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Intellectual-HRDs and claims for academic freedom under human rights law

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Many human rights defenders operate from within higher education institutions, research institutes, academies, societies and ‘think-tanks’. Many of these academics, researchers and lecturers would recognise themselves as human rights defenders because their academic work is consciously paired with rights-promoting education and advocacy. Others may not set out to be human rights defenders, but are cast in the role after being targeted for attack. Human rights claims arising out of such attacks on intellectual-HRDs, if brought, typically do not include claims for violations of academic freedom. As a result the standards are underdeveloped relative to other human rights claims and the scope of academic freedom violations globally. This may be in part due to a negatively reinforcing lack of familiarity with issues of academic freedom and the available standards for protection among human rights advocates, and in part to the fact that attacks on academic freedom often manifest as violations of other rights under which claims are brought (e.g. wrongful detention or torture). This article argues that existing human rights law would sustain claims for violations of academic freedom as independently and interdependently derived from the rights to freedom of opinion and expression and the right to education. This article argues that including academic freedom claims in such cases has the benefit of providing an additional basis for relief while strengthening the claim for relief on a manifested violation by providing evidence of motive and intent. Including academic freedom claims also has the independent value of addressing the wider harms to the claimant-victim and society that result from attacks on intellectual expression and are not reached by relief on the manifested violation alone, including harms to a claimant-victim’s creative, intellectual or expressive work, and widespread chilling effects on creativity, teaching, publication and the free exchange of ideas in society.

Keywords: academic freedom; free inquiry; freedom of movement; higher education; institutional autonomy; right to education; scientific progress

1. Introduction

Many human rights defenders (HRDs) operate on a full or part-time basis from within higher education institutions, including research and teaching universities and colleges as well as independent research institutes, academies, societies and ‘think-tanks’. Many of these academics, researchers and lecturers would recognise themselves as HRDs because their academic research, publishing and/or teaching is consciously paired with rights-promoting education and advocacy activities. This is most evident, for example, with

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academics working in areas directly related to human rights, including women's rights, children's rights, minority rights, land rights, freedom of religion, environmental rights and more.

Others may not set out to be HRDs, but nevertheless are cast in that role as a consequence of being targeted. Some of these may be targeted because of the specific content of their scholarly research, publishing or teaching. For example, a professor of public health whose data on infant mortality undermine the credibility of government claims who engages in advocacy rather than acquiesce to censorship. The environmental researcher whose work on water-management exposes government policy failures, who undertakes public education efforts, resulting in loss of position or prosecution. The professor of religious studies whose reinterpretation of sacred texts promotes inter-sectoral dialogue, despite risks of physical assault.

Still others may be targeted not because of the content of their work, but due to their prominent standing in the intellectual community, especially if they are members of a religious, ethnic or geographic sub-community. For example, a prominent, internationally recognised writer or scientist may be pressured to endorse government or political agendas. Prominent professors of a particular ethnic, religious or geographic group may be pressured to support policies which impact these groups, often negatively. In these cases, a scholar's reluctance or refusal may trigger harassment, intimidation and physical attacks, including grave human rights violations. This is especially true when intellectuals frustrated by restrictions on intellectual inquiry and expression begin to demand recognition of greater freedoms, not only for themselves, but for colleagues and perhaps inevitably for the wider society. There is a rich history of physicists, for example, who despite rarely or never being targeted because of the content of their research have become prominent human rights defenders in the course of demanding greater freedom to travel, engage with colleagues, and express their views publicly, without censorship or intimidation. Tragically but perhaps predictably, there is an equally rich tradition of persecution of such intellectual-HRDs by state and non-state actors, the latter often acting with direct or complicit support of states, or at least without reasonable state efforts to protect individuals against such attacks or to hold perpetrators accountable.

Human rights claims arising out of such attacks on intellectual-HRDs, if they are brought, typically do not include claims for violations of academic freedom. (Here 'claims' are understood broadly as including but not limited to complaints, petitions and other advocacy before United Nations (UN), regional, sub-regional and national institutions competent to address alleged violations of human rights, including courts, tribunals, committees, commissions, ombudspersons and other regular or special procedures and mechanisms.) As a result the standards are underdeveloped relative to other human rights claims and the scope of academic freedom violations globally. This may be in part due to lack of familiarity with issues of academic freedom and the available standards for protection among human rights advocates (a fact which becomes negatively reinforcing), and in part to the fact that attacks on academic freedom often manifest as violations of other rights under which claims are brought. For example in the case of a professor imprisoned in retaliation for publishing a paper on human rights – an academic freedom violation – a claim may be brought for wrongful detention alone. In the case of a scholar tortured because of the content of lectures on human rights, a claim may be brought alleging torture, without mentioning the academic freedom violation which preceded it.

This article argues that in many of these instances existing international human rights law would also sustain claims for violations of academic freedom, defined here as including both traditional core freedoms of teaching and research, as well as related values of higher

education on which core academic freedom depends, including access (including anti-discrimination principles), accountability, autonomy and social responsibility. This article argues that existing international human rights law would recognise such claims to academic freedom as independently and interdependently derived from the rights to freedom of opinion and expression and the right to education. This is not to claim that academic freedom is a ‘new’, independent right, but rather that these well-established rights each, separately and in combination, already include within them protection for the range of conduct that is known as ‘academic freedom’. This article further argues that including a claim for academic freedom violations in such cases has the benefit of providing an additional basis for relief, while strengthening the claim for relief on the manifested violation (e.g. wrongful detention or torture) by providing evidence of motive and intent. Including a claim for academic freedom violations also has a separate, independent value, in that it can address the wider harms to the claimant-victim and society generally that result from intentional attacks on intellectual expression and are not reached by the claims for relief on the manifested violation alone, including harms to a claimant-victim’s creative, intellectual or expressive work, and the widespread chilling effects on creativity, teaching, publication and the free exchange of ideas in society. This article is intended to assist human rights advocates in developing familiarity with these issues and standards with the hope of encouraging the inclusion of such claims in appropriate cases.

1.1 *The history and scope of academic freedom*

Academic freedom has its roots in the evolution of the modern university, to which all regions of the world have made important contributions, each worthy of further examination beyond the scope of this article.¹ Institutions of advanced learning which were the precursors or in some cases direct predecessors of modern universities developed in Asia (third century),² the Middle East (sixth century)³ and Africa (ninth century).⁴ Borrowing from many of these traditions, the European university model emerged with the University of Bologna (established 1088), the University of Paris (established 1150) and their successors, and from these emerged early modern understandings of intellectual freedom, including academic freedom and university autonomy.⁵ These have endured challenges and matured through the Renaissance, Enlightenment and Industrial Revolution, leading ultimately to the innovations of the Humboldtian research university in early nineteenth-century Germany that formalised the ideas of *lehrfreiheit* and *lernfreiheit*, the freedom to teach and learn, to remove restrictions on academics in the classroom and laboratory.⁶ Higher education in Latin and North American institutions was greatly influenced by these developments. The Cordoba Reform of 1918 expanded understandings of how universities could be self-governing and free from government interference,⁷ leading to Latin America’s autonomous universities, and in the early twentieth century the American Association of University Professors (AAUP) formalising understandings of academic freedom, including establishing tenure as a protection for academic freedom and eventually extending the scope of this freedom beyond merely classroom and research content to include some protection of academics’ expression outside of the university, even on subjects outside of the professor’s academic expertise. This recognised academics as valuable social contributors, affording them protections to encourage the dissemination of their views.⁸

While these principles were still often violated, such as in the United States during the McCarthy era when academics were investigated and improperly discharged from their positions for political reasons, the evolution and spread of these ideas continued through the

twentieth century, leading to a number of important statements on academic freedom and autonomy.⁹ Ultimately the UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel (RecSHETP), adopted by the General Conference of UNESCO in 1997, memorialised international understandings of academic freedom and related higher education values and recognised the responsibility of member states to undertake efforts to protect and promote the same.¹⁰

The UNESCO recommendation articulates the core content of academic freedom, but like freedom of expression and other rights it is difficult to provide a definition of academic freedom that precisely defines its full scope or delimits all forms of protected content or conduct in all contexts. Nevertheless, the UNESCO Recommendation defines academic freedom as scholars'

right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.¹¹

A more comprehensive understanding includes those related values of higher education systems on which core academic freedom depends, generally listed as including access (including anti-discrimination principles), accountability, autonomy (which is described as 'the institutional form of academic freedom and a necessary precondition to guarantee' core academic freedom and includes an implied element of physical security¹²), and social responsibility. This understanding grounds academic freedom in the context of democratic values, placing responsibilities on scholars to engage with society outside of the classroom, laboratory or campus, and in return providing some measure of protection for what otherwise might be construed as extramural activities. A case by case determination is required to clarify what is appropriate scholarly engagement in society versus activity which is more appropriately characterised as political or personal in nature which would not be protected by academic freedom, but may nevertheless be protected by general human rights principles.

The fullest understanding of academic freedom accepts this distinction while recognising that in order to protect the core and socially engaged understandings of academic freedom, it is necessary to recognise not only that 'higher education teaching personnel, like all other groups and individuals, should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens',¹³ but also that violations of these rights often interfere with the meaningful exercise of core academic freedom by direct victims and by third parties intimidated by attacks on others. Recognising this, Scholars at Risk interprets its mandate to protect scholars to include both promoting academic freedom in its core and socially engaged understandings and defending the human rights of scholars and other members of higher education communities. Therefore the use of the term 'academic freedom' in this document should be understood as including all three understandings, unless otherwise indicated.

1.2 *Academic freedom's role in society*¹⁴

Academic freedom is critical in top-quality higher education communities and society generally.¹⁵ At their best, higher education communities are models and teachers of democratic values. They model and pass into society the skills and knowledge necessary for democratic

value systems to function properly, most notably a democratic ‘knowledge-over-force’ principle that rejects violence and force as determinants of outcomes, in favour of process, evidence, reasoned discourse and quality. In this critical function, higher education communities matter enormously to the independence and well-being of every nation. But to serve in this role, higher education communities must be grounded in core values including access, accountability, academic freedom, autonomy and social responsibility. Where these are respected, higher education communities not only play a utilitarian role of developing valuable skills and services, but they maximise individual capacity to make informed, creative contributions to society. Without these core values, higher education risks being limited to replication and training in the service of an existing (often undemocratic) status quo; the social, political and cultural functions of education narrow; and efforts to broaden these may be characterised as destabilising threats, creating a pretext for violent attacks against members of higher education communities.

Indeed, purposeful attacks on scholars have been documented throughout history, and have taken numerous forms, including violent attacks and disappearances; arbitrary arrest and detention; retaliatory discharge and loss of position; restrictions on travel and movement; as well as attacks directed at higher education communities as a whole, including university closures, suppression of strikes and protests, censorship, and discriminatory restrictions on academic resources.¹⁶ Other common forms of attacks on scholars and universities include ideological pressure and censorship (including imposition of approved national ideology, book burning and ideological revisionism), closing of schools and universities, suppression of student protests, restrictions on travel and exchange of information, and discriminatory restrictions on academic resources (including discrimination against women, indigenous peoples and cultural or ethnic minorities).¹⁷

There is a rich history of corresponding efforts to protect scholars and universities from such attacks. These include most notably organised efforts to assist European scholars in the 1930s, scientists and other intellectuals from Eastern Europe and the Soviet Union during the Cold War, and professors and students from Latin American during the dictatorships of the 1970s–1980s.¹⁸ Until very recently these efforts focused on humanitarian efforts to remove scholars and students from physical or professional insecurity in their home territory, and to assist them and those otherwise stranded outside their home territory with continuing their studies or intellectual work. Scholars at Risk and its partners, in addition to continuing these essential humanitarian efforts, have devoted considerable effort to prevention, including monitoring incidents of attacks on higher education communities, campaigning for greater protection measures and support for victims *in situ*, and deterring future attacks by urging states to conduct timely, thorough and transparent investigations of incidents and to hold perpetrators accountable in proceedings consistent with internationally recognised standards.¹⁹

This article extends these efforts by calling attention to the fact that many states, in part to promote a top-quality higher education sector that contributes fully to democratic value systems, national integrity and prosperity, and perhaps in part to protect against such attacks, have already acknowledged international human rights treaty obligations that include, *inter alia*, protections for academic freedom and related higher education values, as discussed below.

2. Bringing claims for violations of academic freedom under human rights law

Despite these existing treaty obligations, claims for violations of academic freedom are rarely brought under human rights law.²⁰ As a result the standards are underdeveloped

relative to other human rights violations and the scope of academic freedom violations globally. This may be in part due to lack of familiarity with issues of academic freedom and the available standards for protection among human rights advocates (a fact which becomes negatively reinforcing as failure to invoke the standards contributes to their underdevelopment and lack of familiarity). This may also be due in part to the fact that attacks on academic freedom often manifest as violations of other rights under which claims are brought. For example, in the case of a professor imprisoned in retaliation for publishing a paper – an academic freedom violation – a claim may be brought for wrongful detention alone. In the case of a scholar tortured because of the content of lectures, a claim may be brought alleging torture, without mentioning the academic freedom violation which preceded it.

Including a claim for academic freedom violations in such cases can provide an additional basis for relief, while strengthening the claim for relief on the manifested violation (e.g. wrongful detention or torture) by providing evidence of motive and intent. Including a claim for academic freedom violations also has a separate, independent value, in that it can address the wider harms to the claimant-victim and society generally that result from intentional attacks on intellectual expression and are not reached by the claims for relief on the manifested violation alone. These include harms brought against the claimant-victim's current and future creative, intellectual or expressive work, and the widespread chilling effects on research, experimentation, creativity, teaching, publication and the free exchange of knowledge and information throughout the society. This article is intended to assist human rights advocates in developing familiarity with these issues and standards with the hope of encouraging the inclusion of such claims in appropriate cases.

2.1 Protection for academic freedom under international human rights law

International human rights law would recognise academic freedom as independently and interdependently derived from the rights to freedom of opinion and expression and the right to education, as these have been articulated in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively, and other comparable instruments of the UN and major regional human rights systems (see [Figure 1](#)).²¹

2.2 Article 19: Freedom of opinion and expression

The rights to freedom of opinion²² and expression²³ include 'the 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 [one's] choice' (ICCPR: art. 19, para. 2). Academic conduct and content are clearly protected as specific forms of opinion and expression.²⁴ Necessarily then, the limitations on the state's authority to restrict opinion or expression similarly apply to academic freedom.²⁵ Under international obligations a state may not restrict the rights to freedom of opinion or expression without a justification that either constitutes derogation from its obligations or a reasonable restriction as defined by the particular instrument itself.²⁶ To be found reasonable, a restriction must be necessary and proportionate²⁷ and the reasons for such restriction must be considered relevant and sufficient in light of an acceptable assessment of the facts of the situation.²⁸ It is well established that an expression of information or belief that is unfavourable or disagreeable to the state or others cannot be justifiably restricted on that basis alone.²⁹ Indeed, freedom of expression includes not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

FREEDOM / RIGHT	HUMAN RIGHTS INSTRUMENTS
Opinion and Expression	<p>Universal Declaration of Human Rights [UDHR], Article 19 (“right to freedom of opinion and expression”)</p> <p>International Covenant on Civil and Political Rights [ICCPR], Article 19 (protecting freedom of opinion and freedom of expression as distinct rights)</p> <p>African Charter, Article 9 (“right to receive information” and “the right to express and disseminate [one’s] opinions within the law”)</p> <p>American Convention on Human Rights [ACHR], Article 13 (“freedom of thought and expression”)</p> <p>Convention on the Protection of Human Rights and Fundamental Freedoms [ECHR], Article 10 (including within the right to freedom of expression the right to hold opinions without interference)</p>
Education	<p>UDHR, Article 26 (right to education)</p> <p>International Covenant on Economic Social and Cultural Rights [ICESCR], Article 13 (right of everyone to education)</p> <p>Protocol to ECHR, Article 2 (right to education)</p> <p>African Charter, Article 17 (right to education, participation in cultural life)</p> <p>Additional Protocol to ACHR [Protocol of San Salvador], Article 13 (everyone has right to education)</p>
Liberty and Security of Person	<p>UDHR, Article 3 (right to life, liberty and security)</p> <p>— Article 5 (freedom from torture, cruel, inhuman or degrading treatment or punishment)</p> <p>ICCPR, Article 7 (freedom from torture, cruel, inhuman or degrading treatment or punishment)</p> <p>— Article 9 (right to liberty and security)</p> <p>ECHR, Article 3 (prohibition on torture)</p> <p>— Article 5 (right to liberty and security)</p> <p>African Charter, Article 5 (freedom from torture and other cruel, inhuman or degrading punishment)</p> <p>— Article 6 (right to liberty and security)</p> <p>ACHR, Article 5 (right to humane treatment)</p> <p>— Article 7 (right to liberty and security)</p>
Movement or Travel	<p>UDHR, Article 13 (right to freedom of movement within borders, right to leave any country and right to return to own country)</p> <p>ICCPR, Article 12 (right to liberty of movement, right to leave any country, and right to reenter own country)</p> <p>— Article 15(4) (States recognize “the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields”)</p> <p>ECHR, Protocol 4 Article 2 (liberty of movement, right to leave any country)</p> <p>European Social Charter, Strasbourg, 3.V. (1996), Article 18 (right to engage in a gainful occupation in the territory of other contracting parties)</p> <p>African Charter, Article 12 (freedom of movement, right to leave any country, right to return to own country)</p> <p>ACHR, Article 22 (right to move about a country, right to leave any country, non-expulsion of nationals, right to reenter own country)</p>
Assembly	<p>UDHR, Article 20 (freedom of assembly and association)</p> <p>ICCPR, Article 21 (right to assembly)</p> <p>ECHR, Article 11 (freedom of assembly and association)</p> <p>African Charter, Article 11 (freedom of assembly)</p> <p>ACHR, Article 15 (right to assembly)</p>
Association	<p>UDHR, Article 20 (freedom of assembly and association)</p> <p>ICCPR, Article 22 (freedom of association)</p> <p>ECHR, Article 11 (freedom of assembly and association)</p> <p>African Charter, Article 10 (freedom of association)</p> <p>ACHR, Article 16 (freedom of association)</p>

Figure 1. The constitutions in force on 1 June 2012 containing explicit provisions protecting academic freedom or liberty.

shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (*Case of Vogt v. Germany*, ECtHR Application No. 17851/91, para. 52(ii), 26 September 1995, Grand Chamber).³⁰ This necessarily applies equally to academic content and conduct which may be seen by authorities as unfavourable or disagreeable, or which may offend shock, disturb, or challenge contemporary understandings of historical fact, as the freedom to engage in challenging inquiry and

discourse is essential for scholars and higher education institutions to maximise their contributions to society.³¹

2.3 *Article 13: Right to education*

The right to education applies to everyone. It requires that education ‘shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms’ and that ‘education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups...’ (ICESCR: art. 13, para. 1). States are obligated to take affirmative steps through all possible means and to the maximum of available resources to achieve the full realisation of the right to education.³² Thus, states are obligated not only to respect but to promote academic freedom as a necessary component of quality higher education, as doing so contributes to the realisation of the right to education not only at the tertiary level but also at the levels of primary, secondary, vocational and non-traditional education. This is because of the interdependence within the education sector: primary and secondary schools depend on qualified teachers prepared in tertiary institutions; modes of instruction and curriculum are informed by the findings of scholars at the university level.³³ Indeed, it is well established that ‘the right to education can only be enjoyed if accompanied by the academic freedom of staff and students’ and that ‘staff and students throughout the education sector are entitled to academic freedom’ (CESCR, 1999: para. 38).³⁴ At a minimum, states are obligated not to halt progress deliberately or to regress in their realisation of the right to education (CESCR, 1990: para. 9; CESCR, 1999: para. 45).³⁵ States therefore must not impose new restrictions or limitations which would diminish the scope of academic freedom, in principle or practice.³⁶

As outlined above, academic freedom is grounded in both freedom of opinion and expression and the right to education, but it is fully cognisable under either or both of them, implicating both negative and positive obligations.³⁷ For example, a restriction on the publication of an academic article could be cognisable under the state’s negative obligations under ICCPR Article 19 not to interfere with academic conduct or content, the state’s negative obligations under ICESCR Article 13 not to regress in the progressive realisation of the right to education, and/or the state’s positive obligations under ICESCR Article 13 to promote academic freedom as a necessary element of the right to education.³⁸

Moreover, states have the same general and procedural obligations for the protection of academic freedom as they do for other recognised rights. States are obligated to protect scholars against restrictions on academic conduct or content imposed by third parties,³⁹ to provide procedural guarantees in proceedings based on academic conduct or content (ICCPR: art. 2),⁴⁰ and to provide effective recourse and remedies for violations of the right (ICCPR: art. 3, para. 3).⁴¹

2.4 *Protection for academic freedom claims manifesting as violations of other rights*

As noted above, while academic freedom violations always implicate the right to freedom of opinion and expression and the right to education, they also frequently manifest as violations of other rights. Most commonly these include liberty and security of person (including for example detention or torture in retaliation for academic content or conduct)⁴²; freedom of movement/right to travel (including restrictions on travel to international conferences based on the academic content to be presented)⁴³; freedom of assembly (including restrictions on the organising of conferences based on academic content)⁴⁴; and freedom of

association (including restrictions on academic and student unions).⁴⁵ The following sections analyse standards of protection for some of these rights as they relate to situations involving underlying academic freedom violations.

2.4.1 *Arbitrary arrest and detention; deprivations of liberty*

International law prohibits arbitrary arrest and detention, and deprivations of liberty ‘except on such grounds and in accordance with such procedure as are established by law’ (ICCPR: art. 9(1)). The ICCPR requires, *inter alia*, that anyone ‘who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’; given a prompt hearing 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’ (art. 9(2)–9(5)). Anyone deprived of liberty by arrest or detention is also entitled to proceedings in court to determine whether such detention is unlawful, and anyone who is unlawfully arrested or detained shall have an enforceable right to compensation (ICCPR: art. 9(5)). However, a deprivation of liberty which adheres to these basic elements may nevertheless still be considered arbitrary as any deprivation must be both reasonable and foreseeable.⁴⁶ That is, the prohibition on arbitrariness is ‘not to be equated with “against the law”’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law’ (*Morais v. Angola*: para. 6.1).⁴⁷ The UN Working Group on Arbitrary Detention defines a deprivation of liberty as arbitrary when it is (i) impossible to invoke a legal basis to justify the deprivation of liberty; (ii) the deprivation results from the exercise of rights guaranteed in Articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR or Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR; or (iii) there is grave and total or partial non-observance of the norms of fair trial.⁴⁸ The standards generally do not provide for any exceptions to this right,⁴⁹ and derogation is not likely to be accepted as the prohibition on arbitrary detention has been recognised as having the status of both customary international law and *jus cogens*.⁵⁰

Under these standards, a deprivation of physical liberty that is intended to prevent, stop, limit or chill academic content or conduct, or in retaliation for prior academic content or conduct, is arbitrary *per se* as it arises from the exercise of, *inter alia*, UDHR Article 19 and ICCPR Article 19 (as well as ICESCR Article 13). Such deprivation therefore violates *both* academic freedom *and* the freedom of liberty and security of the person guaranteed by international human rights law, and advocates in actions involving higher education institutions or personnel (including leadership, academic staff, non-academic staff and students) should evaluate the facts of the case for possible academic freedom claims. Examples of such instances might include:

- A higher education administrator, professor, researcher, lecturer or student is detained on charges referring explicitly or implicitly to the content of research projects or papers, classroom lectures or on campus talks (public and private), publications (including books, essays, newspaper columns, blog posts and emails) or other academic content or conduct. Such cases may include charges that a research project, talk or publication ‘offends the state’, ‘insults the head of state’, undermines ‘national identity’, or similar variations.
- A higher education administrator, professor, researcher, lecturer or student is detained without charge, or on charges which appear unrelated to academic content or conduct, such as corruption, mishandling grant or official monies, immoral activities, terrorism or threats to state security, etc., in circumstances where a close examination of the

history, timing and nature of the allegations strongly suggest a pretext intended to punish past academic content or conduct or to chill future academic content or conduct of the detainee or other individuals, especially other members of intellectual or higher education communities.

- A higher education administrator, professor, researcher, lecturer or student is detained without charge following, or on charges relating to non-violent expression of thought or opinion on issues of institutional governance or operations, including on issues of institutional leadership and policy, faculty appointments, faculty or student unions, campus organisations and protests and related concerns.
- A higher education administrator, professor, researcher, lecturer or student is detained without charge following, or on charges relating to non-violent exercise of 'those internationally recognized civil, political, social and cultural rights applicable to all citizens' (UNESCO, 1997: paras 26–9),⁵¹ including non-violent expression of thought or opinion on non-academic matters, in circumstances where a close examination of the history, timing and nature of the deprivation strongly suggests an intention to chill future academic content or conduct of the detainee or other individuals, especially other members of intellectual or higher education communities.

In sum, arrests, detentions or deprivations of liberty intended to punish or chill academic content or conduct and not justified by permissible restrictions relating to the right to freedom of expression, are arbitrary and impermissible.⁵² Such deprivations may not be justified by pretexts and advocates should examine the history, timing and nature of a deprivation for evidence of underlying intent to chill or punish academic content or conduct. Reviewers of any claims brought should similarly examine evidence presented relating to deprivations which suggest impermissible restrictions on academic freedom rights.⁵³

2.4.2 *Restrictions on travel and movement*

Travel and freedom of movement are essential aspects of academic freedom and quality higher education (UNESCO, 1997: para. 13).⁵⁴ Scholars need to move within their own countries to conduct research or meet with colleagues, students or others, as well as to travel to and from other countries for the same purposes. The right of freedom of expression addresses these needs in recognising that the right 'shall include freedom to seek, receive and impart information and ideas of all kinds, *regardless of frontiers*' (ICCPR: art. 19 (2)).⁵⁵ Academic freedom violations manifesting as denials of these rights generally involve denial of entry or return to a country not one's own, expulsion from a country not one's own, or restrictions on leaving any country or returning to or travelling within one's own country.

Regarding denial of entry or return to a country not one's own, international law recognises that states generally have the right to place restrictions on who may enter their territory. But they must exercise that right consistent with their existing human rights obligations, including those relating to academic freedom.⁵⁶ Where denial of entry or re-entry intentionally restricts expression, such restriction must be prescribed by law for a legitimate aim and necessary in a democratic society, and cannot be discriminatory or arbitrarily imposed to restrict or punish academic content or conduct.⁵⁷

Evidence from publicly available reports suggests that many states deny entry or return to scholars because of academic content or conduct, either in isolated cases relating to a single publication of a single scholar, or more systematic denials of any scholars proposing research on unspecified taboo themes, including for example research into regional, ethnic

or political minorities, or into health or environmental crises. Nevertheless, few such cases have been brought to completion in international human rights fora. One important exception is *Cox v. Turkey* (hereinafter *Cox*), in which an American scholar living and working in Turkey for a number of years had expressed opinions during her lectures on the politically sensitive issue of Armenian and Turkish history. She was denied a routine visa to re-enter Turkey on the grounds that such expressions constituted a threat to national security. Finding that the scholar's rights under ECHR Article 10 (which is materially identical to ICCPR Article 19) had been violated, the court held:

[T]he ban on the applicant's re-entry is materially related to her right to freedom of expression because it disregards the fact that Article 10 rights are enshrined 'regardless of frontiers' and that no distinction can be drawn between the protected freedom of expression of nationals and that of foreigners (*Cox v. Turkey*, para. 31).

Cox suggests that despite the initial presumption that states have the right to restrict who may enter their territories, where an applicant can show evidence that the denial of entry was intended to restrict or punish academic content or conduct – that is, evidence of academic freedom violation – then the burden will shift to the state to show that the denial is justified and consistent with its treaty obligations. *Cox* also suggests that courts reviewing a state's justification will employ a strict standard of review reflecting the critical role of free expression (including academic freedom) in democratic society.⁵⁸

Regarding expulsion from a country not one's own based on academic content or conduct, one of the few reported cases is *Kenneth Good v. Botswana*, in which an Australian professor of political studies living and working in Botswana for a number of years had, as part of his academic work, criticised that country's law of presidential succession. He was ordered deported and denied the opportunity to contest the order. Finding that the scholar's rights under Article 9(2) of the African Charter had been violated, the African Commission on Human and Peoples' Rights held that '[t]he expulsion of a non-national legally resident in a country, for simply expressing their views, especially within the course of their profession, is a flagrant violation of [freedom of expression]' (para. 200). The commission underscored the particular importance of academic freedom in this context:

The opinions and views expressed [resulting in expulsion are] critical comments that are expected from an academician of the field; but even if the government, for one reason or another, considers the comments offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals (para. 199).

Regarding restrictions on leaving any country or returning to or travelling within one's own country, international law recognises states' obligations to respect freedom of movement.⁵⁹ Therefore where an applicant can show evidence that restrictions on movement were intended to restrict or punish academic content or conduct – that is, evidence of academic freedom violation – the burden will shift to the state to show that the denial is justified and consistent with its treaty obligations. Examples of these types of violations may involve denial of passports or passport renewals, exit visas, travel permits or internal residence permits (for temporary residence relating to research).

In sum, all three manifestations – denial of entry or return to a country not one's own, expulsion from a country not one's own, or restrictions on leaving any country or returning to or travelling within one's own country – represent violations of *both* academic freedom *and* the freedom of movement and travel guaranteed by international human rights law.

Advocates in actions involving higher education personnel (including leadership, academic staff, non-academic staff and students) should evaluate the facts of the case for possible academic freedom claims. In addition to the examples above other common examples might include:

- A foreign professor invited by local scholars to present a lecture at a conference is denied an entry visa because authorities in the host state disapprove of the lecture content.
- An academic returning from delivering a lecture at an academic conference abroad has her passport confiscated in retaliation for the content of the lecture.
- A researcher is denied a permit to collect data in another region in his own country in retaliation for prior academic content or conduct or to frustrate future work.
- A foreign scholar is denied a work permit to conduct extended or repeated field research in a country not her own because the host state disapproves of the research subject or seeks to control the content of resulting publications.

As with deprivations of liberty, restrictions on movement or travel or denials of related permissions that are intended to punish or chill academic content or conduct are arbitrary and impermissible under states' treaty obligations. Such restrictions or denials may not be justified by pretexts and advocates should examine the history, timing and nature of a restriction or denial for evidence of underlying intent to chill or punish academic content or conduct. Reviewers of any claims brought should similarly examine evidence presented relating to restrictions or denials which suggest impermissible restrictions on academic freedom rights.

2.4.3 *Wrongful or retaliatory discharge or loss of position*

International standards within the higher education sector recognise limits on employer discretion concerning hiring and discharge, renewal or non-renewal of employment contracts, and promotions or demotions of academic personnel to the extent that scholars should 'only be dismissed on professional grounds and in accordance with due process' (UNESCO, 1997: para. 46). They 'should not suffer any penalties simply because of the exercise of' the human rights due all persons, including freedom of expression (UNESCO, 1997: para. 26). They shall have the right to 'fulfill their functions without discrimination of any kind and without fear of repression by the state or any other source', (UNESCO, 1997: para. 27) to teach and to carry out research work, without being forced to 'instruct against their own best knowledge and conscience' and 'without any interference, or any suppression', subject to accepted professional principles including professional responsibility, intellectual rigour, and standards and methods of teaching and research (UNESCO, 1997: paras 28–9).⁶⁰

Employment decisions which are intended to punish past academic content or conduct or to chill future academic content or conduct may violate these standards. They may also violate the international human rights law standards described above, including negative obligations not to impermissibly restrict or limit free expression⁶¹ and positive obligations to promote, *inter alia*, quality education.⁶² In addition, employment decisions which are undertaken summarily or without following established hearing or review procedures may also violate due process obligations, especially if the state is involved in the actions, as in the case of state-owned, controlled or funded institutions where scholars

are directly or indirectly employed by the state.⁶³ This may include actions taken *en masse* against entire faculties or groups of scholars, as well as against individuals.

In the case of *Lombardi Vallauri v. Italy*,⁶⁴ for example, an Italian professor of philosophy at a Catholic university in Italy who had lectured for 20 years under consecutive one-year contracts, applied for renewal and was summarily rejected without consideration at the direction of the Congregation for Catholic Education, an organisation affiliated with the Holy See, which claimed to the university that he held views in opposition to Catholic doctrine. The professor sought an explanation as to the Congregation's specific allegations against him, and when no such explanation was provided, he sought review before the regional administrative court. The court rejected the petition on the grounds that adequate reasons had been provided for the decision, and that both the faculty board and the administrative court lacked jurisdiction to examine the Congregation's decision (*Lombardi Vallauri v. Italy*). After reviewing the case, the ECtHR noted evidence establishing that the applicant was well-qualified, including the fact of the prior renewals over 20 years. The ECtHR found that the decision to deny his renewal constituted an interference with his right of free expression, inasmuch as: (a) that right includes the right to transmit knowledge without restriction; and (b) the basis for the refusal to consider renewing his contract had been the fact that he had expressed views contrary to Catholic doctrine. Further, ECtHR found that the faculty board's failure to provide the applicant with any information as to the substance of the Congregation's allegations against him deprived him of the opportunity to challenge the denial of his right to free expression in an adversarial setting; the domestic administrative courts erred in failing to address this situation. On this basis, the ECtHR held that the applicant was deprived of the basic procedural rights associated with the right to free expression. Such action was not, within the standard of the convention, 'necessary in a democratic society'. For the same reasons, the court found that, by denying the applicant's petition for administrative review the state had failed to provide due process – specifically effective access to court – in violation of ECHR Art. 6 (*Lombardi Vallauri v. Italy*).

It is important to note that the decision in *Lombardi Vallauri* did not involve the issue of pretext for the employment decision, in that the faculty board did not deny that the decision to reject the professor's contract renewal was motivated by objections to his alleged views in opposition to Catholic doctrine. More commonly, employment decisions which are intended to punish past academic content or conduct or to chill future academic content or conduct may manifest as based on other, permissible grounds such as lack of qualification, unprofessional or immoral behaviour, or financial or administrative discretion unrelated to the scholar's conduct or views. Common examples might include:

- Denial of promotion or tenure to a junior professor according to a standard promotion schedule despite apparent satisfaction of all requirements, when the professor is known to publish views which are critical of state or university authorities.
- Firing or denial of contract renewal to a professor, despite professional qualification and quality, after his teaching or lectures angered political authorities.
- Closing an entire department or faculty and discharging its academic staff in response to protesters outside the university objecting to the content of its research or teaching.

Again, advocates in actions involving higher education personnel (including leadership, academic staff, non-academic staff and students) should evaluate the history, timing and nature of the adverse employment decision for evidence of pretext and underlying intent

to chill or punish academic content or conduct which may support claims under international human rights law of violations of, *inter alia*, free expression, academic freedom, the right to education and due process of law. Reviewers of any claims brought should similarly examine evidence presented relating to adverse employment decisions which suggest impermissible restrictions on academic freedom rights.

2.4.4 *Denial of the benefits of science and culture*

As noted above, international law recognises states' obligations to promote access to the benefits of science and culture, which of necessity include protection and promotion of academic freedom.⁶⁵ Indeed, the UN Special Rapporteur in the field of cultural rights has recently noted:

Read in conjunction with the right to freedoms of association, expression and information, scientific freedom encompasses the right to freely communicate research results to others, and to publish and publicize them without censorship and regardless of frontiers. The right of scientists to form and join professional associations as well as to collaborate with others in their own country and internationally, including the freedom to leave and re-enter their own country, must also be respected and protected. In addition, scientific freedom involves respecting the autonomy of higher education institutions and the freedom of faculty and students to, *inter alia*, express opinions about the institution or system in which they work, and to fulfil their functions without discrimination or fear of repression by the State or any other actor (HRC, 2012: para.40).

This statement clarifies states' obligations under the ICESCR to refrain from violating academic freedom rights and from halting their progress deliberately or regressing in their realisation, such as by restricting or censoring research, restricting access to information, denying the right of scholars to claim their work product, interfering with academic unions and associations, and otherwise restricting academic content or conduct through intimidation or fear.⁶⁶ The statement also reemphasises states' positive obligations to promote academic freedom, such as by encouraging international contacts and cooperation among scholars and universities.

Again, advocates in actions involving higher education personnel (including leadership, academic staff, non-academic staff and students) should evaluate the history, timing and nature of the conduct alleged for evidence of intentional and unintentional denial of the benefits of science and culture. Where evidence of intent is present, advocates may wish to bring claims for violations of the right to the benefits of science and culture (under ICESCR Art. 15) together with claims for general academic freedom violations (under ICCPR Art. 19 and ICESCR Art. 13), and any other rights violations discussed above through which these often manifest, including arbitrary detention or restrictions on travel or movement. While again noting that advocates may have difficulty asserting claims on behalf of individuals for violations of the right to the benefits of science and culture standing alone, presenting evidence of these positive obligations may create opportunities for reviewers to examine these treaty provisions more closely, and at a minimum may reinforce claims alleging related violations of negative prohibitions.⁶⁷

In cases lacking adequate evidence of intent, advocates may have difficulty advancing claims for academic freedom, free expression or other rights rooted in negative obligations. In such cases advocates may still be able to bring claims based on the right to the benefits of science and culture, if evidence shows that the conduct alleged had a negative impact on

academic freedom and/or access to the benefits of science and culture, and as such violated states' positive obligations, even if the negative impact was unintentional. Similarly, reviewers of any claims alleging violations of the right to the benefits of science and culture should consider both states' negative and positive obligations, including possible violations involving both intended and unintended harms to academic freedom and related rights.

3. Academic freedom protection in domestic constitutional law

It is worth noting in brief that beyond the international human rights law protections listed above, many states include protection for academic freedom in their constitutions. This may be done explicitly, through the use of terms like 'academic freedom' or 'academic liberty'; it may be done directly but not explicitly, by including constituent elements of academic freedom including terms like 'freedom of scientific inquiry' or 'right to teach'; and it may be done indirectly, by referencing the general rights essential to the full exercise of academic freedom, including 'freedom of expression' or 'freedom to receive and impart ideas and information'. It may also be accomplished through direct incorporation of international human rights treaty obligations (for example, in its constitution Rwanda reaffirms its 'adherence to the principles of human rights enshrined in the United Nations Charter ... the Universal Declaration of Human Rights ... the International Covenant on Economic, Social and Cultural Rights ... the International Covenant on Civil and Political Rights ... the African Charter of Human and Peoples' Rights ...' (Preamble, para. 9) among others). A brief survey suggests that as of December 2012, 20 state constitutions include explicit protections, 99 direct protections and 77 indirect protections. An analysis of these instruments suggests important trends.

The first of these trends is recency. There is a growing trend among newer constitutions to include explicit reference to academic freedom or academic liberty (e.g. South Sudan). This may reflect that many newer constitutions have been drafted by societies exiting a period of conflict, repression or dictatorship. Such societies often have direct, recent experience with repression of information and ideas, including persecution of scholars and/or co-optation of higher education institutions. Enshrining explicit protection for academic freedom may therefore provide both a clear mark of transition from repressive past and a pledge to ensure a more free, open society for the future. Similarly, the trend among newer constitutions to include explicit reference to academic freedom or academic liberty may also suggest an acknowledgment of the importance of intellectual freedom, creativity and top quality higher education in the emerging knowledge economies of the future. States will increasingly be dependent on their domestic knowledge capital for their independence and prosperity. Explicit protection for academic freedom signals the society's commitment to free inquiry and creativity of thought, which are hallmarks of excellence and attractors not only for the higher education sector but for business, information technologies, science and development as well.

The second trend revealed in the analysis of constitutions is that explicit references to academic freedom tend to be drafted in broad language, without significant limitations. This may reflect recognition of the challenge, noted above, of articulating a more detailed definition of academic freedom that precisely defines all forms of protected content or conduct in all contexts. A broad statement of protection demonstrates a firm commitment while providing the flexibility necessary to implement protections based on changing conditions. Indeed, academic freedom is generally recognised as a right and/or located in the section of the constitution discussing rights and liberties. Articulated in this way, academic

freedom should be understood as an actionable claim, along with other rights and liberties. As with any articulation of rights in domestic law, when the right of academic freedom is tied to any limitations or restrictions, these must be consistent with the essence of the right and other rights included in the constitution, as well as the state's international obligations under human rights law, outlined above. This means that permissible limits, if any, must be narrow in scope and consistent with the permissible limits on other expressive rights (e.g. narrow public order exceptions). [Figure 1](#) lists for comparison and ease of reference, in reverse chronological order, the relevant language of the constitutions in force on 1 June 2012 containing explicit provisions protecting academic freedom or liberty.

An analysis of case law arising under national constitutional provisions, the degree and nature of local implementation, and relevant national legislation, are all beyond the scope of this article. The existence of these provisions, however, should be of great use to advocates. Indeed, bringing a local claim under such a provision may be absolutely necessary where exhaustion of local remedies is required to obtain jurisdiction before a UN body or regional human rights system. More generally, the trends described above may be useful to advocates making customary international law arguments relating to academic freedom, and to stakeholders seeking a more complete understanding of constitutional provisions relevant to a given situation.

4. Conclusion

Academic freedom is essential to healthy higher education communities and democratic life. Great nations depend on their intellectual and higher education sectors for creativity, critique, capacity and other forms of development. But to be healthy, higher education institutions and scholars need academic freedom and the autonomy to exercise it. And because the exercise of academic freedom by its nature produces challenges and tensions, whether from within the state or from third parties, robust protections for academic freedom are needed.

International human rights law protects academic freedom generally as independently and interdependently derived from freedom of expression and the right to education. Additional protections are found in related provisions of law protecting specific elements of academic content and conduct, such as the promotion of science and culture, and in international higher education standards. In addition, many states have recognised their obligations to protect academic freedom not only under their international human rights treaty obligations, but by including explicit protection for academic freedom or liberty in their constitutions.

Advocates in cases involving higher education institutions and personnel are urged to consider claims for academic freedom violations which may be available under these provisions, either alone or joined with claims alleging violations of other rights under which academic freedom violations often manifest, such as arbitrary detention or restrictions on travel or movement of higher education personnel. Bringing claims for academic freedom violations can strengthen a case by providing an additional basis for relief and providing evidence of motive or intent underlying claims for violations of other rights. Bringing claims for relief may also address the wider harms to the applicant and society generally that result from attacks on intellectual expression and are not reached by claims for violations of other rights. Finally, by bringing claims for academic freedom violations, advocates may help to highlight the scope of academic freedom violations globally, and in doing so help to develop the existing standards of protection, contributing to greater respect for and enjoyment of these rights in the future.

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Notes

1. A list of further reading on this history is provided at http://scholarsatrisk.nyu.edu/Workshop/a_foundational.php.
2. See *ibid.*, citing The Academy of Natural Sciences, Asia Center, <http://asia.ansp.org/nanjing/index.php>.
3. See *ibid.*, citing Iran Review, <http://www.iranreview.org/content/view/5009/51/>.
4. See *ibid.*, citing John L. Esposito, ed., 'Universities (Islamic)', *Oxford Dictionary of Islam*, Oxford Reference Online (Oxford: Oxford University Press, 2003) (accessed 7 April 2010).
5. See *ibid.*, citing Philip G. Altbach, 'The Academic Profession', in *International Higher Education: An Encyclopaedia*, ed. by Philip G. Altbach (New York: Garland, 1991), 29; Ellwood P. Cubberley, *The History of Education* (EBook #7521, February 2005), 15; Magna Charta Observatory and the National Unions of Students in Europe, *Academic Malpractice: Threats and Temptations* (Bologna, 2007), 18.
6. See *ibid.*, citing Ralph F. Fuchs, 'Academic Freedom: Its Basic Philosophy, Function and History', *Law and Contemporary Problems* 28, no. 3 (1963): 435.

7. See *ibid.*, citing Maria De Figueiredo-Cowen, 'Latin American Universities, Academic Freedom and Autonomy: A Long-Term Myth?', *Comparative Education* 38, no. 4 (2002): 471.
8. See *ibid.*, citing Phillip G. Altbach, 'Academic Freedom: International Realities and Challenges', *Higher Education* 41 (2001): 207.
9. These include the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, approved by the General Assembly of the World University Service (WUS) in 1988, http://www.wusgermany.de/fileadmin/user_upload/Daten/International/PDF/WUS-Lima-englisch.pdf (accessed 4 September 2014); Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (1990), <http://www.codesria.org/spip.php?article351&lang=en> (accessed 4 September 2014) and the Kampala Declaration on Intellectual Freedom and Social Responsibility (1990), <http://www1.umn.edu/humanrts/africa/KAMDOK.htm> (accessed 4 September 2014); the Magna Charta Universitatum (1988), http://www.magna-charta.org/library/userfiles/file/mc_english.pdf (accessed 4 September 2014); and more recently the Amman Declaration on Academic Freedom and the Independence of Institutions of Higher Education and Scientific Research (2004), http://www.concernedhistorians.org/content_files/file/et/11.pdf (accessed 4 September 2014). For more on these statements visit http://scholarsatrisk.nyu.edu/Workshop/b_standards.php#statements.
10. See UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel (RSHETP) (11 November 1997), http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 4 September 2014) (hereinafter 'UNESCO RecSHETP').
11. UNESCO RecSHETP, para. 27; see also UNESCO Recommendation on the Status of Scientific Researchers (20 November 1974), http://portal.unesco.org/en/ev.php-URL_ID=13131&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 4 September 2014) (hereinafter 'UNESCO SSR Rec'), Preamble (stating that 'open communication of ... results, hypotheses and opinions – as suggested by the phrase "academic freedom" – lies at the very heart of the scientific process, and provides the strongest guarantee of accuracy and objectivity of scientific results').
12. *Ibid.*, para. 18.
13. *Ibid.*, paras 26–9. The rights mentioned include academic freedom, the civil, political, economic, social and cultural rights recognised by international instruments, and the right to teach and to carry out research work 'without any interference'.
14. This section borrows from a discussion of competing visions of education in R. Quinn, 'Attacks on Higher Education Communities: A Holistic, Human Rights Approach to Protection', in *Protecting Education from Attack: A State-of-the-Art Review*, eds UNESCO (Paris: UNESCO, 2010), 99–110.
15. For a sample of the extensive literature on the importance of academic freedom to higher education and society generally, see Jonathan Cole, *The Great American University* (New York: PublicAffairs, 2009), 345–86; Robert O'Neil, *Academic Freedom in the Wired World* (Cambridge, MA: Harvard University Press, 2008); Ellen Schrecker, *The Lost Soul of Higher Education* (New York: New Press, 2010); Jonathan F. Fanton, *The University and Civil Society* (New York: New School for Social Research, 1995); Hanna Gray, *Searching for Utopia: Universities and their Histories* (Oakland, CA: University of California Press, 2012).
16. As early as the fifteenth century, Greek scholars fled the Ottoman's conquest of Constantinople, arriving in Italy and the West in the dawn of the Renaissance. In the twentieth century alone, a partial accounting of such attacks must include hundreds of scholars and students forced to flee the Bolsheviks in Russia in the 1910s–1920s; thousands of scholars fleeing racist and nationalist policies of Nazi and fascist dictatorships in Europe in the 1930s; political dismissals in Greece and Portugal and the exile of scholars and student members of the Democratic League in China in the 1940s; Cold War persecutions throughout Eastern Europe and the Soviet block from the 1950s onward; Mao's anti-intellectual purges during the Cultural Revolution in China in the 1960s–1970s and Pol Pot's targeting of intellectuals in Kampuchea in the 1970s–1980s. In the 1990s alone, attacks on scholars and universities were documented in dozens of countries, including Belarus, Burma, China, Cuba, Egypt, Ethiopia, Guatemala, Indonesia, Israel and the Occupied Territories, Jordan, Kenya, Malaysia, Nigeria, Serbia, the Slovak Republic, South Korea, Sudan, Uzbekistan and Zambia. See, e.g., Human Rights Watch, *Human Rights Watch World Report 2000* (December 1999), 457; Human Rights Watch, *Human Rights Watch World Report 1999* (December 1998), 452. Attacks on scholars have continued in the

twenty-first century, with documented reports of attacks on higher education facilities, staff and/or students, or military use of universities in at least 28 countries between 2009 and 2012. See Global Coalition to Protect Education From Attack (GCPEA), *Education Under Attack 2014* (2014), <http://www.protectingeducation.org>; see also Scholars at Risk Academic Freedom MONITOR, <http://monitoring.academicfreedom.info> (documenting more than 250 incidents of attacks on higher education between 2012 and 2014, including killings, violence and disappearances; imprisonment; wrongful prosecution; loss of position and restrictions on travel (hereinafter 'SAR-AF MONITOR'); Scholars at Risk Scholars-in-Prison Project, <http://scholarsatrisk.nyu.edu/Education-Advocacy/Alerts-Scholars-in-Prison.php> (including list of scholars and students missing, detained or facing prosecution or restrictions); Scholars at Risk Media Review Archive, <http://scholarsatrisk.nyu.edu/Events-News/Academic-Freedom-News.php> (list of media stories about threats to universities, scholars and academic freedom) (hereinafter 'SAR-MEDIA').

17. See, e.g., GCPEA, *Education Under Attack 2014*; SAR-AF MONITOR; Human Rights Watch, *Human Rights Watch World Report 1999* (December 1998), 449; World University Service, Ximena Erazo, Mike Kirkwood and Frederiek de Vlaming, *Academic Freedom 4: Education and Human Rights* (London: Zed Books, 1996), 16.
18. See, e.g., Norman Bentwich, *The Rescue and Achievement of Refugee Scholars: The Story of Displaced Scholars and Scientists 1933–1952* (Leiden, the Netherlands: Martinus Nijhoff, 1953) (discussing the European efforts of the 1930s); Lord Beveridge, *A Defence of Free Learning* (Oxford: Oxford University Press, 1959) (same); Stephen Duggan and Betty Drury, *The Rescue of Science and Learning: The Story of the Emergency Committee in Aid of Displaced Foreign Scholars* (Basingstoke: MacMillan, 1948) (discussing the North American experience of the 1930s); Lewis A. Coser, *Refugee Scholars in America: Their Impact and Their Experiences* (New Haven, CT: Yale University Press, 1984) (same); Jack Minker, *Scientific Freedom and Human Rights: Scientists of Conscience During the Cold War* (May 18, 2012) (discussing the Cold War era); Jeremy Adelman, *The Worldly Philosopher: The Odyssey of Albert O. Hirschman* (Princeton, NJ: Princeton University Press, 2013), 467–76 (discussing the Latin American experience of the 1970s); Louis Goodman, 'Military Roles Past and Present', in *Civil-Military Relations and Democracy*, ed. Larry Diamond and Mark F. Plattner (Baltimore, MD: Johns Hopkins University Press, 1996), 30–43 (same).
19. See, e.g., SAR-MEDIA (raising awareness of issues); SAR-AF MONITOR (monitoring attacks); GCPEA, *Education Under Attack 2014* (same); Protecting Higher Education from Attack, project of the Higher Education Working Group of the Global Coalition to Protect Higher Education, <http://www.protectingeducation.org/attacks-higher-education> (calling for greater accountability). See also World University Service, John Daniel, Frederick de Vlaming, Nigel Hartley and Manfred Nowak, eds, *Academic Freedom 2: A Human Rights Report* (London: Zed Books, 1993) (developing the concept of academic freedom within a human rights framework); World University Service, John Daniel, Nigel Hartley, Yves Lado, Manfred Nowak and Frederick de Vlaming, eds, *Academic Freedom 3: Education and Human Rights* (London: Zed Books, 1995) (same); World University Service, Ximena Erazo, Mike Kirkwood and Frederick de Vlaming, *Academic Freedom 4: Education and Human Rights* (London: Zed Books, 1996) (same).
20. For purposes of this article 'claim' is understood broadly and includes, but is not limited to, complaints, petitions and other advocacy before United Nations, regional, sub-regional and national institutions competent to address alleged violations of human rights, including courts, tribunals, committees, commissions, ombudspersons and other regular or special procedures and mechanisms.
21. As to freedom of expression, see [Figure 1](#), at Opinion and Expression. As to the right to education, see *ibid.* (Education).
22. ICCPR, art. 19, para. 1 ('Everyone shall have the right to hold opinions without interference'). See HRC, General Comment No. 34, art. 19: Freedoms of Opinion and Expression (hereinafter HRC GC 34), para. 9 ('Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction ... All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or

imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1’).

23. See Figure 1, at Opinion and Expression.
24. See, e.g., Special Rapporteur on the Right to Freedom of Opinion and Expression (2000), para. 37 (citing examples of academic freedom violations as violations of freedom of opinion and expression, including ‘suppression of research on such controversial topics as a national independence movement that was active in the past; a ban on campuses of any independent organizations that are considered political; refusal of permission to hold a seminar on human rights; State-supported harassment of independent libraries that were established to provide access to materials to which there is no access in State institutions; charges of having published a play that was considered blasphemous; charges against and conviction of the head of a political science department, who was also a contributor to a student magazine, for having defamed the religion of the State’); see also *Sorguç v. Turkey*, ECtHR Application no. 17089/03, para. 35, 23 June 2009 (‘Under [ECtHR] Article 10 [explicitly protecting freedom of expression], the Court has underlined the importance of academic freedom, which “comprises the academics” freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction’).
25. See, e.g., *Başkaya and Okçuoğlu v. Turkey*, ECtHR, Application Nos 23536/94 and 24408/94, para. 65, 8 July 1999 (holding that ‘domestic authorities...failed to have sufficient regard to the freedom of academic expression’ and violated ECHR art. 10 by prosecuting, fining, imprisoning and enjoining future publication by an author and publisher charged with, *inter alia*, ‘disseminating propaganda’ in the form of an academic work on Turkey’s Kurdish population).
26. Each major human rights instrument provides its own system of permissible limitations. For example, under ICCPR art. 19, para. 1, ‘the right to hold opinions without interference’, has no permissible limitations excepting a derogation, and, indeed, the Human Rights Committee has held that the right is essentially non-derogable ‘since it can never become necessary to derogate from it during a state of emergency’. See HRC GC 34, para. 5. In contrast, under ICCPR art. 19, para. 3, freedom of expression can be subject to restrictions ‘only...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.’
27. See *Rafael Margues de Morais v. Angola*, Communication No. 1128/2002, UN Doc. CCPR/C/83/D/1128/2002 (2005), para. 6.8 (hereinafter *Morais v. Angola*) (‘The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect’); *Case of Vogt v. Germany*, para. 52(ii) (‘The adjective “necessary”,...implies the existence of a “pressing social need.”’).
28. See, e.g., HRC GC 34, para. 35 (‘When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.’); *Case of Vogt v. Germany*, para. 52 (in evaluating the proportionality and necessity of a restriction on freedom of expression, the ECtHR ‘has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 ... and, moreover, that they based their decisions on an acceptable assessment of the relevant facts’).
29. See, e.g., *Morais v. Angola*, para. 6.7 (‘The [Human Rights] Committee reiterates that the right to freedom of expression...includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.’).
30. See also *Başkaya and Okçuoğlu v. Turkey*, para. 61 (same); *Handyside v. the United Kingdom*, ECtHR Application No. 5493/72, para. 49, 7 December 1976 (same); *Lingens v. Austria*, ECtHR, Application No. 9815/82, para. 41, 8 July 1986 (same). Similarly, the Human Rights Committee (2005), in *Morais v. Angola*, has stressed that freedom of expression ‘includes the right of individuals to criticize or openly evaluate their governments without fear of interference or punishment’, which must necessarily include academic research and critiques of government (para. 6.7).
31. HRC, 2011. Stating that ‘laws that penalize the expression of opinions about historical facts are incompatible’ with state obligations even if the opinions are erroneous or reflect an incorrect interpretation of past events.

32. The UN Committee on Economic, Social and Cultural Rights (hereinafter CESCR) (1990: para. 9) has said that the concept of progressive realisation 'imposes an obligation to move as expeditiously and effectively as possible towards the goal' of the full realisation.
33. Quinn, 'Attacks on Higher Education Communities'.
34. The committee also recognises the additional rights which relate to academic freedom, including the right of teachers to organise. See *ibid.*, para. 27 ('The Committee also notes the relationship between articles 13 (2) (e), 2 (2), 3 and 6–8 of the Covenant, including the right of teachers to organize and bargain collectively;...and urges States parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.').
35. Furthermore, the CESCR (2006: para. 27) has noted, '[a]s in the case of all other rights contained in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to the protection of the moral and material interest of authors are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after careful consideration of all alternatives and that they are duly justified in the light of the totality of the rights recognized in the Covenant.'
36. Under the ICESCR, the enjoyment of the right to education may be subject 'only to such limitations as are 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' (art. 4). As stated in the 'Limburg Principles', this provision was 'primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State' (UNHCR, 1987: Annex, para. 46).
37. It should be noted that no mechanism presently exists for individuals to bring a complaint under the ICESCR. This will change with the ratification of the Optional Protocol to the ICESCR by 10 states; see GA (2009). However, claims based on violations of the ICESCR, including academic freedom violations, may be included, for example, in submissions to the CESCR alleging widespread or systematic violations; before other treaty bodies with overlapping jurisdiction which allow individual claims; before UN Special Procedures; before regional tribunals where regional instruments contain provisions analogous to the relevant ICESCR provisions and allow individual claims; in proceedings before national commissions, courts or other procedures where the states have incorporated the ICESCR into domestic law; and in conjunction with assertions of claims alleging violations of other rights, especially if evidencing a systematic pattern of human rights violations. See, e.g., OHCHR, 'Procedure for Complaints by Individuals under the Human Rights Treaties' (discussing treaty body complaint procedures).
38. States' positive obligations relating to academic freedom are further elaborated in ICESCR Article 15, which includes state obligations to respect the right of everyone '[t]o enjoy the benefits of scientific progress and its applications' (art. 15(1)(b)); to take steps 'necessary for the conservation, the development and the diffusion of science and culture' (art. 15(2)); to respect 'the freedom indispensable for scientific research and creative activity' (art. 15(3)); and to encourage the development of 'international contacts and cooperation in the scientific and cultural fields' (art. 15(4)). See also UDHR Article 27 ('(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'); Protocol of San Salvador art. 14 ('The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity'); UNESCO, Rec., para. 13 ('The interplay of ideas and information among higher-education teaching personnel throughout the world is vital to the healthy development of higher education and research and should be actively promoted ...'). Although advocates may have difficulty asserting claims for violations of these positive obligations standing alone, presenting evidence of these positive obligations may reinforce claims alleging related violations of negative prohibitions. For example, in a case alleging a denial of a scholar's freedom to attend an international conference because of the content of the article or talk she was expected to deliver, demonstrating the state's positive obligation to encourage international contacts and cooperation may reinforce the claim that the state acted improperly in restricting the scholar's travel based on academic content.
39. See also, HRC, General Comment No. 31 (hereinafter HRC GC 31), para. 8 (discussing states parties' obligations to investigate, punish, redress and prevent violations of rights by private persons or entities).

40. See also, *ibid.*, para. 7 (discussing the requirement that states parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their obligations under the covenant).
41. See also, *ibid.*, para. 15 (discussing accessible and effective remedies, including judicial and administrative mechanisms to address violations of rights guaranteed under the covenant).
42. See [Figure 1](#), Liberty and Security of Person.
43. See *ibid.*, Movement or Travel.
44. See *ibid.*, Assembly.
45. See *ibid.*, Association.
46. See *Morais v. Angola*, para. 6.1 ('remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime').
47. See also, *Gangaram Panday Case v. Suriname*, judgment of 21 January 1994, in OAS doc. OAS/Ser.L/V/III.31, doc. 9, *Annual Report of the Inter-American Court of Human Rights 1994*, p. 32, para. 47.
48. See OHCHR (2000), Annex IV: Revised Methods of Work.
49. See, e.g., ICCPR art. 9 (stating the prohibition on arbitrary detention without exceptions).
50. See UN Working Group on Arbitrary Detention (2011: para. 20).
51. The rights mentioned include academic freedom, the civil, political, economic, social, and cultural rights recognised by international instruments, and the right to teach and to carry out research work 'without any interference'.
52. See OHCHR (2000), Annex IV: Revised Methods of Work, para. 8 (b) (listing deprivation of liberty arising out of the exercise of rights enumerated in ICCPR Art. 19 among those considered to be 'arbitrary deprivation[s] of liberty'); see also *Morais v. Angola*, para. 6.1.
53. See, e.g. *Morais v. Angola*, para. 6.1 ('Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor does the length of his detention of 40 days, including 10 days of incommunicado detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.')
54. UNESCO SSR Rec., *supra* note 11.
55. Emphasis added; see also UDHR Art. 19 (recognising the right 'to seek, receive and impart information and ideas through any media and regardless of frontiers'); ECHR Art. 10 (recognising the right to free expression, which includes 'the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'); ACHR Art. 13 (recognising the right 'to seek, receive, and impart information and ideas of all kinds, regardless of frontiers').
56. See, e.g., HRC, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, at para. 5 ('The Covenant does not recognize the right of aliens to enter or reside in the territory of a State Party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.');
57. See *Cox v. Turkey*, paras 31–45 (applying established framework for evaluating permissibility of restrictions on free expression); see also *Handyside v. the United Kingdom*, para. 49 (same).
58. For example, the court in *Cox* rejected the state's argument that the denial was justified by the professor's 'offensive' expressions, especially when they were part of a heated public debate. *Ibid.*, para. 42; see also HRC GC 34, para. 45 (noting, in the analogous case of journalists and 'others who seek to exercise their freedom of expression (such as persons seeking to travel to human rights-related meetings)', that restrictions on travel outside the state party, entry to the state party, and movement within the state party are normally incompatible with Art. 19(3)).
59. See [Figure 1](#), (Movement or Travel).

60. For a list of UNESCO, ILO and other texts concerning academic and scientific employment, see UNESCO SSR Rec., Annex. See *supra* note 11.
61. *Supra* pp. 6–8 (discussing academic freedom protections within the right of free expression).
62. *Supra* p. 8 (discussing academic freedom protections within the right to education) and note 38 (discussing academic freedom protections within provisions on scientific progress; conservation, development and diffusion of science and culture; scientific research and creative activity; and international cooperation in science and culture).
63. See, e.g. ICCPR art. 14 ('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.');
64. ECHR art. 6 ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.').
64. ECtHR Application No. 39128/05, 20 October 2009. English language summary available at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%22itemid%22:%22002-1276%22> (accessed 7 November 2013).
65. See *supra* note 38.
66. See ICESCR, art. 13 para. 1; CESCR GC 3, para. 9; CESCR GC 13, para. 45. Furthermore, the CESCR (2006: para. 27) has noted, '[a]s in the case of all other rights contained in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to the protection of the moral and material interest of authors are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after careful consideration of all alternatives and that they are duly justified in the light of the totality of the rights recognized in the Covenant.'
67. See *supra* note 38.