing.[71]

50. These rights are key elements of human rights protection and serve as procedural means to safeguard the rule of law.[72] As such, while reservations to particular clauses of Article 14 may be acceptable, it is incompatible with the object and purpose of the Covenant when a State makes a general reservation to the right of fair trial.[73]

51. It should also be noted at the outset that this right is not limited to citizens of the State party. The term 'all persons' used in the paragraph shows that the right must be provided to all individuals regardless of their status, so long as they find themselves in the territory or subject to the jurisdiction of the relevant State party.[74] This is important for YANSAG, whose status may be unclear due to their circumstances of being recruited into NSAGs. For instance, they might not have the relevant documents to prove their nationality and are thus categorised as stateless persons.

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[69] CCPR, 'General Comment No. 32, "Article 14: Right to equality before courts and tribunals"' (7 July 2007) UN Doc CCPR/C/GC/32, [3].
[70] See discussion in the section on Article 10 of ICCPR.
[71] '*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*' (emphasis added). ICCPR, Article 14(1).
[72] CCPR, General Comment No. 32 (n 69), [2].
[73] ibid, [5].
[74] ibid, [9].

52. In relation to the first limb of Article 14(1), which guarantees the right to equality before courts and tribunals, the Committee has clarified that it guarantees '*equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.'* [75]

53. In their General Comment No. 32, the Committee stated that distinctions relating to access to courts and tribunals must be based on law and justified on objective and reasonable grounds.[76] This guarantee will, therefore, be violated if states bar a person's access to courts and tribunals on the basis of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[77] With respect to YANSAG, this provision protects their access to courts and tribunals and prohibits states from limiting their access on discriminatory grounds – i.e., their former affiliation to an armed group or their political opinions. However, it should be noted that this access is limited to first instance procedures and does not address the right to appeal or remedies.[78]

54. The equality of arms – meaning that same procedural rights must be provided to all parties – is also provided for in the right to equality before courts and tribunals.[79] In *Dudko v Australia*, the Committee found that it is for the State Party to show that the procedural inequality was based on reasonable and objective grounds and does not entail actual disadvantage or other unfairness to the author.[80] As this is part of the first sentence of Article 14(1), it also applies to civil proceedings. This provision is useful to YANSAG as a general provision to ensure that their procedural rights are provided for. It has also been argued that where allegations are too numerous or where it may be more convenient, the Committee would find that there is a violation of the more general Article 14(1) rather than relying on the other more individualised paragraphs.[81]

55. The second sentence of Article 14(1) provides the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law in cases regarding the

[75] ibid, [8].
[76] ibid, [9].
[77] ibid.
[78] ibid, [12].
[79] ibid, [13].
[80] *Dudko v Australia* (Views) UN Doc CCPR/C/90/D/1347/2005 (23 July 2007), [7.3] – [7.4].
[81] Paul M Taylor (n 3), 372.

determination of criminal charges against the individual or of their rights and obligations in a suit at law.

56. In *Paul Perterer v Austria*, it was held that the 'determination of a criminal charge' extends to the imposition of sanctions that are penal in nature – due to their purpose, character, or severity – regardless of their qualification in domestic law.[82] As for the term 'suit at law', the Committee has clarified that it is '*based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.*'[83] Simply put, there must be some form of legal entitlement to the individual by domestic law.

57. The notion of a fair hearing means that there should be an absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side for whatever motive.[84] In *de Jorge Asensi v Spain*, the Committee reiterated the conditions of fairness in terms of equality of arms and an absence of arbitrariness, manifest error or denial of justice.[85] In the context of YANSAG, this provision could protect them by obliging states to ensure that their hearing would not be subjected to pressure, including pressure by the public that might create a hostile atmosphere and making it impossible for them to present their defence.[86]

58. The second sentence of Article 14(1) also states that the hearing must be conducted by a competent, independent and impartial tribunal established by law. It should be noted that the provisions of Article 14 apply to all courts and tribunals, including military or special courts. This is a crucial aspect for YANSAG, as states may justify trying them in special courts where the administration of justice is conducted with a diluted form of the principles in Article 14.

59. Importantly, it has been held that special tribunals with 'faceless judges' used to preserve anonymity in cases related to terrorist matters are incompatible with Article 14 of the Covenant, as the accused is not able to challenge the identity of the judges and because neither the

[82] *Paul Perterer v Austria* (Views) UN Doc CCPR/C/81/D/1015/2001 (20 July 2004), [9.2]. See also CCPR, General Comment No. 32 (n 69), [15].
[83] CCPR, General Comment No. 32 (n 69), [16].
[84] ibid, [25].
[85] *Jorge Asensi v Spain* (Views) UN Doc CCPR/C/92/D/1413/2005 (25 March 2008), [8.2].
[86] For a similar case matrix, see *Gridin v Russian Federation* (Views) UN Doc CCPR/C/69/D/770/1997 (20 July 2000), [8.2].

independence nor the impartiality of the judges is guaranteed.[87] This is especially useful for Accept International as they work with YANSAG from different organisations, including those labelled terrorist organisations.[88] As a result, if YANSAG are tried by a 'faceless judge', it is clear that this would breach their rights under Article 14.

60. On the point of impartiality, the Committee has specifically stated that this requirement has two aspects:

> First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.[89]

61. In the case of YANSAG, if they were assigned a judge who is vocal about their views on the specific organisation, for example, this would be a violation of this specific requirement. The YANSAG can therefore challenge the appointment of the judge to their case.

62. The third sentence of Article 14(1) provides for the exceptions to public hearings, which include reasons of national security, when the interest of the private lives of parties so requires or where publicity would prejudice the interests of justice. These specific exceptions cited may be useful to serve as protection for YANSAG where their trial is proceeding. As for the latter part of the third sentence, the part on 'juveniles' may not be applicable to YANSAG.[90]

b) Article 14(2)

63. Article 14(2) states that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law'.[91]

[87] CCPR, General Comment No. 32 (n 69), [23]. See also *Casafranca v Peru* (Viewa) UN Doc CCPR/C/78/D/981/2001 (22 July 2003), [7.3]; and *Arredondo v Peru* (Views) UN Doc CCPR/C/69/D/688/1996 (14 August 2000), [10.5].
[88] Accept International Information Pack, 1.
[89] CCPR, General Comment No. 32 (n 69), [21].
[90] See discussion in the section on Article 10 of ICCPR.
[91] ICCPR, Article 14(2).

64. This provision puts the burden on the prosecutor to prove the guilt of the accused beyond a reasonable doubt. Prior to that, they should be treated as an innocent person.[92]

65. Importantly, the Committee stated that there is a duty for all public authorities to refrain from prejudging the trial, including the duty to abstain from making public statements affirming the guilt of the accused person.[93] The accused should also not be treated in a manner indicating that they may be a dangerous criminal, nor should media coverage of the case be done in a way that would undermine the presumption of innocence.[94]

66. This provision is of high importance for YANSAG. Not only is the presumption of innocence until proven guilty essential for their criminal trials, but their status as YANSAG also makes them vulnerable to being used as political scapegoats. Indeed, this provision was found to have been breached where officials made public statements portraying the author's guilt by characterising them as a traitor[95] and as a bandit or fugitive.[96]

c) Article 14(3)

67. Article 14(3) provides minimum guarantees in a particularised manner, to be applied to individuals in full equality.[97]

[92] CCPR, General Comment No. 32 (n 69), [30].
[93] ibid, [30].
[94] ibid.
[95] *Khadzhiyev and Muradova v Turkmenstein* (Views) UN Doc CCPR/C/122/D/2252/2013 (6 April 2018), [7.10].
[96] *Cedeño v Venezuela* (Views) UN Doc CCPR/C/106/D/1940/2010 (29 October 2012), [7.3].
[97] '*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.' ICCPR, Article 14(3).

68. While all these minimum guarantees are important in both the pre-trial and trial stages, the following clauses warrant a detailed discussion to clarify their scope in general, and the application to the context of YANSAG in particular, namely: clauses (b), (d), and (g).

69. Article 14(3)(b) concerns the principle of equality of arms and provides for two discrete elements: (i) adequate time and facilities for the preparation of a defence; and (ii) the right to communicate with legal counsel of one's own choosing. These rights are particularly important in the pre-trial stage.

70. On the first aspect, the Committee concluded that 'adequate facilities' include access to documents and other evidence, as well as all materials that the prosecution plans to offer in court against the accused or that are exculpatory.[98] 'Adequate time' depends on the circumstances of the case, though it is important to note that a State party is not responsible for the conduct of a defence lawyer unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[99]

71. On the second aspect, the Committee has stated that the right to communicate with counsel requires that the accused is granted prompt access to counsel and that they can meet their counsel in private, with full respect for the confidentiality of their communications.[100] This is an important right for YANSAG, especially where they are held in prolonged pre-trial detention or incommunicado detention.

72. Article 14(3)(d) contains three distinct guarantees: (i) the right to be tried in one's presence on a criminal charge; (ii) the right of accused persons to defend themselves in person or through legal counsel of their own choosing and to be informed of this right; and (iii) the right to have legal assistance assigned to the accused where the interests of justice so require and without payment where they do not have sufficient means to pay for it.

[98] CCPR, General Comment No. 32 (n 69), [33].
[99] ibid, [32].
[100] ibid, [34].

73. On the first guarantee, proceedings in the absence of the accused are only permissible in the interest of the proper administration of justice and when necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the details of their trial.[101] This is crucial for YANSAG to ensure that they are not tried in their absence, especially since their whereabouts may be undetermined following the conflict.

74. Arguably, the most important guarantee of the three in the context of YANSAG is the second, which refers to two types of defences that are not mutually exclusive.[102] The important point of this guarantee is that the right of the accused to defend themselves *or* use legal counsel of their own choosing necessarily means that there is a possibility for the accused to reject assistance from a legal counsel.[103] In *Correia de Matos v Portugal*, the Committee acknowledged that there is a risk that if a lawyer is imposed on the accused against their wishes, they may not be able to defend themselves effectively, as it would mean working with a counsel they do not trust.[104]

75. This provision is important for YANSAG in cases where the legal counsel is assigned by the State, which they deem not to align with their own legal interests in the case, or where such counsel could not be found. However, it is crucial to note that the right to defend oneself without legal counsel is not absolute.[105] The Committee has stated that the interests of justice in a specific trial may still warrant that legal counsel be assigned to the accused.

76. Finally, the third guarantee relates to the right of accused persons to have legal assistance assigned to them and to be without payment where they do not have sufficient means to pay for it. Where counsel is provided by the State party, the State may be held responsible for the blatant misbehaviour or incompetence of the counsel.[106] It should also be noted that the gravity of the offence is an important factor in deciding if a counsel should be assigned to the accused – i.e., if a YANSAG is charged with an offence with capital punishment, then they should be afforded legal assistance.[107]

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[101] ibid, [36].
[102] ibid, [37].
[103] ibid.
[104] *Correia de Matos v Portugal* (Views) UN Doc CCPR/C/86/D/1123/2002 (28 March 2006), [7.3].
[105] CCPR, General Comment No. 32 (n 69), [37].
[106] ibid, [38].
[107] ibid.

77. Article 14(3)(g) relates to the right against self-incrimination. The Committee noted that this safeguard relates to the presence of direct or indirect physical or undue psychological pressure from investigating authorities on the accused in trying to obtain a confession.[108] In this way, Article 14(3)(g) is related to Article 7 on the prevention of torture. It is usually sufficient for authors to present a detailed description of the mistreatment they suffered, where states merely assert that there was no evidence of torture.[109] This is pertinent to the case of YANSAG, as they may be pressured to make false confessions or to testify against themselves.

d) Article 14(5)

78. Article 14(5) provides for the right of appeal for individuals convicted of a crime.[110]

79. This provision is therefore only related to criminal matters.[111] Article 14(5) imposes an obligation on states to substantially review the conviction and sentence, both on the basis of sufficiency of the evidence and of the law.[112] In *Gelazauskas v Lithuania*, the Committee held that a review that is only a matter of discretion does not suffice.[113] For YANSAG whose cases are on appeal, this is an important provision to ensure that their case is not decided only by one court, in case there were mistakes in law or in fact.

e) Article 14(6)

80. Where a person's conviction has been reversed or where they are pardoned due to a discovery of facts showing that there was an injustice, Article 14(6) provides that compensation shall be paid.[114]

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[108] ibid, [41].
[109] *Karimov and Nursatov v Tajikistan* (Views) UN Doc CCPR/C/89/D/1108 and 1121/2002 (27 March 2007), [7.2].
[110] '*5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*' ICCPR, Article 14(5).
[111] CCPR, General Comment No. 32 (n 69), [46].
[112] ibid, [48].
[113] *Gelazauskas v Lithuania* (Views) UN Doc CCPR/C/77/D/836/1998 (17 March 2003), [7.1] – [7.3].
[114] '*When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*' (emphasis added). ICCPR, Article 14(6).

81. It should be noted that this right to compensation has several limitations. First, as expressly provided for in the provision, it does not apply where the non-disclosure of the material fact was wholly or partly attributable to the accused. The Committee has emphasised that the burden of proof rests on states to show that that is the case.[115] Secondly, no compensation would be available where a pardon is made on a humanitarian or discretionary basis.[116] Therefore, where YANSAG is found guilty on certain charges and pardoned by the State on the basis of equity, they will not be allowed to claim compensation as there has not been a miscarriage of justice.

f) Article 14(7)

82. Finally, Article 14(7) embodies the principle of *ne bis in idem*, or the protection against double jeopardy.[117]

83. Simply put, this provision prohibits a State from bringing a person who was already convicted of a specific offence before the same court or another tribunal – including a military or special tribunal – for the same offence.[118] This would protect YANSAG from being tried twice for the same offence, regardless of the forum they are charged in.

84. However, it is important to note that this guarantee does not ensure the prohibition of double jeopardy with regard to the national jurisdictions of two or more states.[119] For example, the Committee did not allow the author in *A.R.J. v Australia*, who was convicted and sentenced in Australia, to rely on this provision to resist his deportation to Iran, as he would be subjected to similar charges there.[120] Therefore, it should be noted that YANSAG who would like to raise this protection will only be able to do so regarding an offence adjudicated by a given state.

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[115] CCPR, General Comment No. 32 (n 69), [53].
[116] ibid.
[117] '*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*'. ICCPR, Article 14(7).
[118] CCPR, General Comment No. 32 (n 69), [54].
[119] ibid, [57].
[120] *A.R.J. v Australia* (Views) UN Doc CCPR/C/60/D/692/1996 (28 July 1997), [6.4].

ARTICLE 18: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION [121]

85. Article 18 of the ICCPR provides the right to enjoy freedom of thought, conscience and religion as a community or individually. In line with Article 4(2), Article 18 cannot be derogated from, including in times of armed conflict. A distinction must be made between freedom of religion, thought and conscience. Freedom of religion entails freedom to believe in or not believe in any religion (traditional or modern). Freedom of religion also encompasses the freedom to manifest, observe, teach and practice one's religion. For instance, this entails the freedom to build places of worship and elect religious leaders, to practice ceremonial acts, adopt dietary restrictions, wear certain types of clothing, or speak a certain language.[122] In the case of YANSAG, this provision is relevant, as it affirms that individuals or communities cannot be targeted on the basis of their religion. Should YANSAG be incarcerated, then they too shall in prison be able to practice their religion or belief as much as possible, given the constraints of prison.

86. In relation to freedom of thought and conscience, these are also non-derogable, and when applied to the religious context, no individual can be compelled to divulge their thoughts or to adhere to a certain belief or religion. Similarly, no individual can be coerced into believing a certain religion, either by force or the threat of force, or by sanctions. This also entails restricting access to medical care, education, or employment due to religion.[123] In the case of reintegration of YANSAG, this means that they cannot be compelled to believe or practice the official religion of the state, should the YANSAG in question maintain other beliefs or religion.

87. However, whilst the freedom of thought and conscience are non-derogable, according to Article 18(3), certain restrictions can be imposed on the freedom to manifest a belief or religion should these restrictions be deemed 'necessary to protect public safety, order, health, or morals or the

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[121] '*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'. ICCPR, Article 18.
[122] CCPR, 'General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)' (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 4.
[123] ICCPR, Article 18(2); CCPR, General Comment No. 22 (n 122), para 5.

fundamental rights and freedoms of others.'[124] The restrictions in this respect can thus not be discriminatory or disproportionate to the situation at hand.[125] In the case of YANSAG, these cannot be targeted disproportionately due to their religious beliefs.

ARTICLE 19: FREEDOM OF OPINION AND EXPRESSION [126]

88. Article 19 ICCPR provides for the freedom of opinion and expression. Whilst Article 19 is not mentioned as a non-derogable right under Article 4(2) ICCPR, the Committee finds that certain rights, despite not being mentioned in Article 4(2), are so fundamental in that they simply cannot be derogated from lawfully. The freedom of opinion is one such right, which cannot be limited in a state of emergency.[127] Similarly, restrictions to the right to freedom of expression would be in contravention of the object and purpose of the ICCPR, such that it would be difficult to lawfully justify a derogation from this right. However, the CCPR does recognise that certain restrictions to the freedom of expression can be made without violating Article 19.

89. Freedom of opinion entails 'the right to hold opinions without interference,'[128] including the right to change one's opinion freely. The term opinion encompasses 'political, scientific, historic, moral or religious' opinions. Importantly, no person may be treated differently or enjoy fewer rights under the Covenant on the basis of their opinion, or be criminalised, intimidated or harassed for having a certain opinion.[129] In the case of YANSAG, this means that the State cannot impose restrictions on their freedoms under the ICCPR, nor the freedom of opinion, should their opinions be in contravention of that of the State, or be aligned with that of the NSAG they were associated with. Should YANSAG be stigmatised, coerced into another opinion, or arrested, detained or put on trial or imprisoned for their opinion, then this would be in contravention with their rights under Article 19(1) ICCPR.

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[124] ICCPR, Article 18(3).
[125] CCPR, General Comment No. 22 (n 122), para 8.
[126] '*1. Everyone shall have the right to hold opinions without interference.*
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.' ICCPR, Article 19.
[127] CCPR, 'General comment no. 34, Article 19, Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 5.
[128] ICCPR, Article 19(1).
[129] CCPR, General comment no. 34 (n 127), para 9.

90. Freedom of expression entails the 'freedom to also not express one's opinion'.[130] Freedom of expression entails the right to impart, seek or receive ideas or information of any kind, even 'deeply offensive' expressions, and to express those in various forms, such as posters, newspapers, pamphlets or books.[131] In this sense, YANSAG are free to express their opinions, even those that are deemed controversial. However, as indicated, certain limitations apply to the freedom of expression. Article 19(3) specifies that these restrictions can either be in relation to respecting the rights or the reputations of others, or the protection of the public order, national security, or public health or morals. These restrictions have to be 'provided by law' and can relate to either subsections a or b of paragraph 3, such that no other justifications for restrictions are permitted.[132] Further, the restrictions the State asserts must align with the test of proportionality and necessity. For example, paragraph 3 justifications cannot be invoked to repress advocacy for democratic values or human rights, nor can violence or the threat of violence be used to that effect.[133] In the case of YANSAG, should their expressions of opinion constitute a violation of others' reputation or rights, or incite hatred or violence, these would be in contravention of Article 19(3) and may be limited by the State. However, should YANSAG choose to express their opinion such that it does not violate Article 19(3), then they may freely do so.

ARTICLE 21: THE RIGHT OF PEACEFUL ASSEMBLY [134]

91. Article 21 allows 'individuals to express themselves collectively and to participate in shaping their societies' and protects therewith the right to autonomy of the individual. This is key as it allows individuals to share aspirations and ideas with the public and garner support for their cause.[135] This is important for the reintegration of YANSAG, as this allows them to share their experiences of being associated with a NSAG, and to raise awareness of the potential difficulty of leaving a NSAG, or the risks of joining one. This right is therefore a key element of reintegrating YANSAG and raising awareness of the difficulties they may face in rejoining society.

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[130] ibid, para 10.
[131] ibid, paras 11-12.
[132] ICCPR, Article 19(3).
[133] CCPR, General comment no. 34 (n 127), para 23.
[134] '*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*' ICCPR, Article 21.
[135] CCPR, 'General Comment No. 37: Article 21 (Right of Peaceful Assembly)' (17 September 2020) UN Doc CCPR/C/GC/37, para 1-2.

92. The right to peaceful assembly requires all assemblies to be of a non-violent nature, no matter whether they are indoors or outdoors, or in public or private locations. The term assembly encompasses protests, demonstrations, rallies, meetings, vigils, sit-ins and flashmobs, either of a stationary or mobile nature.[136] Importantly, it is the duty of the State to ensure that assemblies take place without interference and that participants are protected, so long as the assembly is of a peaceful nature.[137] The determination of whether or not an assembly is peaceful is based on the 'reference to violence that originates from the participants', within which violence against people participating in the peaceful assembly is not constitutive of a non-peaceful assembly. An assembly is thus considered non-peaceful when its participants incite violence, act in such a way that is likely to lead to violence, intend to use violence, or when violence by participants is imminent. Importantly, isolated incidents of this kind do not render an entire assembly non-peaceful. Rather, such acts must be widespread within the assembly to amount to a non-peaceful assembly.[138]

93. Thus, certain restrictions also apply to the organisation of assemblies. Importantly, the burden of demonstrating that an assembly is not peaceful lies with the State. The State must then demonstrate that preventing the assembly from taking place is necessary and proportionate, in order to protect national security, the public or the health and morals and rights of others.[139] Thus, for YANSAG, this means that they enjoy the right to peaceful assembly so long as their actions do not constitute non-peaceful assembly.

[136] ibid, para 6.
[137] ibid, para 27.
[138] ibid, paras 18-19.
[139] ICCPR, Article 21.

2. CONVENTION AGAINST TORTURE

DEFINITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

a) Torture

94. Article (1)1 of CAT defines 'torture' as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from them or a third person information or a confession, punishing them for an act they or a third person committed or are suspected of having committed. This provision also encompasses intimidating or coercing them or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. [140]

95. Establishing the necessary intent and purpose for acts committed against YANSAG can be complex. While direct intent to torture by State officials during the interrogation of YANSAG may sometimes be evident, situations involving NSAGs as the primary perpetrators require demonstrating State 'consent or acquiescence' to the NSAG's actions. These actions by NSAGs may themselves be carried out for purposes clearly prohibited by Article 1, such as indoctrination through brutal initiation rituals, punishment for attempted defection, or intimidation of local populations through the abuse of YANSAG.

96. The element of 'public official' involvement is critical, particularly when NSAGs are the direct perpetrators of abuse against YANSAG. If NSAGs inflict torture or other **cruel, inhuman or degrading treatment or punishment** (CIDT) on YANSAG with the 'consent or acquiescence' of the State, then the State's obligations under CAT are violated. For example, if the State provides arms or funding to an allied militia known to abuse YANSAG, or it deliberately fails to intervene against such abuses in areas under its nominal control. However, proving such

[140] 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 (CAT), Article 1(1).

acquiescence, especially in complex and opaque counter-terrorism or armed conflict scenarios, presents a difficult evidentiary challenge.

b) Cruel, inhuman or degrading treatment or punishment

97. According to Article 16(1), 'other cruel, inhuman or degrading treatment or punishment' refers to acts that 'do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[141] However, the **UN Committee Against Torture** (CAT Committee) has acknowledged that the definitional threshold between CIDT and torture is often unclear.[142]

98. The Committee further observes that the obligation to prevent CIDT in practice overlaps with and is largely congruent with the obligation to prevent torture. This inherent ambiguity presents considerable challenges in the consistent legal application and classification of prohibited acts. Experience demonstrates that the conditions conducive to CIDT frequently facilitate torture; thus, preventative measures required for torture must also be applied to prevent ill-treatment.[143] More specifically, detention conditions lacking healthcare, food, water, and sanitation facilities may constitute CIDT under Article 16.[144] This is particularly relevant to YANSAG since they frequently face extremely poor detention conditions.[145]

LIMITATIONS AND DEROGATIONS?

99. No limits or derogation may be invoked as a justification for torture or CIDT even in situations of public emergency, and such absolute prohibition must be applied to protect any person without discrimination, subject to the *de jure* or *de facto* control of a state party.[146] This means that when YANSAG are apprehended, any suspicion of 'terrorism' or 'insurgency' cannot justify lowering

[141] CAT, Article 16(1).
[142] CAT Committee, 'General comment No. 2 (2007) on the implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2, para 3.
[143] ibid.
[144] *C.P. et al. v France* (Views) UN Doc CAT/C/75/D/922/2019 (16 November 2022), para 7.5.
[145] Yosuke Nagai and Erica Harper (n 1), 3.
[146] CAT, Article 2(2); CAT Committee, General Comment No 2 (n 142), para 5; CCPR, General Comment No 20 (n 25), para 3.

legal protections.[147] Moreover, the prohibition of torture has also been recognised as a rule of customary international law and *jus cogens*.[148] Thus, it is universally applicable and binding in all circumstances and in any place with no derogation permitted.

OBLIGATIONS IN RELATION TO THE PROHIBITION OF TORTURE AND CIDT

100. CAT and ICCPR General Comments No. 20 set out a series of obligations for states to prevent torture or CIDT. These obligations include the negative obligation to refrain from directly committing torture or CIDT. However, the more relevant obligations are the positive ones,[149] which can be divided into legislative, administrative, judicial and other measures.[150] This section will examine these obligations in detail, particularly the ones closely related to YANSAG.

a) Legislative

101. States are obligated to legislate on torture to afford everyone protection from it.[151] More specifically, Article 4(1) of CAT prescribes that each state party shall ensure that all acts of torture are offences under its criminal law. Legislation on non-refoulement[152] and the right to remedy and redress is also required.[153]

b) Administrative

102. Article 10 of CAT stipulates that states shall ensure that education and information regarding the prohibition of torture and CIDT are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. States shall also include this prohibition in the rules or instructions issued in

[147] CAT Committee, General Comment No 2 (n 142), para 5.
[148] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, para 99.
[149] CAT Committee, General Comment No 2 (n 142), para 4.
[150] CAT, Article 2(1).
[151] CCPR, General Comment No 20 (n 25), para 2.
[152] CAT Committee, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) UN Doc CAT/C/GC/4, para 18.
[153] CAT, Article 14; CAT Committee, 'General Comment No 3 (2012) on the Implementation of Article 14 by States Parties' (13 December 2012) UN Doc CAT/C/GC/3, paras 15, 46.

regard to the duties and functions of any such person. Such obligations have also been confirmed by CCPR General Comment No. 20.[154]

103. YANSAG are often subject to detention, interrogation, and prosecution by state authorities.[155] Given the complex nature of their association with NSAGs – whether voluntary, coerced, or due to socio-political factors – states must ensure that law enforcement, military, medical personnel, and public officials handling their cases are adequately trained to uphold the prohibition of torture and CIDT. This obligation is particularly crucial in counter-terrorism and security operations, where the risk of abuse against individuals perceived as threats is significantly high.

104. Moreover, CAT General Comment No. 2 mentions the importance of eliminating employment discrimination and conducting ongoing sensitisation training in contexts where torture or CIDT is likely to be committed.[156] For YANSAG, such actions can promote better protection and foster their rehabilitation and integration into society after disengagement.

c) Judicial

105. Articles 5 to 7 and 15 of CAT obligate states to establish jurisdiction over offences of torture and CIDT, hold the suspects in custody, extradite or prosecute the suspects, and exclude evidence obtained by torture or CIDT.[157]

106. The obligation of non-refoulement under Article 3 of CAT provides that no state party shall expel, return, or extradite an individual to another state where there are substantial grounds for believing they would be at risk of torture.[158] The determination of such grounds requires authorities of the sending state to carefully evaluate all relevant circumstances, including evidence of consistent patterns of gross, flagrant, or mass violations of human rights in the receiving state, especially in situations of armed conflicts.[159] The obligation is absolute,[160] meaning states must

[154] CCPR, General Comment No 20 (n 25), para 10.
[155] Yosuke Nagai and Erica Harper (n 1), 6.
[156] CAT Committee, General Comment No 2 (n 142), para 24.
[157] Also confirmed in CCPR, General Comment No 20 (n 25), para 12.
[158] Also confirmed in CCPR, General Comment No 20 (n 25), para 9.
[159] CAT Committee, General Comment No 4 (n 152), para 43.
[160] CAT Committee, General Comment No 4 (n 152), para 9; *Gorki Ernesto Tapia Paez v Sweden* (Views) UN Doc CAT/C/18/D/39/1996 (28 April 1997), para 9.

rigorously adhere to it without exception, even in cases involving national security or criminal allegations, ensuring procedural safeguards such as individualised assessments, access to legal assistance, and rights to appeal are respected during expulsion or extradition processes.

107. YANSAG tend to face significant risks of torture or severe CIDT upon return to countries with ongoing armed conflict, poor human rights records, or inadequate protection from non-state actors. States must therefore apply heightened scrutiny when considering their expulsion or extradition, acknowledging the severe consequences YANSAG could face, including reprisals, persecution, or further coercive recruitment from both state authorities and non-governmental entities. This is particularly relevant in situations where the receiving state is unable to control non-governmental entities and can only passively accept their actions. This principle is highlighted in *C and D v Switzerland*, where the CAT Committee found that returning individuals to a situation where authorities could not protect them from a 'real, present, personal and foreseeable risk' of severe pain or suffering by non-state actors would violate Article 3 of the CAT. The Committee noted that in such circumstances, the authorities 'would effectively be in a position of having no choice but to acquiesce to such treatment.'[161]

108. On the other hand, there still exists a gap since Article 3(1) does not cover situations where risk of pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the state (provided that the state has the ability to protect YANSAG from non-governmental entities. Otherwise, the state will be considered as 'having no choice but to acquiesce to' torture or CIDT).[162] In this scenario, the non-refoulement obligation may not apply. However, the receiving state still has a positive obligation to protect the YANSAG from torture and CIDT. Hence, the inapplicability of non-refoulement in this context does not necessarily lead to a protection vacuum.

109. With respect to the obligation to ensure the right to remedy and redress, which is highly relevant to the rehabilitation of YANSAG, Article 14 of CAT provides that states parties must ensure that victims of torture or CIDT have access to redress and an enforceable right to fair and adequate

[161] *C and D v Switzerland* (Views) UN Doc CAT/C/76/D/1077/2021 (21 April 2023), para 7.9.
[162] *Mükerrem Güclü v Sweden* (Decision on merits) UN Doc CAT/C/45/D/349/2008 (11 November 2010), para 5.2.

compensation, including as full rehabilitation as possible.[163] This encompasses multiple dimensions of redress: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[164] The right to redress is broad and includes not only monetary compensation but also comprehensive measures such as medical and psychological care,[165] social and legal services, vocational training, and educational opportunities aimed at restoring the victim's independence and full participation in society.[166] States are required to establish accessible mechanisms that provide victims with a holistic and tailored approach to rehabilitation, considering their unique circumstances and specific needs.[167]

110. In the context of YANSAG, the obligation to ensure the right to remedy and redress is particularly critical. These youth often experience severe trauma, physical injuries, psychological harm, and social stigma due to their involvement with armed groups.[168] As victims of torture or CIDT, YANSAG require tailored rehabilitation and reintegration programmes designed to address their unique vulnerabilities and facilitate their effective re-entry into society. States have a duty to provide accessible, culturally sensitive, and comprehensive rehabilitation services, ensuring YANSAG are not subject to discrimination or re-traumatisation during legal or administrative proceedings. Effective remedies for YANSAG must include medical, psychological, vocational, educational, and social support, thereby enabling their recovery, dignity restoration, and meaningful societal reintegration.

[163] Also confirmed in CCPR, General Comment No 20 (n 25), paras 14-15.
[164] CAT Committee, General Comment No 3 (n 153), para 2.
[165] Yosuke Nagai and Erica Harper (n 1), 3.
[166] CAT Committee, General Comment No 3 (n 153), paras 11, 13.
[167] ibid 3, para 5.
[168] Yosuke Nagai and Erica Harper (n 1), 11.

3. CONVENTION ON ENFORCED DISAPPEARANCE

111. YANSAG are particularly vulnerable to enforced disappearance due to their past or perceived affiliations. States may attempt to conceal the detention or whereabouts of YANSAG to evade accountability, (international) scrutiny, or legal obligations, especially in the context of counter-terrorism or internal security operations. Such concealment significantly increases the risk of torture, CIDT, extrajudicial execution, or prolonged arbitrary detention without judicial oversight for these individuals.[169] By mandating transparency and accountability, CED addresses and mitigates these risks, ensuring greater protection for YANSAG.

DEFINITION OF ENFORCED DISAPPEARANCE

112. Article 2 of CED defines

> 'enforced disappearance' as 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'[170]

113. It is notable that enforced disappearance occurs not only through direct state action but also includes acts committed by persons or groups acting with the authorisation, support, or acquiescence of the state. This broader scope is especially relevant for YANSAG, who often face secret or unofficial detention, carried out indirectly through militia groups, paramilitary forces, or other entities operating with tacit state approval.[171]

114. Additionally, if there is enough evidence showing state agents' involvement in enforced disappearance, then the burden of proof is on the state to prove otherwise. The state must

[169] Yosuke Nagai and Erica Harper (n 1), 7.
[170] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/RES/61/177 (CED), Article 2.
[171] ibid.

investigate with due diligence and show that neither its agents nor anyone acting with its authorisation, support, or acquiescence was responsible for the disappearance.[172]

115. However, gaps still exist where a disappearance lacks state involvement and thus does not qualify as 'enforced disappearance' under CED. This scenario is more likely to be faced by YANSAG due to their previous association with NSAG. Many victims feel rejected, in particular because they cannot lodge a complaint against a non-state actor or submit a case to the UN Working Group on Enforced or Involuntary Disappearances or the CED Committee, given that the disappearance of their loved one is considered outside the ambit of the definition. Consequently, proposals have been made to extend the definition of 'enforced disappearance' to include acts committed by non-state actors, even in the absence of state involvement, to address this protection gap.[173]

LIMITATIONS OR DEROGATIONS?

116. Similar to CAT, Article 1(2) of the CED prescribes that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.[174] This means that any claims of armed conflict, national security threats, or political instability cannot be invoked to justify enforced disappearance, and thus safeguard YANSAG from becoming invisible victims of abuse, secret detention, or violations outside the scrutiny of law and international oversight.

OBLIGATIONS IN RELATION TO THE PROHIBITION OF ENFORCED DISAPPEARANCE

117. The CED imposes both negative and positive obligations, with the latter being particularly relevant in the context of YANSAG.

[172] *Angélica María Berrospe Medina v Mexico* (Views) UN Doc CED/C/24/D/4/2021 (24 March 2023), para 7.3.
[173] Ana Srovin Coralli, *Non-State Actors and Enforced Disappearances: Defining a Path Forward* (Geneva Academy Working Paper, September 2021), 15.
[174] CED Committee, 'General Comment No 1 on Enforced Disappearances in the Context of Migration' (26 October 2023) UN Doc CED/C/GC/1, para 17; *Estela Deolinda Yrusta and Alejandra del Valle Yrusta v Argentina* (Decision on merits) CED/C/10/D/1/2013 (11 March 2016), para 10.3.

a) Legislative

118. Article 4 of CED requires states to create the offence of enforced disappearance under their criminal law.[175] In accordance with Article 16(1), states parties should explicitly incorporate the non-derogable principle of non-refoulement into national legislation and refrain from creating exceptions in the law aimed at its circumvention.[176] Furthermore, Article 17(2) obligates states to legislate on various aspects of the deprivation of liberty as follows: It requires states to clearly define in law the conditions under which individuals may be deprived of liberty, and to explicitly identify the authorities empowered to issue such orders. Further, it mandates that deprivation of liberty may only take place in officially recognised and supervised facilities. The article also emphasises the rights of detained persons to communicate with family, legal counsel, or consular representatives (in the case of foreign nationals), subject only to legally established conditions. Additionally, it ensures that authorised authorities and institutions have guaranteed access to detention sites, subject to judicial oversight when necessary. Crucially, the provision guarantees judicial review of the legality of detention, granting detained persons or others with legitimate interest, such as relatives or legal representatives, the right to challenge unlawful detention and seek immediate release.

b) Administrative

119. Article 17(3) of the CED requires states to assure the compilation, maintenance and prompt provision of one or more up-to-date official registers and/or records of persons deprived of liberty. This obligation provides transparency and accountability, significantly reducing the likelihood of enforced disappearance for YANSAG.

120. Article 23 mandates comprehensive training and education for personnel who are involved in the custody or treatment of detained persons, including law enforcement, military, medical staff, and public officials. This training must encompass essential knowledge on the provisions of the CED, emphasising prevention of enforced disappearance, the necessity of thorough and timely investigations, and the critical importance of promptly resolving disappearance cases.

[175] CED, Article 4.
[176] CED Committee, General Comment No 1 (n 174), para 31.

Furthermore, the article explicitly prohibits any orders or instructions that prescribe, authorise, or encourage enforced disappearance, providing assurances that individuals who refuse to follow unlawful orders will face no punitive measures. Personnel are also required to report any suspected or planned enforced disappearance to the appropriate supervisory or investigative bodies.

121. Article 25 obligates states to actively search for, identify, and return to their families any children who have been wrongfully removed due to enforced disappearance. This includes children who themselves have been victims of enforced disappearance, those whose parents or guardians have disappeared, and children born during a mother's enforced captivity. States are required to adopt appropriate legal procedures aligned with international standards, criminalise such wrongful removals, and ensure accountability through judicial mechanisms.

122. Many YANSAG have been forcibly separated from their families since childhood or adolescence, resulting in prolonged social isolation and psychological trauma. For them, the obligation to actively locate, identify, and reunite them with their families serves not only as an essential step towards restoring their fundamental rights and dignity but also greatly facilitates their psychological healing, social reintegration, and long-term recovery. By prioritising the restoration of family ties disrupted by enforced disappearance, this measure provides a crucial foundation for comprehensive reintegration programmes aimed at rebuilding the lives and identities of affected YANSAG.

c) Judicial

123. Similar to the CAT, Articles 6 to 7, 9 to 11 and 13 of the CED require states to establish jurisdiction over the offence of enforced disappearance, hold the suspects in custody, extradite or prosecute them, uphold criminal responsibility and punish by appropriate penalties. Article 16 enshrines the fundamental principle of non-refoulement. This principle obligates states not to expel, return, or extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to enforced disappearance. To ensure this protection is meaningfully applied, it further requires states to ensure that each person's case is examined individually, impartially, and independently by competent administrative and judicial

authorities, in conformity with international due process standards.[177] This means YANSAG cannot be transferred if such a transfer would place them at risk of enforced disappearance in the receiving state.

124. Article 24 establishes comprehensive judicial rights of the victims and corresponding obligations of the states. This includes the right to know the truth about enforced disappearance, obtain reparation, including secure prompt, fair, and adequate compensation. Reparation encompasses compensation for material and moral damage, restitution, rehabilitation, satisfaction (including restoration of dignity and reputation), and guarantees of non-repetition.[178] States are required to actively search for disappeared persons, clarify their fate, and provide social, financial, legal, and psychological support to victims and their families.[179] Furthermore, victims have the explicit right to freely form and participate in organisations dedicated to uncovering enforced disappearance and supporting affected individuals.

125. YANSAG often experience enforced disappearance and subsequent trauma, stigma, and exclusion from their communities.[180] Acknowledging past violations and providing comprehensive reparation, including psychosocial rehabilitation, restoration of dignity, and economic support, are essential steps for their successful reintegration into society.[181] Ensuring the right of YANSAG to know the truth helps address their psychological and emotional harm, while facilitating their acceptance back into communities by mitigating stigma. By explicitly protecting the rights of victims to organise and participate in supportive associations, this provision empowers YANSAG, enhancing their capacity to engage actively and positively in their communities after disengagement from NSAGs.

126. Furthermore, for the enforcement mechanism, the urgent action procedure under Article 30 is unique to CED. It offers a direct channel for relatives or representatives of the disappeared person to alert the CED Committee, which can then swiftly request the concerned state to take measures to find the YANSAG and protect their life and integrity. However, the effectiveness of

[177] *E.L.A. v France* (Decision on merits) CED/C/19/D/3/2019 (25 September 2020), para 7.2.
[178] CED Committee, General Comment No 1 (n 174), para 44.
[179] ibid, para 46.
[180] Yosuke Nagai and Erica Harper (n 1), 19.
[181] ibid, 17.

this mechanism for YANSAG may be limited due to several challenges: state non-cooperation, invocation of national security to withhold information, lack of awareness among affected families, and resource constraints of the Committee. Despite these challenges, the urgent action procedure remains a vital, potentially life-saving tool in the desperate circumstances surrounding the disappearance of a young person associated with a NSAG.

4. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

127. The ICESCR is applicable to YANSAG following Articles 2(2) and 3 of the ICESCR, ensuring the exercise of the rights protected under the Covenant 'without discrimination of any kind', to men and women equally[182]. Any limitation on these rights must be 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'[183].

128. The realisation of these social and economic rights typically requires the state to take positive action, which means that resources must be allocated by the State towards the achievement of those rights. In the context of YANSAG in post-conflict states, the capacity to allocate resources to realise these rights will likely be limited. The protection of social and economic rights in this context may be further complicated because the full realisation of these rights must only be achieved progressively, subject to the maximum available resources.

129. Despite this standard of progressive realisation, State obligations under the ICESCR should not be seen as merely aspirational. The **Committee on Economic Social and Cultural Rights** (CESCR) has used interpretative approaches that seek to ensure the protection of the most vulnerable groups even in cases where resources are limited.

130. There is a minimum core obligation attached to each right that should be immediately attained to the best of the state's ability.[184] In doing so, the state can prioritise the most vulnerable groups in their allocation of resources to meet this minimum core obligation for these groups. Some have argued that it is too difficult to define what minimum core obligations would be and that alternative approaches, such as reasonableness review, would be preferable.[185] In the context of

[182] International Covenant on Economic, Social and Cultural Rights, (adopted 19 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR), Articles 2(2) and 3.
[183] ICESCR. Article 4.
[184] See CESCR Committee, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 10.
[185] See Liebenberg, Sandra, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010), Ch. 3 and 4; Blichitz, David, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007), Ch. 2 and 6.

YANSAG, where state resources are likely significantly limited, an interpretation in the first place that upholds minimum core obligations for vulnerable groups is necessary.

PROGRESSIVE REALISATION OF RIGHTS

131. Article 2(1) of the ICESCR requires that states take steps to the maximum of their available resources with a view to progressively achieving the full realisation of the rights in the ICESCR[186]. In General Comment No. 3, the CESCR emphasised that Article 2(1) should not be read as designating rights as aspirations, but at the same time, the Committee accepts that states should retain economic discretion in how they allocate resources[187]. The Committee has said that the ICESCR obligations are obligations of result that are progressively realisable (rather than obligations of conduct)[188]. This is because they recognise that certain states may not be capable of achieving the targeted standard of protection straight away, while others are. The Committee has nevertheless noted that the obligation of conduct in *taking steps* towards achieving the rights is immediately realisable[189]. The idea is that rights protection is continuous, and there should not be a concrete endpoint. The Committee states that progressive realisation is a 'flexibility device, reflecting the realities of the real world.'[190] Furthermore, progressive realisation means that the state cannot adopt retrogressive measures without strict justification.[191]

132. The obligation of progressive realisation is subject to the maximum availability of resources. Commentators have noted that this gives considerable discretion to states, and they can still determine which policies are appropriate and the number of resources they can allocate.[192] As Saul et al note, the terminology implies an 'unavoidable subjectivity.' They write that the determination of maximum available resources is largely a question for the State to decide alone and remains somewhat indeterminate.[193]

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[186] ICESCR, Article 2(1).
[187] CESCR, General Comment No 3 (n 184).
[188] ibid, para 9.
[189] ibid, paras 1-2.
[190] ibid, para 9.
[191] ibid.
[192] Matthew C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995), 141–160; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156.
[193] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* 1 (2014), 143-144.

133. It is this textual basis of Article 2(1) that has led to treating social and economic rights as aspirational in comparison to civil and political rights that are immediately enforceable, thus inviting scepticism about how these socioeconomic rights can be protected in the context of YANSAG.[194] The 'conditionality' of the text on the available resources can be seen as a weakness that states could use to justify a lack of investment in the protection of social and economic rights. As a result, enforcement of these rights proves problematic.[195] The benchmark of maximum available resources provides no consistent tool for monitoring compliance as it stands. This is further complicated by the differing economic and social contexts of each state.[196] Making the rights realisable 'subject to maximum available resources' seems to allow the state a wide margin of discretion.

134. For YANSAG, we may often be dealing with states that are emerging from conflict situations. It is therefore likely that the ability of such states to allocate financial resources may be significantly affected. If progressive realisation is interpreted in a way that leaves broad discretion to states, then it is the needs of YANSAG that will likely not be protected. Furthermore, it has been noted how progressive realisation does not help us in determining what the substantive content of a particular right is. It is unclear what the state must do to fulfil these obligations[197]. Attempts by the Committee to clarify what full and progressive realisation amounts to still lack sufficient normative content so as to impose real enforcement duties on states. This is particularly true in the YANSAG context, where the likely lack of availability of resources necessitates clarity and certainty to avoid accountability gaps.

[194] Cf. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996).
[195] Allison Corkery and Ignacio Saiz, 'Progressive realisation using maximum available resources: the accountability challenge' in Dugard et al, *Research Handbook on Economic, Social and Cultural Rights ss Human Rights* (2020), 275.
[196] Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, *The Evolving Doctrine on ESCR and 'Maximum Available Resources'* (2019), 643.
[197] Sandra Fredman, *Comparative Human Rights Law* (2018), 69-70.

a) The Importance of a Minimum Core Approach in the Context of YANSAG Rights

135. The concept of minimum core approach in this context has proven controversial and has been criticised by many scholars, both regarding its substance and its application.[198] General Comment No. 3 of the CESCR assimilates the minimum core to the '*raison d'être*' of the Covenant. The implications of this are difficult to assess. Katharine Young established three approaches to the minimum core obligation: the minimum core as a normative essence, as a minimum consensus, or as a minimum obligation.[199] Importantly, Young criticises the ambiguity and indeterminacy of the minimum core concept, arguing that it lacks fixed content and risks legitimising exceptionally low levels of protection, especially in countries where resources are rare or lacking.[200] As YANSAG are presumably from conflict zones in which resources might be lacking, this critique is worth mentioning. However, the minimum core can also serve as a catalyst for reforms by mandating targeted interventions to improve the fulfilment of given rights.[201]

136. Others have advocated for an approach to socio-economic rights that focuses on reasonableness as opposed to the minimum core. This has been the main approach taken by the South African Constitutional Court.[202] Critics have argued, for example, that the minimum core will be too varied across different states due to diverging economic situations and social circumstances in different states.[203] However, it is submitted that an approach that does not at least consider the minimum core in the first place dilutes the normative content of the rights. An approach based on the minimum core does not need to render context irrelevant. It simply prioritises the minimum core and places high justificatory burdens in cases where protection has not been upheld.[204] Indeed, if a reasonableness review was considered necessary, this could come in the

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[198] See Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012), Ch 5; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010), Chapter 4; Bilchitz, David, *Poverty and Fundamental Rights* (Oxford University Press 2007), Chs 2 and 6.
[199] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012), Ch 5.
[200] ibid.
[201] The case of South Africa, for example, represents a good example of how a minimum core can foster reforms even where resources are lacking. See e.g. Nurina Ally and Tatiana Kazim, 'Lessons from the 'minimum core' approach to the right to basic education in South Africa' (2024) *African Human Rights Law Journal*, 24(1), 179-208.
[202] For example, see the decisions in *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC) and *Minister of Health v Treatment Action campaign* 2002 (4) BCLR 356 (T).
[203] Karin Lehmann '*In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core'* [2006] 22 AJIL 163
[204] For example, David Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' [2003] 19 South African Journal on Human Rights 1.

form of a second-stage test to assess the actions of the state, as is proposed by Liebenberg.[205] This would ensure that the right itself still has key content whilst also taking a context-sensitive approach. Reasonableness alone as an interpretative tool does not ensure the protection of vulnerable groups as effectively as an interpretation based on minimum obligations in the first place. As Kwadrans puts it,

> '[t]o reject the minimum core altogether in favour of an approach based solely on examining the reasonableness of state actions in the abstract risks creating the very danger that the CESCR sought to avoid: that the obligation to progressively realise rights will be misconstrued to deprive ESR of meaningful content and legitimise the deprivation of vulnerable and marginalised groups'.[206]

137. Although practice in Africa and America demonstrates a cross-cutting use of the standards of minimum core and reasonableness,[207] this practice remains inconsistent and insufficient to establish a link between these two standards.[208] It is therefore crucial that an approach to economic and social rights for YANSAG focuses on the minimum core in the first place due to their vulnerabilities. Furthermore, the minimum core is not a monolithic standard that lowers protection or encourages 'a race to the bottom' approach. Rather, such an approach conceptualises a right as having two levels. The minimum core level and the progressive realisation level. In the case of resource limitations, the minimum core should be prioritised. This allows targeted support for the vulnerable groups that are most in need, as these are the groups served in the first instance when the minimum core obligations are met.

138. For YANSAG, the minimum core principle should guarantee a minimum access to basic services essential for their survival and dignity. Hence, the minimum core will be beneficial to YANSAG by providing a non-derogable baseline protection of their economic, social, and cultural rights. It

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[205] Sandra Liebenberg *'Reasonableness Review'* in Malcom Langford and Katherine G. Young (eds) *The Oxford Handbook of Economic and Social Rights* (2022)

[206] Ania Kwadrans 'Socioeconomic Rights Adjudication in Canda: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?' [2016] 25 Journal of Law and Social Policy 79, 90.

[207] See The indigenous community Xákmok Kásek v. Paraguay and African commission on Human and People's Rights, 'Principles and guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011).

[208] Joie Chowdhury, 'Unpacking the minimum core and reasonableness standards' in Jackie Dugard et al (Ed.), *Research handbook on economic, social and cultural rights as human rights* (2020) 262.

will ensure that deprivation of such rights by states is not legitimised on the basis of reasonableness alone or other interpretative standards.[209]

b) Minimum Core Protecting YANSAG Rights

139. The minimum core requires that the State take steps that are non-discriminatory. This is an immediate obligation. The Committee notes that even in times of severe resource constraints, vulnerable members of society should be protected by 'low-cost targeted programmes'.[210] It is this non-discrimination requirement that has allowed the CESCR to interpret into obligations of conduct a requirement for the adoption of legislation that does not require significant resource allocation. Therefore, even where resources are limited, there remains an obligation for states to protect the enjoyment of these rights as far as possible. The obligation to monitor and to devise strategies and programmes for the promotion of these rights still persist despite resource constraints.[211] It is proposed that YANSAG should be regarded as members of a vulnerable group for which the Committee should prioritise protection. It is clear that the Committee wishes to emphasise that despite severe resource constraints, which is likely reflective of the YANSAG context, vulnerable groups must be prioritised. Fredman comments that the minimum core relates to conditions that are so crucial that they should be prioritised over state resources.[212] She states that 'the minimum core requires states to do everything possible to uphold the basic right of survival of the most destitute and disadvantaged in society, because there is very little that can take priority over the basic right of survival'[213]. Bilchitz's analysis is also helpful in applying the minimum core approach to the YANSAG context. He writes that the minimum core is a means of specifying priorities and that the State must thus give priority to those whose survival is threatened. He states further that 'any government programme must consider the needs of people in such a situation and assist them as a matter of priority.'[214] It is submitted that YANSAG fall into this category and so require prioritisation. This prioritisation is particularly urgent given the

[209] ibid.
[210] CESCR, General Comment No 3 (n 184), para. 12.
[211] ibid, paras 11-12.
[212] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 86
[213] ibid.
[214] David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) *South African Journal on Human Rights*, *19*(1), 16, accessed 12 March 2025 < https://doi.org/10.1080/19962126.2003.11865170>.

realities YANSAG often face, including homelessness, statelessness, and lack of access to the enjoyment of fundamental human rights.

140. The obligation of non-retrogression also forms part of the minimum core. The Committee has commented that 'deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[215] It is submitted therefore that for states in the context of YANSAG, there exists a high burden to prove that measures are taken to satisfy the core content of the right, and those measures that are not taken are subject to strict justification on the basis that they would require resources above the maximum available at the time.[216] This is necessary because of the specific vulnerabilities of YANSAG. Furthermore, ensuring non-discrimination against vulnerable groups is a key factor in assessing whether retrogressive measures are justified. The extent to which states actively protect such groups can serve as an indicator of genuine commitment to progressive realisation.[217]

141. The approach reflected in the 1987 Limburg Principles on the Implementation of the ICESCR,[218] accepted by human rights monitoring bodies, is also helpful. These principles outline that due priority shall be given in the realisation of these rights and that resource allocation should be done equitably and effectively. Corkey and Saiz have noted how the African Commission on Human and People's Rights has interpreted equity as demanding that disadvantaged groups be prioritised in all resource allocation decisions.[219] Lastly, it should be noted that the concept of maximum available resources not only includes domestic financial resources but also those available through international assistance. Upprimy et al comment that the CESCR will hold developed nations to account regarding their contributions and how developing states use these contributions.[220] This

[215] CESCR, General Comment No 3 (n 184), para 9.
[216] ibid. See also David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007), Ch 4 and 6.
[217] ibid, paras 11-12.
[218] Commission on Human Rights, 'Annex: The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17.
[219] Corkey and Saiz (n 194), para 5.1.
[220] Cf. Rodrigo Uprimmy, Sergio Chaparro Hernandez and Andrés Castro, 'Chapter 20: Bridging the Gap: The Evolving Doctrine on ESCR and 'Maximum Available Resources' in Katharine G. Young (ed) *The Future of Economic and Social Rights* (CUP 2019).

is particularly relevant considering the recent cuts to development aid by the United States and the United Kingdom,[221] which have significantly reduced their Official Development Assistance budgets in the past few years. These reductions have raised concerns about the ability of resource-constrained states to meet their minimum core obligations and progressively realise economic and social rights. The withdrawal of external support risks exacerbating inequality and undercutting global solidarity.

MINIMUM CORE CONTENT IN RELATION TO SUBSTANTIVE RIGHTS

a) The right to work's minimum core content

142. Article 6 of the ICESCR protects the right to work, encompassing the right of everyone to gain their living through work which they freely choose or accept. States are required to take appropriate steps to safeguard this right. These steps include implementing technical and vocational guidance and training programmes, along with policies designed to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms.[222] In General Comment No. 18, the ICESCR interprets work to include all forms of work that offer the opportunity to gain one's living by work.[223]

143. General comment No.18 identifies three key elements of the right to work: (1) the freedom to choose and accept work where it is available; (2) the prohibition of discrimination; (3) the prohibition of forced labour. These, according to the commentary, should be viewed as the minimum core obligations of the right to work that have immediate effect.[224] General Comment No.3 confirms that 'in the context of Article 6, the 'core obligation' encompasses the obligation to ensure non-discrimination and equal protection of employment.' It notes that discrimination in this area can have a considerable effect on all aspects of life.'[225] This means that 'even in times

[221] UK House of Commons Library, *UK to Reduce Aid to 0.3% of Gross National Income from 2027* (6 March 2024) < UK to reduce aid to 0.3% of gross national income from 2027> accessed 12 April 2025.
[222] ICESCR, Article 6.
[223] CESCR, 'General Comment No. 18: The Rights to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)' (6 February 2006) UN Doc E/C.12/GC/18.
[224] See Ben Saul, David Kinley and Jacqueline Mowbray (n 193).
[225] CESCR, General Comment No 3 (n 184).

of severe resource constraints, disadvantaged and marginalised individuals and groups must be protected by the adoption of relatively low cost-targeted programmes.'[226] In addition to this, the commentary notes that the CESCR has endorsed the adoption of employment quotas from particular states for marginalised groups.[227]

144. The minimum core of the right to work also includes the right of access to employment, in particular for disadvantaged or marginalised groups, allowing them to live a life of dignity and avoid measures that would weaken the protection for these groups. This requires the adoption of a national strategy based on participation and transparency. This is of particular relevance to YANSAG as a marginalised group. General Comment No 18 recognises the importance of the right to work as a means of escaping poverty. It notes the difficulties of young persons in finding employment. It follows, according to the Committee, that national policies should specifically address access to employment for young persons. It can be said that even if this duty is subject to progressive realisation, non-discrimination and the minimum core of the right to work should ensure that young persons, and therefore YANSAG, are included in these policies.[228] Gomes contends that the adoption of targeted strategies forms part of the core obligation of the right to work. This is because a strategy in this case should be formed through engagement and discussion with rights holders to reinforce the principles of participation and accountability. The specific context of the right to work makes a national strategy more important. [229]

b) The right to housing's minimum core content

145. The right to housing under the ICESCR is contained within the right to an adequate standard of living. Article 11 recognises the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The provision requires State Parties to take appropriate steps to ensure the realisation of this right, recognising, to this effect, the essential importance of international co-operation based on free consent.[230]

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[226] ibid.
[227] See Ben Saul, David Kinley and Jacqueline Mowbray (n 193).
[228] CESCR, General Comment No.18 (n 223).
[229] Virginia Brás Gomes 'The right to work and rights at work' in Jackie Dugard et al (ed) *Research Handbook on Economic, Social and Cultural Rights as Human* Rights (EE 2020) 232.
[230] ICESCR, Article 11.

146. The Committee has, on various occasions, noted the importance of the right to housing in terms of the impact it can have on the enjoyment of other rights. It should be interpreted broadly as the right to live somewhere in security, peace, and dignity. In terms of the minimum core of the right to housing, the Committee clarifies the steps that states are required to take immediately.[231] It requires that states give due priority to social groups living in unfavourable conditions and to the development of policies aimed at helping these groups.[232] Recognising the difficulties in maintaining living standards across the board, the Committee notes that the obligations under the Covenant become even more important in times of economic contraction.[233] A housing strategy should be developed through a participative process of those affected, and effective monitoring mechanisms should be put in place. Here, such mechanisms should focus on the most vulnerable and disadvantaged in terms of access to housing. [234]

147. In the context of YANSAG, it is clear that there are barriers to the implementation of effective housing strategies. Issues such as the destruction of housing during conflicts or limited resource capacity to build housing so as to increase housing provision may make the protection of this right for YANSAG more difficult. However, it is argued that even if this is the case, the interpretative priority given to vulnerable groups means that the needs of YANSAG must be prioritised along with other vulnerable groups. Such an approach finds some basis in the jurisprudence of the Committee. In *Ben Djazia and Bellili v Spain*,[235] an individual communication concerning the eviction of a family, the Committee considered that special attention should be paid to groups who cannot access housing by their own means due to their vulnerability as a group or groups that suffer systemic discrimination in terms of eviction. More generally, the Committee recognised that the claimants were part of a vulnerable group and so the state must give them priority in terms of policy and allocation of resources. In terms of a lack of financial

[231] CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1999) UN Doc E/1992/23, para 11.
[232] ibid.
[233] ibid.
[234] ibid, para 11.
[235] *Ben Djazia et Bellillil v. Spain* (Views) UN Doc E/C.12/61/D/5/2015 (20 Jun 2017).

resources in an economic emergency, the Committee clarified that the burden of proof is a high threshold to reach and that such measures should still be non-discriminatory.[236]

c) The right to health's minimum core content

148. The right to health is guaranteed under article 12 of the ICESCR, which recognises everyone's right to fully enjoy physical and mental health possible. The wording 'highest attainable standard' highlights that even though states may face resource constraints, they must take deliberate, concrete, and targeted steps toward the progressive realisation of this right. General Comment No. 14 offers a detailed interpretation of the right to health as articulated in Article 12 of the ICESCR, placing the right to health as a fundamental human right, which is essential for the realisation of all other human rights.[237]

149. Indeed, General Comment No. 14 emphasises that the right to health goes beyond the mere access to medical services. Rather, it includes the social and economic conditions which are required to live a healthy life. Accordingly, the right to health is closely linked to other human rights, including the rights to food, housing, employment, education, dignity, and life itself. A particular importance is given to the principle of non-discrimination, as it requires that access to healthcare and its underlying human rights must be guaranteed to all individuals without discrimination based on race, gender, socio-economic status, or any other characteristic linked to personhood.

150. As a result of the intertwinement of the right to health with other rights, Article 12 includes, inter alia, environmental conditions, access to clean water, adequate nutrition, and safe working environments. This interpretation therefore challenges states to proactively pursue health equity and implicitly acknowledges that entrenched social and economic disparities tend to prevent the full realisation of the right to health[238]. This entails that health policies cannot exist in isolation

[236] Julieta Rossi, 'Progressive Realization, Non-Retrogression and Maximum of Available Resources: Agreements and Disagreements between the Inter-American Court and the United Nations ESCR Committee' in Pou Giménez, Clérico and Restrepo-Saldarriaga (eds), *Proportionality and Transformation: Theory and Practice From Latin America* (2022), 175.
[237] CESCR**,** 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2000) UN Doc. E/C.12/2000/4.
[238] Chapman, Audrey R. 'The social determinants of health, health equity, and human rights' (2010) *Health and Human Rights* 12, no. 2.

from other human rights guarantees, requiring them to be part of a broader and coordinated strategy converging toward a constant improvement of living conditions.

151. In practice, YANSAG may face considerable obstacles in accessing healthcare, thereby significantly hampering the realisation of their right to health as understood in Article 12 of the ICESCR. These barriers arise from a combination of legal and socio-economic factors, which collectively marginalise YANSAG from benefiting from effective healthcare systems. First, YANSAG might face legal restrictions and policies that inevitably deny healthcare access to individuals affiliated with NSAG. Indeed, some countries, such as Colombia or Nigeria, criminalise involvement in these groups, categorising even young people who were coerced or recruited as combatants or perpetrators, even if they are only victims. Such a designation may result in the denial of medical care, particularly in conflict or post-conflict contexts where authorities may refuse care on the basis of national security or counterterrorism concerns.[239] Second, governments and international organisations often prioritise health services for officially recognised civilians or individuals recognised as or part of governmental entities, which in effect amounts to excluding YANSAG from public health initiatives.[240] Finally, financial constraints might further prevent YANSAG from affording essential medical care, especially in conflict and post-conflict zones where healthcare systems are often privatised or underfunded.[241]

d) The right to education's minimum core content

152. The right to education is guaranteed under Article 13 of the ICESCR, which recognises education as an individual right. It is the longest provision in the Covenant, reflecting the multifaceted nature of the right to education and its essential role within the human rights framework. The key operative provisions are paragraphs one to three. Article 13(1) establishes the purpose of education, stating that 'education shall be directed to the full development of the human personality and the sense of its dignity' and must 'enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial,

[239] International Peace Institute, *Hard to Reach: Providing Healthcare in Armed Conflict* (December 2018).
[240] Serena Luchenski et al., 'What works in inclusion health: overview of effective interventions for marginalised and excluded populations' (2018) 16 *International Journal for Equity in Health* 70.
[241] Sophie Witter, *Health Financing in Post-Conflict Settings – A Literature Review* (ReBUILD Consortium 2011) < health-financing-in-post-conflict-settings-a-literature-review.pdf> accessed 10 April 2025.

ethnic or religious groups'.[242] Article 13(2) sets out the conditions to be met in order to achieve the full realisation of the right, establishing a progressive framework for the right to education. Article 13(3) establishes the liberty of the parents to choose their children's education in line with 'their own convictions'. This provision seeks to balance state interference with individual freedoms, enabling parents to choose the most appropriate educational system for their children. This paragraph, however, needs to be interpreted carefully, as parental choice cannot be exercised in a way that would undermine or eliminate the child's fundamental human rights.

153. In addition, Article 14 of the ICESCR sets out an obligation on states parties to the Covenant to adopt a plan of action for implementing 'compulsory primary education, free of charge', within two years of their accession to the Covenant. This provision establishes a clear and time-bound obligation on states to ensure free and compulsory education at the primary level. To date, the meaning of 'free and compulsory' remains unsettled in international law, with its specific elements varying according to national laws and regulations. These provisions place the right to education as a cornerstone of economic, social, and cultural rights, recognising it as both an individual fundamental human right and a means to fulfil other human rights.

154. General Comment No. 13 and General Comment No. 11 provide a detailed interpretation of Articles 13 and 14 on the right to education, elaborating on states' obligations, on the main elements of education, and on the implementation of 'free and compulsory primary education.'[243] Both General Comments must be read and understood together as part of a single framework. First, General Comment No. 13 recognises education as an empowerment right, which enables 'economically and socially marginalised adults and children' to overcome poverty.[244] It acknowledges that the right to education is a 'vital' human right, which is interconnected to women's empowerment, children's protection from exploitative and hazardous labour and sexual exploitation.[245] It sets out four 'interrelated and essential features' of this right: availability, accessibility, acceptability and adaptability.[246] These four dimensions of the right to education

[242] ICESCR, Article 13(1).
[243] CESCR, 'General Comment No. 13: The Right to Education (Article 13 of the Covenant)' (8 December 1999) UN Doc. E/C.12/1999/10; CESCR, 'General Comment No. 11: Plans of Action for Primary Education (Article 14 of the Covenant)' (10 May 1999) UN Doc. E/C.12/1999/4.
[244] CESCR, General Comment No. 13 (n 243), para 1.
[245] ibid, para 1.
[246] ibid, para 6.

represent the benchmark for determining whether states are fulfilling their obligations under Article 13 of the ICESCR. These objectives established under General Comment No. 13 align with other provisions on the right to education, namely Article 29(1) of the Convention on the Rights of the Child, Part I paragraph 33 and Part II paragraph 80 of the Vienna Declaration and Programme for Action, and paragraph 2 of the Plan of Action for the United Nations Decade for Human Rights Education.[247]

155. Although it should be acknowledged that some of these provisions are not legally binding[248], this alignment between most international provisions shows the international consensus around this right, strengthening the central role of the right to education as a universal, multifaceted, and interconnected human right. Second, General Comment No. 11 establishes a plan of action for primary education, out of which states cannot opt out on the mere basis of a lack of resources. The plan of action is aimed at securing the progressive implementation of the right to compulsory primary education free of charge. The plant must set a target date which must be 'within a reasonable number of years', and it must set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.[249] Compared to General Comment No. 13, General Comment No. 11 adopts a more stringent approach, reflecting the importance of the implementation of this right by states, and limiting the negative impact that progressive realisation can have.

156. In practice, governments can impose restrictions on the right to education on the basis of public interest or national security, as we have previously explained. In addition, factors such as political instability, lack of infrastructure, displacement of populations, and socio-economic barriers challenge the realisation of the right to education in post-conflict contexts. In these settings, refugees, women, and ethnic minorities, tends to face discrimination and are more likely to be

[247] UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 28; See the Vienna Declaration and Programme for Action <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> accessed 1 June 2025; See the Plan for Action for United Nations Decade for Human Rights Education 1995-2004 <https://www.ohchr.org/en/resources/educators/human-rights-education-training/2-plan-action-united-nations-decade-human-rights-education-1995-2004-1996#:~:text=3.-,The%20United%20Nations%20Decade%20for%20Human%20Rights%20Education%20shall%20be,values%20enshrined%20in%20the%20Universal> accessed 1 June 2025.

[248] ibid.

[249] CESCR, General Comment No. 11 (n 243), para 10.

subject to educational exclusion.[250] Moreover, schools in conflict zones face numerous hazards: they may be targeted by armed groups, repurposed for military activities, or lack the necessary resources to ensure effective education.[251] Ultimately, international organisations like UNESCO, UNICEF, and UNHCR play a key role in advocating for inclusive educational policies, supporting emergency education initiatives, and monitoring violations of the right to education.[252]

[250] UNESCO, *Protecting the Right to Education for Refugees* (2017).
[251] Global Coalition to Protect Education from Attack, *Education Under Attack 2020* (2020).
[252] See UNICEF, *Education Solutions for Migrant and Displaced Children and Their Host Communities* (2019); UNHCR, *Refugee Education 2030: A Strategy for Refugee Inclusion* (2019).

5. SPECIAL PROTECTION FOR CERTAIN GROUPS

PEOPLE WITH DISABILITIES: CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

157. The CRPD is, together with the CRC, the only international human rights treaty that continues to apply during armed conflicts alongside international humanitarian law.[253] In addition, the CRPD does not have a derogations clause. The protections under the CRPD must therefore be ensured by states even during states of emergency or armed conflicts.

158. The CRPD does not expressly refer to YANSAG. Moreover, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has, between 2022 and 2024, issued at least four statements expressing concern over the impact of armed conflict on persons with disabilities, but always from the perspective of civilians - they are silent on those associated with armed groups.[254]

159. An important aspect of the CRPD, however, is that its protections are owed to people irrespective of how their disabilities were caused. War and conflict are mass disabling events:[255] their consequences range from physical impacts, amputations, and spinal injuries, worsened by poor nutrition and collapsing healthcare, in addition to acquiring mental, mood, intellectual, and psychosocial disabilities such as post-traumatic stress disorder, night terrors, schizophrenia, anxiety, and depression. All those who have become disabled through conflict are entitled to the full protections of the CRPD. This is especially relevant for YANSAG, who might not otherwise

[253] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), Article 11.
[254] UN experts call for urgent action to protect Ukrainian children with disabilities in residential care institutions <https://www.ohchr.org/en/statements-and-speeches/2022/10/un-experts-call-urgent-action-protect-ukrainian-children> (7 October 2022) accessed 28 May 2025; Protection measures needed to support children with disabilities in armed conflict: UN experts <https://www.ohchr.org/en/statements-and-speeches/2022/12/protection-measures-needed-support-children-disabilities-armed> (2 December 2022) accessed 28 May 2025; Armed conflict puts human rights of people with disabilities and all civilians in peril: UN experts <https://www.ohchr.org/en/statements-and-speeches/2023/12/armed-conflict-puts-human-rights-people-disabilities-and-all> (1 December 2023) accessed 28 May 2023; Palestinians with disabilities subject to unbearable consequences of the ongoing hostilities and violence in the OPT <https://www.ohchr.org/en/statements-and-speeches/2024/05/palestinians-disabilities-subject-unbearable-consequences-ongoing> (27 May 2024) accessed 28 May 2025.
[255] Helen Mookosha, 'Decolonising disability: thinking and acting globally' (2011) 26(6) *Disability & Society* 667-682 <http://dx.doi.org/10.1080/09687599.2011.602860> accessed 13 March 2025.

be afforded the sympathy that children (under the age of 18) get because the decision of YANSAG to join NSAG may indeed have been voluntary.

160. Duty-bearers under the CRPD, however, do not have *carte blanche* as to how the fulfilment of rights under the CRPD should take place. An important aspect of this is that persons with mental, mood, intellectual, and psychosocial disabilities are never to be institutionalised against their will, which could otherwise be abused as a way of punishing YANSAG for their participation in conflict.[256] Instead, the CRPD requires that states take measures to guarantee the right of persons with disabilities to live independently and be included in the community.[257] However, the state's failure to abolish involuntary institutionalisation is a recurring theme in the CRPD Committee's concluding observations.[258]

161. Finally, the CRPD has comprehensive protection against disability discrimination. In addition to enshrining protections against direct and indirect discrimination, the CRPD includes within its definition of discrimination the failure to provide reasonable accommodation. Reasonable accommodation refers to the 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[259] 'Reasonable', in this context, means the necessity and appropriateness of the accommodation and has nothing to do with the cost or hardship involved in their acquisition and implementation; only after this investigation is carried out are costs relevant, where the provision of such accommodations amount to a 'disproportionate or undue hardship' for the state.[260] Moreover, reasonable accommodations are owed from the moment a person with a disability expresses that it is needed, or when it becomes reasonably self-evident to the goods/service provider that such reasonable accommodation is necessary.[261] This is

[256] CRPD Committee, 'General comment No.5 on Article 19 - the right to live independently and be included in the community' (27 October 2017) UN Doc CRPD/C/GC/5, para 30.
[257] CRPD, Article 19.
[258] International Disability Alliance, 'IDA's Compilation of CRPD Committee's Concluding Observations: Art 19 CRPD (Living independently and being included in the community)' (Oct 2022) <https://www.internationaldisabilityalliance.org/sites/default/files/article_19_crpd.pdf> accessed 30 May 2025.
[259] CRPD, Article 2.
[260] CRPD Committee, 'General comment No.6 on equality and non-discrimination' (26 April 2018) UN Doc CRPD/C/GC/6, para 25.
[261] ibid, para 24.

significant because it means that the state owes all persons with disabilities, including YANSAG, a positive duty to remove disabling barriers to facilitate the full and equal exercise of their rights.

WOMEN: CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

162. CEDAW offers essential protections for women through various critical provisions that mandate states to actively combat discrimination and foster gender equality. These provisions hold particular significance in scenarios where women encounter systemic disadvantages, such as conflict situations and efforts for post-conflict reintegration.

163. There are two ways that CEDAW applies to YANSAG. The first is in application to **women who are YANSAG** (W-YANSAG). On the one hand, W-YANSAG might be involved in armed conflict as combatants, be they involuntary or voluntary. In this respect, they are owed all the protections of the law and, where appropriate, the criminal justice process without discrimination by virtue of Article 2 of CEDAW. This might include taking special measures to meet the needs of W-YANSAG, which is not a breach of the non-discrimination duty (e.g., having access to women's health services in detention).[262]

164. On the other hand, women may be directly involved as YANSAG by virtue of human and sex trafficking, and other forms of gendered exploitation which occur during conflict and which disproportionately impact women.[263] In this regard, Article 6 of CEDAW places a duty on states 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.' Therefore, states owe a positive obligation to monitor, intervene, and prevent sexploitation of women to prevent their involvement in NSAG.

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[262] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Article 4(1).

[263] CEDAW Committee, Working Group on Gender-Based Violence (2019-2022) 'Conflict-related sexual violence as Gender-based Violence against Women and Girls' (September 2022) <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ohchr.org/sites/default/files/documents/hrbodies/cedaw/2022-12-12/Conflict-related-sexual-violence.docx&ved=2ahUKEwiugYud0tCNAxX7UEEAHV9dIgAQFnoECB4QAQ&usg=AOvVaw2RRIRO8gDBttFXtf0YrlUL> accessed 30 May 2025.

165. The second way for CEDAW to apply to YANSAG is in respect of a state's approach to YANSAG impacts on women. For example, post-conflict **disarmament, demobilisation, and reintegration** (DDR) processes must anticipate their gendered consequences. As the UN Development Fund for Women (now UN Women) has stated, 'Where DDR fails sufficiently to address the psychosocial needs of male ex-combatants, demobilization can have severe consequences for women, including an increase in domestic violence and gender-based violence as traumatized and violent ex-combatants return to communities.'[264] Moreover, women's burdens of care-giving, domestic work, agriculture, water collection, cooking, and clothe-making all increase during and post-conflict.[265] CEDAW requires that states pre-empt and prevent these consequences, and at the same time work to change social, economic, political, and cultural arrangements such that these harms do not fall disproportionately on women.[266]

166. Some specific articles warrant comment. Article 2 of CEDAW articulates a comprehensive obligation for states to eradicate discrimination against women perpetrated by both public and private entities. It requires the implementation of legislative and policy measures to guarantee equal rights for women across all aspects of life. This provision is especially pertinent for W-YANSAG, who confront dual disadvantage stemming from both their association with armed groups and from their gender. Numerous W-YANSAG are frequently excluded from reintegration initiatives, encounter legal obstacles to accessing essential resources, and endure increased societal stigma compared to their male peers.[267] Moreover, women survivors of trafficking and sexploitation can encounter ostracisation, exclusion, and blame from their communities, thus engaging the state's obligations to prevent and ameliorate such disadvantage.

167. The above ties to Article 5, which emphasises the necessity for states to transform social and cultural norms that perpetuate gender stereotypes and maintain the subordination of women. For women who have been recruited, coerced, or born into NSAG, entrenched biases may lead to

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[264] UN Development Fund for Women, 'CEDAW and Security Council Resolution 1325: A Quick Guide' Women, Peace & Security, 18-19 <https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/CEDAWandUNSCR1325eng.pdf> accessed 28 May 2025.
[265] ibid, 19.
[266] CEDAW, Article 3.
[267] Folke Bernadotte Academy 'Women associated with armed groups are doubly stigmatized' <https://fba.se/en/newspress/News/2020/women-associated-with-armed-groups-are-doubly-stigmatized/> accessed 28 May 2025.

further marginalisation, particularly in patriarchal societies where their affiliation with armed groups is perceived as a moral failing. Even those who have experienced victimisation through recruitment or sexual violence often find themselves viewed as complicit, rather than as individuals deserving of protection and support.

168. Article 11 affirms women's rights to employment and safeguards against workplace discrimination, a vital consideration in the context of post-conflict reintegration for W-YANSAG. Many W-YANSAG face significant barriers to re-entering the labour market due to inadequate education, social stigma, and discriminatory hiring practices. Additionally, women with histories in armed groups may encounter legal limitations, insufficient vocational training, or societal rejection, thereby hindering their ability to attain economic autonomy, increasing their dependence on, and vulnerability to, their partners. It is imperative that reintegration programmes incorporate gender-sensitive employment initiatives to address these obstacles effectively.

169. Article 12 is of particular importance as it delineates special protections regarding women's health and reproductive health, crucial for addressing the heightened vulnerabilities of W-YANSAG. Many lack adequate access to healthcare, endure trauma or physical injuries arising from conflict, and may have been subjected to sexual violence, forced marriages, or forced pregnancies. Ensuring comprehensive access to medical care, psychological support, and reproductive health services is fundamental to preserving their rights and dignity.

CHILDREN: CONVENTION ON THE RIGHTS OF THE CHILD

170. Article 1 of the CRC defines a child as 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'.[268] This implies that a child, for the purposes of the CRC, can only be under 18. Since YANSAG generally refers to individuals between 18 and 35 years of age, the Convention will, for the most part, not be applicable to YANSAG. Nonetheless, the CRC can be used to provide a framework for the protection of YANSAG rights.

[268] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 1.

a) Article 19: Protection from Violence, Abuse, and Exploitation

171. Article 19 of CRC obligates the states to protect children from all forms of violence, including violence during armed conflict, and to provide support for affected children.[269] States parties have the responsibility to take all appropriate legislative, administrative, social, and educational measures to protect children from all forms of violence, abuse, neglect, and exploitation, including recruitment into armed groups and exposure to armed conflict.

172. This provision is relevant for YANSAG below the age of 18, who are at heightened risk of physical and psychological harm. States must establish effective mechanisms for prevention, identification, reporting, investigation, and treatment of child maltreatment. As per the **UN Committee on the Rights of the Child** (CRC Committee), 'all forms of violence' under Article 19 include torture and inhuman or degrading treatment or punishment by non-state armed actors.[270]

173. The CRC Committee recognises that children in emergencies, including in armed conflict, are often separated from their caregivers and removed from safe environments, becoming particularly vulnerable to violence.[271] However, the CRC Committee notes with concern that many states treat former child soldiers as security threats rather than victims, leading to detention, prosecution, or extrajudicial measures instead of protection and rehabilitation.[272] Similarly, the UN Security Council Working Group on Children and Armed Conflict has called for greater

[269] '*1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.' CRC, Article 19.
[270] CRC Committee, 'General Comment No 13: The Right of the Child to Freedom from All Forms of Violence' (18 April 2011) UN Doc CRC/C/GC/13, para 26.
[271] ibid, para 72(g).
[272] CRC Committee, 'General Comment No 24 on children's rights in the child justice system' (18 September 2019) UN Doc CRC/C/GC/24, paras 97-100.

efforts to prevent recruitment, provide psychosocial support, and ensure community-based reintegration approaches.[273]

b) Article 38: Children in Armed Conflict and Protection from Recruitment

174. Article 38 grants protection to children in armed conflict by reiterating the requirement for respect of the relevant provisions of IHL. It creates a duty on the states to take all feasible measures to ensure that children under 15 do not participate in hostilities. It also directs the states to provide care and protection to children affected by armed conflict.[274] This article is crucial because children recruited into armed groups, whether the latter groups constitute state or non-state actors, face severe risks, including violence, exploitation, and trauma.[275]

175. Since YANSAG is not a legally defined category, the status of YANSAG under Article 38 depends on whether the particular individuals are below the age of 15. If individuals are between 15 and 18, their participation should be discouraged, and they should receive protection if affected by conflict.[276]

176. In *Prosecutor v Lubanga*, the **International Criminal Court** (ICC) confirmed that recruiting and using children under 15 in armed conflict is a war crime.[277] The court emphasised that even if children voluntarily joined, their recruitment was still unlawful.[278]

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[273] UN Security Council, 'Public Statement by Chair of Security Council Working Group on Children and Armed Conflict' (28 April 2021) <https://press.un.org/en/2021/sc14508.doc.htm> accessed 22 May 2025.

[274] '*1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.*
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.' CRC, Article 38.

[275] UNGA, *Report of the Secretary-General on Children and Armed Conflict* (26 November 2003) UN Doc A/58/546–S/2003/1053, para 24.

[276] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (CUP 2005) 482-485.

[277] *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (05 April 2012).

[278] ibid.

c) Article 39: Rehabilitation and Reintegration of Child Victims

177. Article 39 provides for the rehabilitation and reintegration of children by making it incumbent upon the states to take all appropriate measures to ensure the physical and psychological recovery and reintegration of child victims of armed conflict, neglect, exploitation, abuse, and torture. This recovery must occur in an environment that fosters the child's health, self-respect, and dignity.[279]

178. The provision applies to all children involved in armed conflict, regardless of whether they joined voluntarily or were coerced. Responsibility has been imposed on the states to provide support through legal, medical, psychological, and educational assistance. However, many governments fail to offer adequate reintegration programs, and some even criminalise former child soldiers instead of treating them as victims.[280]

179. Courts have recognised the importance of rehabilitation for child soldiers. In *Prosecutor v Lubanga*, the ICC acknowledged the need for demobilisation, rehabilitation and reintegration efforts as part of transitional justice.[281] In *Prosecutor v Charles Taylor*, the Special Court for Sierra Leone considered the impact of recruitment on child soldiers when determining sentencing.[282]

d) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

180. The CRC-OP-AC[283] amplifies the protection of the CRC by, among others, raising the age of persons who can be recruited into the armed forces and participate in hostilities.

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[279] '*States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*' CRC, Article 39.

[280] CRC Committee, General Comment No 24 on children's rights in the child justice system (18 September 2019) UN Doc CRC/C/GC/24, paras 97-100.

[281] *Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06-2904 (7 August 2012).

[282] Cf. *Prosecutor v Charles Ghankay Taylor* (Judgement) SCSL-03-01-T (26 April 2012).

[283] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222 (CRC-OP-AC).

181. Although the CRC-OP-AC does not completely prohibit states from recruiting people under 18 for their armed forces, it requires states to 'take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities'.[284] Consequently, Article 1 of the CRC-OP-AC broadens the protection of Article 38(2) of the CRC by prohibiting all persons under 18 (not just those under 15) from participating directly in hostilities.

182. Additionally, while the CRC has no specific provision on the involvement of children with NSAG, Article 4 of the CRC-OP-AC expressly prohibits NSAG from recruiting or using persons under 18 in hostilities in all circumstances.[285]

183. Finally, Article 6(3) of the CRC-OP-AC expands states' obligations related to the recovery and reintegration of children involved in armed conflict, imposing on states the duty to take all feasible measures to demobilise and release children illegally involved in armed conflict from their service.[286]

184. In recent concluding observations on the implementation of CRC-OP-AC, the CRC Committee recommended that states 'review [their] legislation with a view to prohibiting the recruitment and use of children under the age of 18 years by non-State armed groups',[287] 'establish as soon as possible a mechanism for early identification and protection of children at risk of recruitment or use by armed groups',[288] 'collect information on the recruitment and use of children by non-State

[284] CRC-OP-AC, Article 1.
[285] '*1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.*
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict'. CRC-OP-AC, Article 4(1).
[286] '*3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration*'. CRC-OP-AC, Article 6(3).
[287] CRC Committee, 'Concluding observations on the combined third and fourth reports submitted by the United States of America under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (11 July 2017) UN Doc CRC/C/OPAC/USA/CO/3-4, para 30.
[288] CRC Committee, 'Concluding observations on the report submitted by Togo under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (10 October 2033) UN Doc CRC/C/OPAC/TGO/CO/1, para 15.

armed groups'[289] and 'take all measures necessary […] to ensure that children are provided with physical and psychological recovery services and have access to rehabilitation and reintegration programmes'.[290]

e) Application of CRC to persons of 18 years of age

185. As mentioned above, the CRC and its optional protocols protect the rights of children, considered as persons below the age of 18. However, in some exceptional situations, the CRC Committee allowed for the application of the CRC to protect the rights of people 18 years or older, as in the case of continuing violations of human rights.[291]

186. For instance, in *D.E.P. v Argentina*, the author, who was already an adult, submitted an individual communication to the CRC Committee claiming that Argentina had violated his rights by convicting him of a criminal offence and determining and executing his sentence without considering his best interest as a child at the time of the facts.[292] In its admissibility consideration, the CRC Committee noted that, although the offence and the imposition of the sentence happened before the optional protocol admitting individual communications under CRC entered into force for Argentina, the author's imprisonment continued for years after the entry into force of the instrument.[293] Additionally, the Committee observed that even though the author was over 18 at the time of his final conviction and submission of the communication, the sentence was imposed for acts committed when he was a child.[294] As a result, the Committee considered that the communication was admissible *ratione materiae* and *ratione temporis*,[295] recognising the violation of the rights of the author by the state party.[296]

[289] CRC Committee, 'Concluding observations on the report submitted by Senegal under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (1 March 2024) UN Doc CRC/C/OPAC/SEN/CO/1, para 23.
[290] ibid, para 31.
[291] Continuing violations are usually defined as violations composed of one act that extends over time and has a long-lasting nature (as opposed to 'instantaneous violations'). Loukis G Loucaides, 'Chapter 2. The Concept of "Continuing" Violations of Human Rights' in *The European Convention on Human Rights: Collected Essays* (Brill | Nijhoff, 2007) 19.
[292] *D.E.P. v Argentina* (Views) UN Doc CRC/C/94/D/89/2019 (19 September 2023).
[293] ibid, para 5.3.
[294] ibid, para 5.4.
[295] ibid, paras 5.3 and 5.4.
[296] ibid, para 7.

187. So far, the CRC Committee has not dealt with communications related to children involved in armed conflict. However, given that children's participation in armed conflicts directly interferes with their development and their ability to enjoy the other rights recognised in the CRC, it is possible that the association of children with NSAG could be equated to a continuing violation of their rights under CRC and CRC-OP-AC. In such case, if the reasoning from *D.E.P. v Argentina* were applied to a situation involving an adult YANSAG recruited as a child, the CRC Committee might as well recognise the application of the CRC and CRC-OP-AC to this particular group, if (i) the involvement with the armed group started when the YANSAG was under the age of 18; and (ii) the effects of this involvement continued until after the victim turned 18.

SPECIAL PROTECTION AGAINST RACIAL DISCRIMINATION: CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

188. Articles 1 to 7 of the CERD can be applied to protect the rights of YANSAG. The CERD's framework provides protections applicable to these vulnerable young people, who often face discrimination based on their perceived affiliations, ethnicity, or social origin. Many YANSAG become associated with NSAG due to factors linked to their ethnic, religious, or social backgrounds, making the CERD's protections particularly relevant.[297] The CERD prohibits racial discrimination, defined broadly,[298] in all its forms, which can address the stigmatisation and marginalisation YANSAG often face during reintegration into communities.

189. The CERD guarantees equal rights across political, economic, social, and cultural domains, which can be invoked to ensure YANSAG have equal access to education, healthcare, and rehabilitation services. The CERD places positive obligations on states to eliminate racial discrimination and promote understanding among all races,[299] which can be used to advocate for policies that protect YANSAG from discriminatory treatment by authorities or even their own communities. The Convention requires states to provide effective remedies for discrimination, offering a basis for seeking justice for YANSAG who have faced rights violations.[300]

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[297] Amnesty International, 'THIS IS the THOUGHT POLICE' the Prevent Duty and Its Chilling Effect on Human Rights' (2023) <https://www.amnesty.org.uk/files/2023-11/Amnesty%20UK%20Prevent%20report%20(1).pdf>.
[298] See Article 1 CERD and the discussion in the following paragraph. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).
[299] CERD, Article 2(1).
[300] ibid.

190. Article 1 defines racial discrimination broadly to include 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin' that impairs equal exercise of human rights.[301]

191. Article 2 of the CERD imposes an array of state obligations, discussed below in turn, relevant to YANSAG as they often come from marginalised racial, national or ethnic communities and face compound discrimination both due to their racial identity and due to their association with armed groups. Article 2 creates positive obligations for states to address this discrimination and protect these vulnerable YANSAG.[302]

192. Article 2(1)(a) requires states to 'engage in no act or practice of racial discrimination' and ensure all public authorities comply with this obligation.[303] This provision directly prohibits security forces, law enforcement, courts, and detention facilities from discriminatory treatment of YANSAG based on their ethnic or racial background. It can be used to challenge profiling and targeting of YANSAG from specific ethnic communities for investigation; harsher detention conditions or sentencing for YANSAG from certain backgrounds; and denial of due process rights based on perceived group affiliations.

193. Under Article 2(1)(c), states must 'take effective measures to review governmental policies' and amend laws that perpetuate racial discrimination.[304] This creates an obligation to review counterterrorism and security legislation that disproportionately impacts YANSAG from marginalised groups; reform demobilisation protocols that inadvertently discriminate against certain ethnic communities; and revise reintegration programs that fail to address the specific needs of marginalised YANSAG.

194. Article 2(1)(d) extends beyond state action to require states to 'prohibit and bring to an end' discrimination by 'any persons, group or organization.'[305] This provision addresses community-

[301] ibid, Article 1.
[302] ibid, Article 2.
[303] ibid, Article 2(1)(a).
[304] ibid, Article 2(1)(c).
[305] ibid, Article 2(1)(d).

level stigmatization and ostracism of returning YANSAG; discrimination by private employers or educational institutions; and hate speech and incitement against former associates of armed groups.

195. Article 2(1)(e) obligates states to encourage 'integrationist' movements and eliminate barriers between groups.[306] This supports the development of reconciliation initiatives between communities and returning YANSAG; programmes fostering understanding and acceptance of reintegrated YANSAG; and efforts to counter narratives that deepen divisions between groups.

196. Most significantly, Article 2(2) requires that states, when the circumstances so warrant, implement 'special and concrete measures' to ensure the 'adequate development and protection of certain racial groups' in order to guarantee their equal enjoyment of human rights.[307] This provides legal grounding for specialised rehabilitation programmes for YANSAG from marginalised communities; targeted educational and vocational opportunities to counter historical disadvantages; enhanced protection mechanisms during judicial proceedings; and culturally and linguistically appropriate reintegration services.

197. As noted in the general comments, the Committee on the Elimination of Racial Discrimination (CERD Committee) has repeatedly expressed concern about racial profiling and has recommended that states end this practice. This directly applies to YANSAG, who are often subjected to profiling based on both their perceived associations and their ethnic or racial backgrounds.[308]

198. The Committee's reference to General Recommendation No. 31 on 'the prevention of racial discrimination in the administration and functioning of the criminal justice system' provides specific guidance for applying Article 2 to YANSAG. Many YANSAG associated with NSAG face discriminatory treatment within criminal justice systems, making this recommendation particularly relevant to their protection.[309]

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[306] ibid, Article 2(1)(e).
[307] ibid, Article 2(2).
[308] CERD Committee, 'General Recommendation No. 31 (2005) on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System' UN Doc A/60/18.
[309] ibid.

199. The Committee's references to specific vulnerable groups 'such as migrants, asylum seekers, people of African descent, indigenous peoples, and members of religious and ethnic minorities, including Roma' reinforce the applicability of Article 2 to YANSAG, who often belong to these marginalised groups.[310] This creates a stronger basis for arguing that states must take specific measures to prevent law enforcement from profiling YANSAG from particular communities as potential associates of armed groups; criminal justice systems must be reformed to prevent discriminatory treatment of YANSAG based on their ethnic or racial background; special measures under Article 2(2) should address the compounded discrimination faced by YANSAG who belong to these specifically recognised vulnerable groups.

200. Article 3 requires states to 'prevent, prohibit and eradicate' practices of segregation within their territories.[311] This creates a strong mandate to challenge detention systems that separate YANSAG based on their ethnic or racial background; oppose rehabilitation programs that isolate YANSAG from specific communities; and condemn community-level segregation of returning YANSAG.

201. YANSAG are frequently subjected to dehumanising rhetoric and discriminatory treatment based on a combination of their past associations and their ethnic, racial, or religious identities.[312] Article 4 creates robust obligations for states to combat the propaganda and organisations that promote such discrimination, providing essential protections for vulnerable YANSAG during disengagement and reintegration processes.

202. Article 4 condemns 'all propaganda' based on theories of racial superiority and propaganda that promotes 'racial hatred and discrimination in any form.'[313] This provision directly addresses public discourse that dehumanises YANSAG from specific ethnic backgrounds; media portrayals that link certain racial groups to terrorism or violence; rhetoric that portrays former associates from

[310] ibid.
[311] CERD, Article 3.
[312] UNESCO, 'Addressing Hate Speech through Education a Guide for Policy-Makers' (2023) UN Educational, Scientific and Cultural Organisation <https://www.un.org/en/genocideprevention/documents/publications-and-resources/Addressing_hate_speech_through_education_A_guide_for_policy_makers.pdf> accessed 12 May 2025.
[313] CERD, Article 4.

minority communities as inherently dangerous; and hate speech that inhibits community acceptance of returning YANSAG.

203. Under Article 4(a), states must criminalise 'all dissemination of ideas based on racial superiority or hatred' and 'incitement to racial discrimination.'[314] This creates a clear legal basis to challenge rhetoric that incites discrimination against YANSAG based on their ethnic or racial identity.

204. Article 4(b) requires states to 'declare illegal and prohibit organizations [...] which promote and incite racial discrimination.'[315] This provision can be used to address vigilante groups targeting YANSAG from specific communities; organisations promoting discriminatory treatment of former associates; groups obstructing reintegration efforts for YANSAG from certain backgrounds; and entities propagating stereotypes that link specific ethnicities to armed groups.

205. Crucially, Article 4(c) prohibits 'public authorities or public institutions' from promoting or inciting racial discrimination.[316] This provision creates a strong basis for challenging government communications that stigmatise YANSAG from certain communities; security sector policies that promote ethnic stereotyping; public statements by officials that fuel discrimination against former associates; and institutional practices that reinforce racial prejudice against YANSAG.

206. Article 4 of the CERD, when interpreted in light of the CERD Committee's general comments, provides an even more robust framework for protecting YANSAG. The Committee's extensive focus on racial profiling significantly strengthens Article 4 protections by highlighting the connection between discriminatory rhetoric and discriminatory practices.[317] General Recommendation No. 31 on 'the prevention of racial discrimination in the administration and functioning of the criminal justice system' provides a clear foundation for arguing that states must combat propaganda that fuels racial profiling of YANSAG by law enforcement; public authorities' discriminatory messaging about YANSAG from specific communities violates Article 4(c); organisations promoting stereotypes that lead to profiling should be prohibited under Article 4(b).

[314] ibid, Article 4(a).
[315] ibid, Article 4(b).
[316] ibid, Article 4(c).
[317] CERD Committee, General Recommendation No. 31 (n 308).

207. The statement that 'several other international human rights mechanisms have explicitly highlighted racial profiling as a violation of international human rights law' reinforces Article 4 arguments by demonstrating international consensus. References to the CCPR and the CAT Committee create a more comprehensive legal framework for challenging discriminatory rhetoric and organisations.

208. This consensus enables advocates to draw on multiple treaty bodies' observations when challenging discriminatory messaging about YANSAG; build stronger cases against organisations promoting stereotypes that lead to profiling; and hold public institutions accountable for discriminatory rhetoric using various international mechanisms.

6. THE ROME STATUTE

209. The Rome Statute[318] is silent as to specific, explicit protections for YANSAG. However, its provisions, supplemented with the judgments of the ICC, can be interpreted as providing incidental protection for YANSAG in the form of an excuse from criminal responsibility, a defence to an international crime, and leniency in sentencing, depending on the particular YANSAG's level of participation in a **non-international armed conflict** (NIAC).

210. Nonetheless, issues of reintegration and rehabilitation of YANSAG are outside the direct scope of the Rome Statute and therefore the ICC's case law, which have thus far adjudicated on the issue of child soldiers but have not considered protections of YANSAG.

ARTICLE 26: EXCLUSION OF JURISDICTION OVER PERSONS UNDER EIGHTEEN

211. Article 26 provides perhaps the strongest protection for YANSAG from prosecution, if the YANSAG participated in the NIAC as a child soldier.[319] This provision excludes the ICC's jurisdiction where the perpetrator was aged under eighteen at the time the physical element of the crime alleged was committed or, if a protected act, completed.[320] Thus, YANSAG who were originally recruited by an armed group as child soldiers and committed international crimes as minors, but not as adults, are excluded from the court's jurisdiction altogether. Whilst this Article was intended as a compromise to balance the varying ages of criminal responsibility in domestic jurisdictions,[321] it nevertheless doubles as a key protection for YANSAG in excluding criminal responsibility for crimes committed as minors, thereby presenting an avenue for rehabilitation and reintegration into society without a criminal record at the ICC. However, it must be noted that this protection is limited. The exclusion of jurisdiction only applies to the ICC and does not extend to national jurisdiction where the crimes are committed, which may have a far lower age of criminal responsibility.

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[318] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).
[319] Rome Statute, Article 26.
[320] Kai Ambos, *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth edition, Beck/Hart 2021) [2719]- [2720].
[321] Rome Statue Commentary, [2710].

ARTICLE 31(D): DURESS AND NECESSITY AS A GROUND FOR EXCLUDING CRIMINAL RESPONSIBILITY

212. Article 31(d) of the Rome Statute encompasses the grounds of duress and necessity – though drafted only by reference to duress - for excluding criminal responsibility.[322] This defence excludes the criminal responsibility of the perpetrator if committed under a 'threat of imminent death or of continuing or imminent serious bodily harm against that person or another person',[323] meaning that the mental element, intention, of the crime is negated.

213. Further, the threat need not necessarily be made by an identifiable person, but rather, it can be 'constituted by other circumstances beyond that person's control'.[324] Thus, the context of a NIAC itself could, in theory, create the circumstances that lead to duress, though the threat of harm must, in any event, be imminent, as a merely 'elevated probability that a dangerous situation might occur' is insufficient.[325]

214. However, the threshold to successfully rely upon this defence is a high one; the perpetrator must have acted 'necessarily and reasonably to avoid this threat',[326] meaning that the perpetrator must demonstrate that they had no viable means of escaping the situation without committing the crime.[327] It has never been raised successfully at the ICC; though it was raised in *Prosecutor v Ongwen*, the defence was unsuccessful.[328]

215. Thus, while the grounds for excluding criminal responsibility can provide a degree of protection to YANSAG recruited to the armed group through coercive means, the high evidentiary threshold of the defence means that, in practice, the defence is unlikely to succeed at the ICC, given that the ICC's jurisdiction is reserved to cases of 'sufficient gravity' due to limitations on resources.[329]

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322 Rome Statute, Article 31(d); ibid [2949].
323 ibid, Article 31(d)(ii).
324 ibid, Article 31(d); Rome Statue Commentary [2949].
325 *Prosecutor v Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15 (4 February 2021) [2583].
326 Rome Statute, Article 31(d).
327 *Ongwen* [2634]- [2635].
328 ibid [2668]- [2672].
329 Rome Statute, Article 17(1)(d).

ARTICLE 78 AND RULE 145: SENTENCING AND MITIGATING CIRCUMSTANCES

216. Article 78 of the Rome Statute governs sentencing considerations,[330] requiring the ICC to weigh the gravity of the crime against the personal circumstances of the convicted individual. This is relevant for YANSAG, as it allows the Court to consider factors that may justify a reduced sentence.

217. The Rules of Procedure and Evidence further provide for the considerations that must be taken into account,[331] including the extent of harm caused to victims and their families, the nature of the unlawful act, the means used to commit the crime, and the degree of intent and participation by the accused.[332] This includes cases where the threshold for duress is not met, and therefore criminal responsibility is not excluded, but the circumstances may be relied upon as mitigating factors in considering sentencing following a conviction.[333] Though this does not completely exclude criminal responsibility, it nevertheless amounts to a protection available to Defendants, including YANSAG, where the circumstances of their participation in hostilities may be taken into consideration.

218. The rule also highlights the importance of assessing the individual's background, including their age, education, and social and economic conditions. This is important in cases where YANSAG may have been recruited at a young age, lacked access to formal education, or were compelled to act under duress. By incorporating these factors into sentencing, the Rome Statute provides a mechanism for recognising the complex realities of individuals involved in armed conflict.

ARTICLE 8: PROTECTIONS AS A VICTIM OF A WAR CRIME

219. Any protections offered by the Rome Statute are limited in scope by the ICC's jurisdiction being limited due to the nexus requirement of an international armed conflict (IAC) or a NIAC,[334] with only the latter being the relevant factual context in the case of YANSAG. Though NIACs are undefined – beyond that they are 'armed conflicts not of an international character' - in the Rome

[330] ibid, Article 78.
[331] International Criminal Court, 'Rules of Procedure and Evidence' (2002), Rule 145(1)(c).
[332] ibid, Rule 145(1)(c).
[333] ibid, Rule 145(2)(a)(i).
[334] *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Judgment) ICC-01/05-01/08 (21 March 2016).

Statute itself,[335] it is well-established that the threshold for a conflict to be categorised as a NIAC is a high one; a NIAC is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State',[336] whereas 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' are insufficient.[337] Consequently, whilst the sections below expand upon the protections that YANSAG may access as victims of a war crime once a situation can be categorised as a NIAC, the initial categorisation is decisive.

a) Article (2)(d)(vii): Prohibition of Child Soldier Recruitment

220. In contrast to the above, where YANSAG are considered in the role of a Defendant, the war crime of 'enlisting children under the age of fifteen into armed groups to participate actively in hostilities' broadens the scope in which YANSAG may be defined as victims in situations where they became associated with the relevant armed group as a minor,[338] but have not committed any international crimes as adults.

221. The definition of 'participate actively' is a broad one; it is not limited to a direct role in military activities, but rather includes indirect roles,[339] 'linked to combat,'[340] that expose the child to a 'real danger as a potential military target.'[341]

222. It aims to protect children from the dangers and psychological trauma associated with armed conflict. The ICC has emphasised the significance of this provision, recognising that child recruitment causes severe physical and psychological harm, disrupts education, and exposes children to violent and coercive environments.

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335 Rome Statute, Article 8(2)(c); ibid [128].
336 *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (2 October 1995) [70].
337 Rome Statute, Article 8(2)(d).
338 ibid, Article 8(2)(d)(vii).
339 Rome Statue Commentary [1515].
340 *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-T (26 April 2012) [SCSL Trial Chamber] [444].
341 Rome Statue Commentary [1515]; *Prosecutor v Thomas Lubanga Dyilo* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) [628].

223. The *Lubanga* case was the first ICC conviction under this provision, with the Court holding *Lubanga* accountable for recruiting child soldiers in the Democratic Republic of Congo.[342] The ruling highlighted that the prohibition on child recruitment is rooted in the need to safeguard children's well-being and to prevent their exposure to violence. This may be a key protection for YANSAG enlisted as children towards rehabilitation and reintegration through their categorisation as a victim, thereby allowing those YANSAG access to the various victims' support mechanisms.

b) Article 8(2)(c): Protection of Individuals Who Have Ceased to Take Part in Hostilities

224. This provision incorporates Common Article 3 of the Geneva Conventions,[343] which ensures humane treatment for individuals who have ceased to take part in hostilities, including those who have laid down their arms or are hors de combat.[344] The purpose of this provision is to guarantee that persons no longer participating in armed conflict are not subjected to unlawful killings, torture, or cruel and degrading treatment.

225. In circumstances where YANSAG surrender or are otherwise made *hors de combat*, YANSAG, as with any other participant, are entitled to humane treatment under international law and must not be subjected to arbitrary detention, inhumane conditions, or summary execution.[345] The protection extends to all individuals in this category, regardless of their prior actions or affiliations.[346] In *Prosecutor v. Katanga*, the Court affirmed that Common Article 3 protections apply broadly to all persons affected by armed conflicts.[347]

226. However, once again, the provision is limited to the treatment of a member of the opposing armed group and thus does not include any reference to the rehabilitation or reintegration of YANSAG after the obligation ends.

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[342] *Lubanga* [914].
[343] Rome Statute, Article 8(2)(c).
[344] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949, art 3.
[345] *Prosecutor v Germain Katanga* (Trial Judgment) ICC-01/04-01/07 (7 March 2014) [785].
[346] ibid.
[347] ibid.

227. Thus, there are no special protections for YANSAG as a category of victims or as defendants; the Rome Statute's provisions on excluding criminal responsibility, whether by way of being under the age of criminal responsibility or through the successful use of a defence, provide protections to YANSAG to the same extent as any other adult Defendant. These protections may be amplified if the YANSAG was originally recruited as a child soldier, through the added consideration of the factual circumstances in assessing criminal responsibility.

228. Thus, whilst these provisions may be interpreted as providing additional protections, these are often due to an initial status as a child soldier, rather than a distinct categorisation as YANSAG. Further, given that the court's mandate is to 'end impunity' through the prosecution of serious international crimes, the focus is on proving criminal liability; thus, the issues of reintegration and rehabilitation of YANSAG fall somewhat outside of the Rome Statute's ambit.